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Office of Administrative Law Judges
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Issue Date: 30 June 2020

Case No.: 2018-SDW-00002

In the Matter of:

KATRINA BROWN,
Complainant,

v.

DETROIT PUBLIC SCHOOLS,
Respondent.

Appearances:

Jerome D. Goldberg, Esq.
Jerome D. Goldberg, PLLC
Detroit, MI
For the Complainant

Rebecca Shaw-Hicks, Esq.
Phyllis Hurks-Hill, Esq.
Jenice C. Mitchell Ford, Esq.
Detroit Public Schools Community District
Office of General Counsel
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER

This claim arises under the employee protection provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9, and its implementing regulations at 29 C.F.R. Part 24. Complainant Katrina Brown alleges that Respondent Detroit Public Schools Community District (DPS)[1] retaliated against her in violation of the employee protection provision of the SDWA.[2]

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[1] Although Respondent may have been referred to differently in Brown's complaints to the Occupational Safety and Health Administration (OSHA), United States Department of Labor and various orders by this tribunal, the parties have stipulated that Respondent's proper name is Detroit Public Schools Community District and I find the same. (*See* Administrative Law Judge Exhibit (ALJX) 1).

Specifically, Brown alleges that her employer, DPS, gave her a negative performance evaluation, failed to promote her, transferred her to another school, and took other actions against her, which allegedly created a hostile work environment all in retaliation for reporting the unsafe condition and lack of adequate drinking water at DPS's John R. King school. Brown seeks restored pay and administrative leave for June 8 and 9, 2016, economic damages for work missed from October 12, 2106 to July 2017, compensatory damages for emotional distress, a change of her negative performance evaluation, punitive damages, and attorneys' fees and costs. (Joint Exhibit (JT) 1; JT 2; JT 3; JT 5; *see* Compl. Brf.)

DPS responds that Brown's claim must fail because DPS is not subject to the SDWA; Brown did not engage in protected activity; actions taken by DPS were not adverse actions; Brown's alleged protected activities were not a motivating factor in the alleged adverse actions against her; and DPS would have taken the same actions against Brown for a legitimate nondiscriminatory reason absent any alleged protected activity. (Resp. Brf.)

Before I conducted a hearing in this proceeding, on November 16, 2017, Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System for the Michigan Employment Relations Commission issued a Decision and Recommended Order (D&RO) in the case of *Detroit Public Schools Community District v. Katrina Brown*, Case No. C16 J-107 (State Action). In the State Action, Brown asserted an unfair labor practice charge against DPS under the Public Employment Relations Act (PERA). (D&RO 1). Judge Stern's D&RO is discussed in greater detail below.[3]

I conducted an on-the-record final prehearing telephone conference on April 18, 2019, and a formal in-person hearing in Detroit, Michigan commencing on April 22, 2019. All parties were represented by counsel and afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.[4] I accepted stipulations of the parties and admitted in evidence ALJX 1, JT 1-30, and Complainant's exhibits (CX) 1-11. (Hearing transcript (Tr.) 6-7, 11-13, 15-17, 91, 129, 131, 211, 224; *see* transcript of final prehearing telephone conference on April 18, 2019). Complainant Brown and witnesses Glenda Booker, Felicia Cook, and Tiffany Jackson testified at the hearing before me.

On May 30, 2019, I issued an Order on (1) Parties' Prehearing Motions Regarding Res Judicata and Collateral Estoppel; (2) Evidence; and (3) Post-Hearing Schedule. In the Order, I stated that I "will give preclusive effect to certain of ALJ Stein's [sic] findings, to be enumerated

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[2] Brown asserts that her claim also arises under 29 U.S.C. § 660, (Compl. Brf. at 1), but this tribunal has no jurisdiction to hear claims under Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660. *Aityahia v. Aviation Academy of America*, ARB No. 2018-0028, ALJ No. 2017-AIR-00029, 2019 WL 5089600, *6-7 (Sept. 12, 2019); *DeFazio v. Sheraton Steamboat Resorts & Villas*, ARB No. 11-063, ALJ No. 2011-SOX-035, 2012 WL 5391427, *1, n.2 (Oct. 23, 2012). Further, it appears from OSHA's June 25, 2018 Findings, that it did not investigate Brown's claims under Section 660. And, it does not appear that Brown alleged a violation of Section 660 before or during the hearing. To the extent Brown has asserted a claim under 29 U.S.C. § 660, such claim is dismissed for want of jurisdiction.

[3] *See* Section III.H., *infra*

[4] 29 C.F.R. Part 18.

in [my] ultimate Decision and Order, under the doctrine of collateral estoppel." (May 30, 2019 Order at 6). Further, I admitted in evidence ALJX 2, which is the parties' Stipulated Facts on Lost Earnings, and transcripts of testimony in the State Action submitted by the parties to me on May 3, 2019. Such testimony was from witnesses Derrick Edwards, Lakina Moseley, Nyla Moore, Brenda Jordan, Erika McClure, Nicole Samuel, Yancy Gideon, III, Carl Shazor, Cassandra Washington, Charles Beattie, Emmanuel El-Amin, Georgina Tait, Ivan Branson, Ivy Bailey, Lauri Washington, Leenet Campbell-Williams, Marvin McCallum,[5] Sabrina McConnel, and Stacye L. Dowlen.[6]

In reaching a decision, unless noted otherwise herein, I have reviewed and considered all the parties' stipulations, testimony and exhibits admitted in evidence, Judge Stern's D&RO solely for any preclusive effect, and the parties' arguments.

I. PROCEDURAL HISTORY

Brown filed a complaint with the OSHA on May 31, 2016. (JT 1; Tr. 53-54; *see* Tr. 152-154). On June 21 and 24, 2016, she filed supplemental complaints with the OSHA. (JT 2; JT 3). On June 13, 2018, she supplemented her OSHA complaint with "Supplemental Allegations of Retaliation" by DPS. (JT 5). On June 25, 2018, OSHA dismissed the complaint. On July 23, 2018, Brown filed her objections to the dismissal and request for hearing with the Office of Administrative Law Judges.[7]

II. THE SAFE DRINKING WATER ACT

"The purpose of the SDWA 'is to assure that water supply systems serving the public meet minimum national standards for protection of public health.'"[8] The SDWA was enacted to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption.[9] The SDWA, among other things, "'establish[es] "overall minimum drinking water protection standards for the nation.'" The SDWA also gives the Administrator of the EPA certain emergency powers, including "issuing such orders as may be necessary to protect the health of persons who are or may be users of [a

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[5] McCallum's last name appears to be spelled "McCullum" in the transcript of the hearing before me. But, he spells his name "McCallum." (*See* McCallum Testimony (T.) at 51).

[6] Some of the testimony in the State Action refers to exhibits that are numbered differently than the exhibits in this proceeding. To the extent I determined which exhibits in this proceeding such testimony references, I identified such exhibits in my citations herein.

[7] In my Order on Respondent's Motion for Summary Decision issued on February 1, 2019, I found that "[a]ll of the supplemental complaints that Complainant filed with OSHA in this matter were timely because they were filed within 30 days of the alleged adverse action to which they pertain or because they relate back to Complainant's initial complaint filed on May 31, 2016." Further, I find that Brown's initial complaint filed on May 31, 2016, was timely because it was filed within 30 days of an alleged adverse action upon which it is based, namely the performance evaluation that Brown received on May 27, 2016. (*See* JT 1; Tr. 52-53, 112, 121-122).

[8] *Wright v. R.R. Comm'n of Texas*, ARB No. 16-068, ALJ No. 2015-SDW-001, 2018 WL 2927573, *4 (Jan. 12, 2018) (quoting 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)).

[9] *Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-3, PDF at 6 (Mar. 30, 2009) (citing *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-045, ALJ Nos. 2000-CAA-20, 2001-CAA-009, -011, slip op. at 9 (ARB June 30, 2004)).

public water system or underground source of drinking water] (including travelers), including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment."[10]

The SDWA's employee protection "provision protects employees who 'commence,' 'testify,' 'assist,' or 'participate' in a 'proceeding' or administer or enforce requirements of the act or carry out its purposes."[11] The employee protection provision provides:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--
> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
> (B) testified or is about to testify in any such proceeding, or
> (C) 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 this subchapter.[12]

According to the Administrative Review Board, "[t]he language of the SDWA simply prohibits employers from discriminating against employees who have "participated in activities

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[10] 42 U.S.C. § 300i(a).
[11] *Id.* (citing 42 U.S.C.A. § 300j-9(i)(1)).
[12] 42 U.S.C. § 300j-9(i). Similarly, 29 C.F.R. § 24.102 states:

> (a) No employer subject to the provisions of any of the statutes listed in §24.100(a), [which includes 42 U.S.C. § 300j-9(i),] . . . , may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.
> (b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has:
> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the statutes listed in §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
> (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 statute.
> (c) Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in §24.100(a), it is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has:
> (1) Notified the employer of an alleged violation of such statute or the AEA of 1954;
> (2) Refused to engage in any practice made unlawful by such statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or
> (3) Testified or is about to testify before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of such statute or the AEA of 1954. . . .

to carry out the purposes" of the act. This is broad language, some of the broadest of any of the statutes the ARB has the responsibility to adjudicate."[13] The Board has "interpreted the term 'proceeding' to include internal and external employee complaints that may precipitate a proceeding."[14]

To prevail in a claim under the employee protection provision of the SDWA, a complainant must demonstrate by a preponderance of the evidence that she engaged in activity protected by the SDWA of which the respondent was aware; the complainant suffered an adverse employment action; and "the protected activity caused or was a motivating factor in [such] adverse action."[15] Additionally, a respondent may still prevail if it establishes by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.[16]

Federal appellate jurisdiction of claims under the employee protection provision of the SDWA rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation.[17] Because the factual circumstances giving rise to the claim occurred in Michigan and Brown resided in Michigan at all relevant times, I will apply the law of the United States Court of Appeals for the Sixth Circuit. (*See* JT 1; JT 2; JT 27 at 1; April 22, 2019, Sealed Tr. 4).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Miscellaneous Issues

1. Whether DPS is an Employer Under the SDWA.

DPS argues that it is not subject to or regulated by the SDWA because it does not operate a water system, nor does it engage in any activity that could affect a water system, and thus, it is not an employer subject to the SDWA. (Resp. Brf. at 6-8). Neither the SDWA nor 29 C.F.R. Part 24 defines the term "employer" or limits application of the employee protection provision of the SDWA to employers who operate water systems or engage in activity that could affect a water system. The legal authority that DPS cites in support of its argument is unpersuasive.

In finding that the United States Environmental Protection Agency (EPA) was subject to the SDWA, the Secretary of Labor stated that "[t]he SDWA . . . contemplates broad coverage. Its employee protection provision refers interchangeably to 'employer[s]' and 'person[s]' as being

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[13] *Wright*, 2018 WL 2927573, *5.

[14] *Collins*, ARB No. 07-079, PDF at 6 (citing *Dixon v. U.S. Dep't of Interior*, ARB Nos. 06-147, 06-160, ALJ No. 2005-SDW-008, slip op. at 9 (ARB Aug. 28, 2008)); *Jenkins v. U.S. Envt'l Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, PDF at 17 (Feb. 28, 2003).

[15] 29 C.F.R. § 24.109(b)(2); *Onysko v. State of Utah, Department of Envt'l Quality*, ARB No. 11-023, ALJ No. 2009-SDW-4, 2013 DOL Ad. Rev. Bd. LEXIS 2, *24-25 (Jan. 23, 2013) (quoting 42 U.S.C.A. § 300(j)-(9)(i); *see also* 29 C.F.R. § 24.102(b)); *Collins*, ARB No. 07-079, PDF at 5-6.

[16] 29 C.F.R. § 24.109(b)(2).

[17] 29 C.F.R. § 24.112.

subject to its prohibitions."[18] After noting that "the SDWA does not define the term employer for purposes of Section 300j-9(i)," the Secretary then referred to the SDWA's definition of the term "person" to find that the EPA was subject to the SDWA.[19] The SDWA defines the term "person" as "an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency)."[20] DPS does not challenge that it is a person as defined by the SDWA. And, it stipulated that it employed Brown. (ALJX 1 at 1). The Secretary's discussion of who is an employer subject to the SDWA weighs against DPS's argument.

Further, DPS relies on information about public schools not being regulated by the SDWA, which is not in evidence. It asserts that DPS "does not operate a water system, nor does it engage in any activity that could affect a water system." (Resp. Brf. at 7). DPS cites to a website, https://www.epa.gov/node/116045, as authority for some of the factual information it relies upon. (*See* Resp. Brf. at 7, n. 4). It does not cite any authority or record evidence for other factual information it relies upon. And, DPS has not asked me to take official notice of the contents of the website and I decline to do so. The time for a request to take official notice was before or during the hearing of this matter. Considering the information now without prior notice to Brown would cause her undue prejudice and deprive her of due process. DPS's argument that it is not an employer subject to the SDWA is not well taken.

I find that Brown need not establish that DPS operates a water system or engages in any activity that could affect a water system. DPS is an employer subject to the SDWA. And, Brown is an employee covered under the SDWA.

2. Katrina Brown, Her Supervisors, and the 6th Grade Teaching Team

Brown was first employed by DPS in about 2002. (ALJX 1, ¶ 1.)[21] She testified that she is certified to teach science up to 8th or 9th grade, all subjects up to 5th grade, and special education. (Tr. 28-30). She began teaching 6th grade at DPS's John R. King school in about 2012. (ALJX 1, ¶ 1.) She testified that she taught 6th grade science at J.R. King during the 2014-2015 and 2015-2016 school years. (Tr. 284). Also, in 2014-2015, Brown was the alternate union building representative at J.R. King. (Tr. 43-45). On or about May 20, 2016, she was elected the new union building representative at J.R. King for the 2016-2017 school year. (ALJX 1, ¶ 7; Tr. 75-77.)

In 2015-2016, three teachers taught 6th grade. Brown was assigned to teach science and social studies. (Tr. 32-33). The other 2 teachers were Glenda Booker and Tiffany Jackson. (Tr. 227).

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[18] *Jenkins v. U.S. Envt'l Protection Agency*, Case No. 92-CAA-6, 1994 WL 897221, *2 (DOL Off. Adm. App. May 18, 1994).
[19] *Id*.
[20] 42 U.S.C. § 300f(12).
[21] Brown testified that she has worked for DPS since 1999, but the parties stipulated that she was first employed by DSP in about 2002. (Compare Tr. 30 and ALJX 1, ¶ 1). Absent an explanation from Brown for this discrepancy, I credit the parties' stipulation over Brown's testimony on this issue.

Booker testified that she has been employed by DPS at J.R. King for 26 years. (Tr. 225-226). Also, she is the Vice-President of the Detroit Federation of Teachers (DFT) and was on its Executive Board since 2011. (Tr. 229-230).

Jackson testified that she is a teacher at J.R. King, and she has been a teacher for 5 years. (Tr. 396-397). She taught math at J.R. King in 2015-2016 and 2016-2017. (Tr. 397). She testified that she is certified to teach all subjects in kindergarten through 5th grade and math in 6th through 8th grades. (Tr. 397).

Felicia Cook is the Principal at J.R. King and has served in that position since approximately October 2014. (Tr. 283; *see* Tr. 32-33). Cook was Brown's supervisor. (Tr. 266-267).

Ivan Branson was the Assistant or Vice Principal at J.R. King when Cook started there and held that position during the 2015-2016 school year. (Tr. 283; Branson T. at 129-130).

On or about July 1, 2016, J.R. King was transferred to Network 2.[22] Leenet Campbell-Williams was the lead for that network. (ALJX 1, ¶ 11; Tr. 304; Campbell-Williams T. at 72-73). So, Campbell-Williams became Cook's supervisor at that time. (Tr. 308). Previously, Dr. Sherrell Hobbs, Deputy Network Leader, was the manager immediately above Cook. (Tr. 45-46).

I find that Brown was employed by DPS at all relevant times and I credit the foregoing testimony.

3. Credibility Findings Regarding Katrina Brown and Felicia Cook

I observed Brown closely while she testified and observed her at counsel table while other witnesses testified. Brown made good eye contact and was calm while testifying with some appropriate display of emotion. She was articulate and answered questions directly. However, there were times when she did not accept DPS's counsel's characterizations. One could certainly view her as argumentative. Also, her testimony was somewhat incoherent in that it was not focused; her answers tended to include information that was not entirely responsive to the questions asked. She was very visually expressive, especially while sitting at counsel table while other witnesses testified.

At the end of several of Brown's emails, she wrote "[w]ritten under duress please disregard all errors," or similar words. (*See, e.g.*, JT 8 at 1; JT 10). One witness described Brown as an advocate for teachers and students about various issues. (Moore T. at 145-147). Also, there was testimony from multiple witnesses (discussed below)[23] about incidents in which Brown had verbal altercations with other staff and used profanity in front of students. In general, I credit the testimony that Brown had multiple verbal altercations with other staff and used profanity during altercations.

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[22] DPS's schools are organized into various networks.

[23] Witnesses described incidents in or before May 2016, in which Brown had difficulties with other teachers. These incidents include one during a meeting on April 27, 2016, for which Brown allegedly received a reprimand and an incident during a fundraiser in the gym in May 2016. (*See* Sections III.D.9., III.E.1., *infra*).

Based on my observations of Brown and the evidence of record, my impressions of Brown are that she has a strong personality, is emotional and prone to exaggeration, and she could certainly be reasonably perceived by others as aggressive and difficult. Her lack of focus while testifying makes me question the strength of her ability to accurately match certain events with specific times. The proneness to exaggeration, lack of focus while testifying, and one or more discrepancies discussed below between her testimony and other evidence leads me to conclude that she was not a credible witness.

I observed Cook closely while she testified and observed her at counsel table while other witnesses testified. She testified well during direct examination, but closed down somewhat during cross examination. She almost appeared meek at times. Some of Cook's testimony was equivocal (discussed below).[24] Based on my observations of Cook and the evidence of record, my impressions of Cook are that she is non-confrontational, at least when dealing with strong personalities and/or difficult situations. Her equivocation at times and change in demeanor on cross examination diminishes her credibility as a witness.

Further, the opposing personalities of Brown and Cook, one strong and aggressive and the other non-confrontational, lead me to further question their credibility when testifying about each other and their interactions.

4. Acrimony Among the 6th Grade Teachers at J.R. King by Early 2016

Booker testified that she and Brown had problems with the other 6th grade teacher, Jackson. (Tr. 232). The atmosphere among the team was tense. (Tr. 265-265). Booker testified that 6th grade classes normally are not self-contained. Instead, they are "platooned," which means that the kids switch classes among the 6th grade teachers. The 6th grade was initially platooned during the 2015-2016 school year, but switched to self-contained classes in approximately March or April 2015. (Tr. 226-228, 294; *see* Tr. 286, 293, 399). In self-contained classes, one teacher teaches all subjects to one class, all day. (Tr. 34; *see* Tr. 228).

Jackson testified to multiple examples of situations in which she had difficulties with Brown. (*See, e.g*., Tr. 399-403). She testified that she felt threatened during at least one incident and reported multiple incidents to Cook. (*See* Tr. 402-403). Jackson further testified that she filed for a personal protection order against Brown on February 2, 2016, which was denied. (Tr. 403-404).

Booker testified that after a meeting between these 3 teachers and Cook in October 2015, Cook stated that "she was tired of all of the things that were going on with the 6th grade team, and she wanted [them] to be more professional . . . ." (Tr. 234). In February 2016, Cook reprimanded Booker for a problem with Jackson. (Tr. 232-233, 240). Jackson testified that she also received a reprimand for her interaction with Booker at that time. (Tr. 405). Jackson further testified that after a meeting among the 6th grade teachers and Cook in late February 2016, she went on sick leave for the rest of the school year due to stress, in part, because of Brown's

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[24] *See* Sections III.B.1., III.D.7., *infra*.

behavior. (Tr. 404-406). Jackson testified that both Brown and Booker called the police on her on separate occasions. (Tr. 407).[25]

By contrast, Derrick Edwards, who worked at J.R. King, testified that Brown is easy to get along with. (Edwards T. at 138-140). Also, Brown testified that she did not intimidate or attempt to intimidate her fellow workers, and she did not stalk them. (Tr. 133). Brown further testified that she was never written up for intimidating any workers and, aside from her August 31, 2016 reprimand, she was never written up for anything dealing with her fellow workers. (Tr. 133).

Cook testified that she first learned of problems with the 6th grade teaching team during the first semester of the 2015-2016 school year. (Tr. 287). She testified that there were multiple problems:

> There were multiple problems. As we heard before, lining up, not getting along, calling each other names, just going back and forth. Just unprofessionalism, calling each other -- you know, just using profanity in front of students, among each other, not working as a group or team as I tried to get the school to become overall a team type of place.

(Tr. 287). According to Cook, the problems were not just with Jackson, but with the entire group. And, other teachers had problems with Brown. (Tr. 287, 290-293). Cook described Brown's effect on J.R. King as a "strain on it, tension, toxic." (Tr. 308).[26]

Brown acknowledged that she had problems with Jackson. Brown testified that initially when classroom management problems occurred, they would go to Cook, but then Cook said she did not want to deal with the 6th grade staff anymore. (Tr. 133-139).

I find that by the end of February 2016, there was a good deal of acrimony, discord, and bad relations among the 6th grade teaching team at J.R. King. DPS has made great effort to assign blame for this discord to Brown. And, Brown has made great effort to assign blame for the discord to Jackson. However, determining who was more at fault is unnecessary. It is enough to say that as the supervisor having to deal with such an untenable situation, Cook developed a strong and unfavorable attitude towards Brown before March 2016.

5. The Drinking Water at J.R. King During the 2015-2016 School Year

Brown testified that at the beginning of the 2015-2016 school year, she noticed the water from the sinks and in the toilets upon flushing was yellow at J.R. King. (Tr. 34-35). Sometime in late 2015 or early 2016, DPS began testing the water in all its buildings for contaminants. (ALJX

[25] Charles Beattie, another teacher at J.R. King, recalls being at the meeting with other teachers. He recalls the teachers complaining about each other's conduct constantly. The solution became for them to self-contain. He believes the teachers were Brown, Jackson, and Ms. White-Berry – all 6th grade teachers. (Beattie T. at 114-115).

[26] Cook testified that she complained to Human Resources regarding Brown, but nothing was done; she does not know why. (Tr. 308). She also complained to Campbell-Williams. (Tr. 308-309). Some or all of these complaints by Cook were made after February 2016.

1, ¶ 4.) On April 13, 2016, DPS announced that 19 schools had excessive levels of copper and/or lead in their drinking water. J.R. King was identified as having an unacceptable level of copper in the water from a sink in the kitchen and several drinking fountains. (ALJX 1, ¶ 5.)

On April 14, 2016, Cook sent a memo to parents and staff indicating that the water to a sink in the kitchen and all drinking fountains at the school would be shut off until further notice. The affected sink and the school's drinking fountains were shut off and the drinking fountains were wrapped in plastic. The water to all of the school's other sinks, including the sinks in the restrooms, remained on, but signs were placed on the restroom sinks advising people not to drink from them. (ALJX 1, ¶ 6; *see* CX 2; Tr. 36-38.)

Brown testified that the signs were not adequate because some kids could not read. Kids would drink water from the restroom sinks. (Tr. 44, 193; *see* 243-245, 269). Brown and Booker testified that after the drinking fountains were wrapped in plastic, but before they were turned off, the students continued drinking from the fountains. (Tr. 38, 152-153, 205, 243-245, 269). Cook testified that she never saw kids tearing the plastic off the fountains and drinking from them or holes in the plastic. (Tr. 329).

Emmanuel El-Amin is employed by U.S. Metro Group at J.R. King as the Building Engineer and has been at the school approximately 6 years. (El-Amin T. at 28-29). El-Amin testified that he maintains the drinking fountains at the school and turns them on and off as needed. (*Id*. at 30). During the 2015-2106 school year, he turned off the water fountains after January 2016, using valves underneath the fountains. (*Id*. at 30-31, 35). He testified that he turned them off around March and they stayed off until September 2016. (*Id*. at 31-32).

Cook's April 14 memo also stated that DPS "will also be providing extra bottled water to the students and staff of the school." (CX 2; Tr. 36-38). But, Brown testified that DPS never provided bottled water. Instead, it provided 4 oz. cups of Glacier water. (Tr. 38-39). Brown and Booker testified that the amount of water provided by DPS was insufficient. (Tr. 41-42, 57, 64, 245-246). And, they testified that the water ran out at some point towards the end of the school year. (Tr. 41-42, 261). Cook testified that to her knowledge, the building never completely ran out of water. (Tr. 328). However, she admitted that when the lack of water was brought to her attention, she "asked to order more water." (Tr. 355).

Lakina Moseley has been employed at J.R. King since 2011. She is the union alternate steward. (Moseley T. at 101-102). Moseley testified as follows:

> In or about May 2015, issues began with the drinking fountains. The water was turned off to the 2 fountains in the gym. There were boxes of water available. But, at some point that water ran out. Then Brown and Booker had the UAW bring in bottled water. Mosely did not advise Cook or Branson about the water shortage. Moseley does not remember how long the school was without drinking water. (*Id*. at 106-109). Also, students did not have enough water on Field Day. Moseley does not know whether he told Cook about the lack of water. (*Id*. at 112). Initially, students were allowed to bring in their own water. Then they were prohibited from doing so. (*Id*. at 115).

According to Brown, the 2015-2016 school year ended on approximately June 22 or 23, 2016. (Tr. 69).

Other teachers at J.R. King, Marvin McCallum, Beattie, and Stacye Dowlen, testified that they did not have difficulty obtaining water for the students and/or there was no limit on the cups of water supplied at the school. (McCallum T. at 68; Beattie T. at 90-91; Dowlen T. at 134-135).

The foregoing testimony regarding whether students continued to drink from water fountains after a certain point and whether J.R. King ran out of or ran low on cups of drinking water seems contradictory on its face. But, just because some of the foregoing witnesses did not experience or were not aware of a lack of drinking water at the school does not mean that other witnesses had the same experience. Moreover, Cook's testimony that she ordered more water when informed of a lack of water supports Brown's contention that there was a lack of drinking water, but does not establish that the entire school ever completely ran out of drinking water. It was Brown's, Booker's, and Moseley's impression that the school ran out of water at the end of the year, but there was an inadequate foundation laid to credit that testimony as anything more than opinions.

Similar to the issue of a lack of water, witnesses who did not observe students drinking from fountains when they were purportedly turned off does not establish that other witnesses, Brown and Booker, had the same experience. Moreover, the fact that the fountains could be turned on and off by valves under the fountains, without further explanatory testimony, does not preclude the possibility that students could have turned fountains on and temporarily removed the plastic from them to drink. The testimony was not clear that the fountains were turned off at the same time they were covered with plastic bags. Indeed, there was no explanation provided for why the fountains were covered in plastic bags if they were turned off.

I do not discredit any of the foregoing testimony based on seeming contradictions. Based on the entire record before me, I find the following: The drinking fountains at J.R. King were covered in plastic bags and turned off in March or April 2016; students continued to drink from the fountains for some period of time after plastic bags were placed over them; there were occasions from the time the fountains were turned off until the end of the 2015-2016 school year in which there was a lack of adequate drinking water for all the students and staff at J.R. King; Brown reasonably believed that there was an unsafe level of contaminants in the water from the drinking fountains at J.R. King from April 14, 2016, to the end of the 2015-2016 school year; and Brown reasonably believed that there was a lack of adequate drinking water for all the students and staff at J.R. King on occasions from the time the drinking fountains were turned off until the end of the 2015-2016 school year.

6. The Drinking Water at J.R. King During the 2016-2017 School Year

According to Brown, the Mayor made an announcement to the public that "all the Detroit Public Schools are safe, they've met the City codes, he went out and he had some inspectors inspect every school, and that the doors were open for all of the students to come back." (Tr. 85). Brown testified that the drinking fountains were back on the first day of school, September 6, 2016. (Tr. 85-87). And, the water was back on as early as August 29, 2016. (*See* JT 24 at 1; Tr.

95; *see* Tr. 260 (Booker's similar testimony)). According to Brown, the fountains stayed on for about 10 to 12 days. (Tr. 85-87). Students and staff were drinking contaminated water. (Tr. 89).

According to Cook, the water stayed on for a couple of days, a week, or 10 days. (Tr. 332, 369).

According to Jackson, there was plastic over the fountains at the beginning of the 2016-2017 school year and she never saw holes ripped in the plastic. (Tr. 409).

El-Amin testified that he turned the fountains back on in September and, approximately a week later, he turned them off again as instructed by U.S. Metro Group. (*Id*. at 32-33). The restroom sinks were not turned off. (*Id*. at 36). El-Amin further testified that he has a flush log dated September 12, 2016. This date is when he removed the bags from the fountains and performed a flush test on them. He turned the fountains back off about a week later. (*Id*. at 39). According to El-Amin, the fountains should not have been open on August 29, 2016. They were bagged up until September 12, 2016. (*Id*. at 40-41).

Moseley testified that during the first day of school, he asked El-Amin whether the water was safe to drink and El-Amin said yes. Further, the water fountains in the gym were on and not covered. (Moseley T. at 126).

On September 19, 2016, Cook and a representative from DPS's headquarters held a meeting at J.R. King with all the staff. (Tr. 96-100). DPS distributed a letter at the meeting, JT 8, which advised parents that testing of the water at J.R. King exceeded a certain threshold for lead and/or copper contaminates. The letter further advised that "a corrosion control system is being considered for installation at the schools. Until the system is in-place the water will remain off at the source water outlet and bottled water will be provided . . . ;" (JT 8 at 2), and the school "will receive the new DiHydro, corrosion control system this week. The school has also received additional drinking water since the fountains are off. However, the water at handsinks in the lavatory and other sinks throughout the building are functional." (JT 8 at 1). The letter states that "since 2011, DPS' Office of School Nutrition has provided all schools with 8 oz. bottles of water for students to drink with meals and throughout the day." (JT 8 at 5). Brown testified that this statement about the water bottles was not true and that the letter mentioned nothing about offering testing to students who were exposed to contaminated water. (Tr. 99-101).

The foregoing testimony about **exactly** when the water fountains at J.R. King were turned on and then turned off in the 2016-2017 school year is irreconcilable. However, other parts of the witnesses' testimony are consistent, e.g., the water was turned on, remained on for some period of time, and then was turned off. Based on such consistencies, I find that the drinking fountains at J.R. King were on for less than 2 weeks at or near the beginning of the 2016-2017 school year and they should not have been because of contaminants in the water.

Further, it is most likely that the drinking fountains were not turned on by El-Amin in August 2016, and they were shut off by the September 19, 2016 staff meeting. I do not credit Brown's testimony that the drinking fountains were on as early as August 29, because it is inconsistent with her September 20, 2016 email to Cook, (JT 22 at 1), in which she stated that

"[w]e have been drinking water out of the fountain at J.R. King since September 6, 2016 until September 19, 2016." And, both her testimony that the drinking fountains were on as early as August 29 and her September 20 email are inconsistent with her testimony that the fountains were on for about 10 to 12 days. Further, Moseley's reference to the water being on the first day of school does not specify whether he meant the first day for teachers or the first day for students, which were different days. Similarly, Jackson's testimony about observing bags on the fountains at the begging of the school year is too vague as to time to be of any use in reaching a more exact resolution of this issue.

B. Protected Activity

According to the Board, "[a]n employee engages in protected activity if he provides information 'grounded in conditions constituting reasonably perceived violations' of the SDWA. The employee need not prove that the hazards she perceived actually violated the act, or that her assessment of the hazard was correct. On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment or that is based on 'numerous assumptions and speculation' is not protected."[27] "All that is required under the SDWA is that a complainant reasonably believe that a violation of the act occurred."[28] And, the issue must be "within the scope of" or "'grounded in conditions' that reasonably could be concluded to relate to the . . . SDWA . . ."[29]

1. Katrina Brown's Complaints to DPS

Brown testified that starting in April 2016, she took her complaints and those of other teachers to Cook in passing and then in meetings. (Tr. 43-45; *see* Tr. 343). Subsequently, she took her complaints to higher-ups within the Board of Education. (Tr. 45). Brown testified that she took her complaints about water conditions at the school, not having enough water, and the water being warm to Deputy Network Leader Hobbs. (Tr. 45-46). Cook indicated that Brown's complaints could have come in April or May 2016. (Tr. 342-343). Cook remembers at least one meeting with Brown in which Brown expressed concerns about the water. (Tr. 344).

Brown emailed Hobbs on April 28, 2016. On May 4, Brown and Hobbs spoke. Hobbs instructed Brown to re-engage with Cook and how to do so. (CX 1; Tr. 45-46). Brown further testified that she met with Cook on May 26, 2016, and they discussed various issues, including "water, the water issues . . . how the water would be disbursed in the school, where to go and who to get it from exactly . . . ." (Tr. 47 (emphasis added)). They also discussed the heat, which impacted the water issues. (*Id.*; JT 6 at 1). Booker testified that she attended part of this meeting and confirmed that Brown complained about there being an inadequate amount of drinking water and students continuing to drink out of the fountains. (Tr. 247-248). At one point during the hearing, Cook testified that Brown came to her with complaints about toxic water and an inadequate supply of water. (Tr. 342-343). Later during the hearing, Cook clarified that it was

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[27] *Collins*, ARB No. 07-079, PDF at 6 (citing *Dixon*, ARB Nos. 06-147, 06-160, slip op. at 8-9).
[28] *Id.*, PDF at 7.
[29] *Johnson v. Oak Ridge Operations Office, U.S. DOE*, ARB No. 97-057, ALJ Nos. 95-CAA-20, -21, -22, PDF at 11 (Sept. 30, 1999)

her understanding that Brown's complaints concerned a lack of water as opposed to kids drinking from the water fountains. (Tr. 385).

In an email of May 27, 2016, Brown communicated to Cook, among other things, about contact information for Erika McClure and that "student [sic] continuing to ask for water," and "we still need water not enough for 111 students these rooms are hot we have no air." (JT 6 at 2). McClure has been a Budget Accountant for DPS since August 2016. (McClure T. at 182). Before then, McClure was Deputy Network Leader of Operations for Network 2. (*Id*. at 182).

Brown testified that the water situation had not changed as of late May, but then the school ran out of water on Field Day, which the parties agree was June 3, 2016. (Compl. Brf. at 4; Resp. Brf. at 4). Brown testified that she advised Cook of the lack of water that day. (Tr. 56-57). And, on the Monday following Field Day, there was no water in the school and Brown advised Cook of same. (Tr. 60). Moseley testified that there was a lack of drinking water at Field Day. (Moseley T. at 112).

Cook testified that there was no lack of water on Field Day. (Tr. 328). And, although people did bring their concerns about a lack of water on Field Day to her, Brown did not. (Tr. 351). However, later in her testimony, Cook stated that she did not recall teachers complaining to her about the lack of water at Field Day. (Tr. 356). This latter testimony by Cook is ambiguous in that it is either inconsistent with Cook's testimony that teachers came to her after Field Day with their complaints or merely evinces Cook's lack of recollection of any complaints during Field Day about a lack of water. In any event, this inconsistency or lack of recollection diminishes Cook's credibility regarding whether there was a lack of water during Field Day and whether Brown complained to her during Field Day of a lack of water. I credit Moseley's and Brown's testimony that there was a lack of water on Field Day because they are consistent with one another on this point and because the credibility of Cook's testimony on this point is diminished. Further, I credit Brown's testimony that she informed Cook on Field Day of a lack of drinking water. Such testimony by Brown is contradicted only by Cook's testimony, which I have discredited.

In a June 3, 2016 email to Hobbs, Brown stated that during her meeting with Cook, she "informed Ms. Cook about the illegal, unethical, unsafe, hostile work environment, and hazardous activities going on here at John R. King School." (JT 6 at 1).

On June 6, 2016, Brown sent Cook an email advising her that she had requested water from the cafeteria at about 1:30, and was told that there is no more water. (JT 9; Tr. 61-62). On June 7, 2016 at 9:16 a.m., Brown emailed Hobbs that "for two days now the students at John R. King have been deprived of water. all [sic] of our drinking fountains have plastic bags over them because of lead. I informed Principal cook [sic] yesterday that the cafeteria staff 'said we have no water available for students.' . . . (When I speak up for the students I get backlashed from administration. Please help us. [sic]" (JT 10). According to Brown, she received no response to this email.

On September 20, 2016, in the beginning of the 2016-2017 school year, Brown expressed her concern in an email to Cook, stating:

> The staff at John R. King has major concern over the contaminated water that we have been exposed to for ten days at John R. King. (staff with health issues)
>
> * * *
>
> We have been drinking water out of the fountain at John R. King since September 6, 2016 until September 19, 2016.
>
> On August 29, 2016 I was told by Administration as well as the school Engineer Mr. Emanuel El-Amin that the water was safe for us to drink.
>
> * * *
>
> 1. Is dpscd going to offer testing for students and staff for drink this contaminated water for the past 10 ten days?
>
> * * *
>
> 5. Why is administration mad at the staff about communicating health concerns to the public and not mad/ upset that students and staff have been drinking contaminated water for ten days?

(JT 22 at 1; Tr. 100-101). Cook testified that this was the first time she heard that people were drinking water out of the fountains. (Tr. 385).

Booker testified that she was copied on emails that Brown sent to Cook about the drinking water and sat in on meetings between them about the water to take notes. (Tr. 246).

Based on the entire record before me, I find the following:

a. Sometime between April 14 and May 26, 2016, Brown discussed the lack of drinking water at J.R. King with Cook. Brown testified that she did and Cook testified that Brown's complaints could have come in April or May. There is inadequate evidence to make a more specific finding before May 26, 2016.

b. In a meeting on May 26, 2016, Brown complained to Cook of an inadequate amount of drinking water.[30] Both Brown's and Booker's testimony support this finding and Cook's testimony does not contradict it.

[30] Based on the record, one of Brown's complaints to DPS is that the bottled or cupped drinking water that was provided was warm. There is no evidence in the record that the bottled or cupped water was too warm to safely drink or otherwise was a safety hazard. And, Brown did not include her complaints about the temperature of the drinking water in her initial or supplemental OSHA complaints in May and June 2016. There is no evidence that Brown reasonably believed that reporting the temperature of the bottled or cupped drinking water to DPS was protected activity. Thus, I do not consider the part of Brown's complaints regarding the drinking water temperature to be protected activity.

c. Although Brown and Booker testified that Brown also complained to Cook during the May 26 meeting that students continued to drink from the water fountains, I find that Brown did not complain to Cook of students continuing to drink from the water fountains during the May 26 meeting or earlier.

Brown was obviously concerned about people drinking from the water fountains in the fall of 2016. She reported it to Cook in her September 20, 2016 email. She testified that she even had her own blood tested for contaminates even though the water fountains were only on for about 10 to 12 days in the fall. (*See* Tr. 85-87, 184). She sent numerous emails and made numerous complaints about the lack of drinking water, but no written complaints about students drinking from the fountains in the spring of 2016.

Similarly, Brown's alleged complaint about students drinking from the water fountains in the spring of 2016 is conspicuously absent from the OSHA complaint that she filed on May 31, 2016, only 5 days after her meeting with Cook. What is described in the OSHA complaint, with specificity, is Brown's report of a lack of water:

> ON 05-26-2016 AROUND 830 MET WITH PRINCIPAL COOK AND OTHERS WHILE WAITING FOR ASSISTANT PRINCIPAL MR. BRANSON I SPOKE WITH THE PRINCIPAL ABOUT SAFETY, HEALTH, FRAUD, STEALING ISSUES THAT DFT MEMBERS HAD BROUGHT TO MY ATTENETION. [sic] I TOLD THE PRINCIPAL THAT SHE WAS IGNORING STUDENTS AND TEACHERS HEALTH WITH STUDENTS NOT BEING ABLE TO RECEIVE WATER OR GET WATER AS NEEDED, WATER IN THE STUDENTS / TEACHER BATHROOMS SINKS WHICH WE WERE TOLD TO USE TO WASH OUR HANDS WAS NOW YELLOW WATER.

(JT 1 at 2). Further, Brown's 3 detailed pages of supplemental complaints filed with OSHA on June 21 and 24, 2016, also do not report students drinking from the water fountains. Instead, the June 21 report states, "I have seen younger kids attempt to drink out [sic] directly out of the bathroom spouts." (JT 2 at 1). Given the seriousness with which Brown took drinking contaminated water in the fall of 2016, the lack of any written documentation until September 2016, of her specific complaint about students drinking from the water fountains, and her lack of focus while testifying and diminished credibility, leads me to give Brown's testimony on the substance of her complaints before and during the May 26, 2016 meeting little weight. Further, this discrepancy between what Brown testified she complained about in May 2016, and what the documents show substantially diminishes her overall credibility as a witness.

Booker's supporting testimony is also unpersuasive. If Booker attended meetings with Brown to act as a witness and takes notes, as Booker testified (Tr. 246-247), those notes were never offered in evidence. Moreover, Booker's description of the conversation between Brown and Cook on May 26, focuses almost exclusively on the lack of drinking water, except for a "yes" answer to a leading question: "Do you recall Ms. Brown discussing the problems that because of adequate – lack of adequate water, that the kids

were at times drinking from the fountain." (Tr. 248; *see* Tr. 247). Booker's testimony mirrored Brown's on several key points. Because I have discredited Brown's testimony on the substance of her complaints before and during the May 26, 2016 meeting, and because of the lack of unprompted detail from Booker about Brown reporting students drinking from the fountains, I give little weight to Booker's testimony on this issue.

Cook clearly testified that the first time she had heard that students were drinking from the water fountains was from Brown's September 20, 2016 email. Although Cook's previous testimony during the hearing on this subject may appear somewhat equivocal, I found her later testimony corrective, not equivocal, and I credit it over the testimony of Brown and Booker on the substance of Brown's complaints before and on May 26, 2016.

d. Brown complained to Cook of a lack of drinking water in an email on May 27, 2016.

e. Brown complained to Cook of a lack of drinking water on Field Day, June 3, 2016, and the following Monday, June 6, 2016.

f. On June 6, 2016, Brown reported a lack of drinking water to Cook by email.

g. On June 7, 2016 at 9:16 a.m., Brown reported a lack of drinking water to Hobbs by email.

h. On September 20, 2016, Brown complained to Cook of staff and students drinking contaminated water from the fountains.

2. Whether Katrina Brown's Complaints to DPS of a Lack of Drinking Water and People Drinking Contaminated Water at J.R. King Are Protected Activity Under the SDWA.

Brown asserts that the SDWA "protects against retaliation for complaints concerning exposure to toxic water and failure to provide alternative drinking supplies or to perform other ameliorative actions in response to this exposure." (Compl. Brf. at 1). Referring to the purpose of the SDWA – to ensure that water supply systems meet minimum national standards to protect public health, DPS contends that complaints of a lack of drinking water are not protected activity. (Resp. Brf. at 9-11).

In *Stojicevic v. Arizona – American Water*,[31] the administrative law judge described the complainant's "alleged protected activities [under the SDWA]: 'Complainant alleges that he raised concerns with management about the capacity of the projected well to support the water needs of the Lake Havasu community . . . . This includes maintaining sufficient water pressure to put out fires.'"[32] On appeal, the respondent did not challenge the judge's determination that the

[31] ARB No. 05-081, ALJ No. 2004-SOX-073, 2007 WL 7143177 (Oct. 30, 2007).
[32] *Id*. at *5.

complainant engaged in protected activity, so the Board did not review that finding. However, the Board commented that

> Stojicevic's complaints, as described by the ALJ, on their face, do not implicate the coverage of the SDWA's enumerated protected activities i.e., 'a proceeding under this subchapter [i.e., an SWDA whistleblower proceeding] or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State proceeding.' Accordingly, we note that the ALJ's determination that Stojicevic's complaints concerning well capacity and water pressure were protected under the SDWA's whistleblower provision is highly questionable.[33]

The same could be said regarding Brown's complaints of a lack of drinking water. However, in *Stojicevic*, the Board did not consider that the SDWA gives the Administrator emergency power to issue orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment or the language in the SDWA that "simply prohibits employers from discriminating against employees who have 'participated in activities to carry out the purposes' of the act."[34] Although there is no evidence that the Administrator issued such an order in this case, unlike in *Stojicevic*, there was an existing contamination of drinking water in this case. The SDWA was enacted to promote the safety of the nation's public water systems so as to provide water fit for human consumption. I find that under the circumstances in this case, namely the contamination of the drinking water in a public elementary/middle school in May and June in Detroit, complaints by Brown to DPS that the school lacked an adequate supply of alternative, safe drinking water is an activity that carries out the purposes of the act, including providing water fit for human consumption. Additionally, such complaints further the purpose of public safety.

Brown need not prove that the hazard she perceived, the lack of an adequate amount of drinking water, actually violated the SDWA. All that is required is that she reasonably believed that a violation of the SDWA occurred. She filed an OSHA complaint on May 26, 2016, in which she described the activity for which she was being retaliated against as reporting a lack of drinking water to DPS. The complaint to OSHA was timely enough in relation to Brown's preceding and subsequent complaints to DPS regarding drinking water to demonstrate that she believed her activity was protected. I find that Brown reasonably believed that a violation of the SDWA occurred when she reported the lack of an adequate amount of drinking water at J.R. King to DPS, and later on September 20, 2016, when she reported staff and students drinking from the water fountains to DPS.

I find that Brown's report of a lack of an adequate amount of drinking water at J.R. King to DPS between April 14 and May 26, 2016, on May 26 and 27, 2016, and on June 3, 6 and 7, 2016, are protected activities under the SDWA. Further, I find that Brown's report of the staff and students drinking contaminated water at J.R. King to DPS on September 20, 2016, is protected activity under the SDWA.

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[33] *Id*.
[34] *Wright*, 2018 WL 2927573, *5.

3. Katrina Brown's Complaints to Government Entities Other Than DPS

In late May or early June 2016, Brown filed a complaint with the Michigan Occupational Safety and Health Administration (MIOSHA) regarding the lack of an adequate water supply at J.R. King. (ALJX 1, ¶ 8; Tr. 54). On May 31, 2016, she also filed a complaint with the OSHA. (JT 1; Tr. 53-54; *see* Tr. 152-154). Branson testified that he was not aware that Brown had filed a complaint with the OSHA. (Branson T. at 169). Campbell-Williams testified that she was aware of Brown's OSHA complaint in July 2016. (Campbell-Williams T. at 103). And, Cook acknowledged that she received notice of Brown's OSHA complaint in June 2016. (Tr. 308).

Brown testified that in the fall of 2016, she called the Detroit Public Health Department and was told the water should not be turned back on at J. R. King. (Tr. 89). Later, Brown contacted the Michigan Department of Environmental Quality (MDEQ) and the EPA. (Tr. 87). She does not recall whether the EPA contacted DPS. (Tr. 95). Cook testified that she is not sure whether Brown filed a complaint regarding the water being turned on. (Tr. 332).

An email from the MDEQ dated September 20, 2016, confirms that Brown reported to the MDEQ that she was concerned the school's drinking water was contaminated and the water was not turned off. (CX 11 at 1; Tr. 87-88). A September 26, 2016 email from the MDEQ to michelle.zdrodowski@detroitk12.org relays complaints about the schools water made by a teacher, but does not identify the teacher by name. A subsequent email from the MDEQ on September 26 to Chrystal Wilson states: "I received the email that Michelle is gone, please forward this note to the contact in the district for this issue." (CX 11 at 2; Tr. 88-89).

Brown testified that these emails the MDEQ sent "had informed Detroit Public Schools as well as the Health Department at Lansing – spoke to the Detroit Health Department and to the School District." (Tr. 88). Contrary to Brown's testimony, CX 11 does not demonstrate that the MDEQ notified DPS of Brown's complaint. Instead, CX 11 demonstrates that the MDEQ attempted to notify DPS of Brown's complaint. Further, even assuming Wilson is a DPS employee and that she received the email addressed to her, CX 11 does not establish that anyone at DPS involved in the decisions to take any action against Brown was aware of the complaint to the MDEQ or that it was Brown who made the complaint to the MDEQ before DPS took any action against Brown.

According to JT 24, on September 20, 2016, Brown also lodged a complaint regarding J.R. King's drinking water with the MIOSHA. Specifically, she alleged that water testing showed high levels of lead and copper in February 2015; and since August 29, 2016, staff have been drinking and using water in the school, but on September 19, staff were told during an emergency meeting that the water should not have been turned back on – employees were exposed to high levels of copper and lead. On September 26, 2016, MIOSHA communicated this complaint to Felicia Venable-Akinbode, Executive Director, DPS, without divulging the identity or position of the complainant. (*See* JT 24; Tr. 93-95). Cook testified that she was not aware of this complaint to the MIOSHA. (Tr. 370). I credit Cook's uncontested testimony on this point.

Other than arguing that it is not subject to the SDWA and that complaints of a lack of adequate drinking water are not protected activity under the SDWA, DPS does not seriously challenge that Brown's reports to government agencies other than DPS are protected activity. In making reports or communicating with government agencies, Brown commenced a proceeding under the SDWA or for the administration or enforcement of drinking water regulations, and/or she participated in some other action to carry out the purposes of the SDWA. For this reason and for the same reasons that I have found Brown's reports to DPS to be protected activity, I find that Brown engaged in protected activity under the SDWA when she filed complaints or communicated with:

(1) the MIOSHA in late May or early June 2016, regarding a lack of adequate drinking water at J.R. King;
(2) the OSHA on May 31, 2016, and June 21 and 24, 2016, regarding a lack of adequate drinking water at J.R. King;
(3) the Detroit Public Health Department in September 2016, regarding the water fountains being on at J.R. King;
(4) the MDEQ in the fall of 2016;
(5) the EPA in the fall of 2016;[35]
(6) the MDEQ on September 20, 2016, regarding the water fountains being on at J.R. King while the water was contaminated; and
(7) the MIOSHA on September 20, 2016, regarding the water fountains being on at J.R. King while the water was contaminated.

However, Brown has not established that DPS was aware that Brown had complained to the MIOSHA, the Detroit Public Health Department, the MDEQ or the EPA regarding the water at J.R. King. Conversely, I find that in July 2016, Campbell-Williams was aware of Brown's complaint to the OSHA and Cook was aware of the OSHA complaint in June 2016.

C. Timeline

There is a significant amount of conflicting evidence pertinent to which of DPS's actions, if any, constitute adverse actions and whether Brown's protected activities were a motivating factor in DPS's decisions to take such actions. In order to resolve such conflicts in the evidence, I have considered the temporal relationship between Brown's protected activities and all the actions alleged to be adverse actions. The following timeline lays out events and alleged events that are described in more detail below. The timeline does not constitute part of my findings.

[35] Although Brown's testimony is sufficient for me to infer that she contacted the Health Department before September 19, 2016, I decline to do so. (*See* Tr. 85-87). Her testimony and the evidence is not entirely clear regarding whether her contact with the Detroit Public Health Department and the EPA and any of her contact with the MDEQ occurred before September 19, 2016. These questions were not asked and/or she did not answer them clearly. More importantly, the issue of whether these specific contacts were made before September 19, 2016, is of very little consequence to my analysis because of the significant amount of other protected activities Brown engaged in prior to September 19, 2016. Thus, I have not made a finding regarding whether Brown's contact with the Detroit Public Health Department and the EPA and any of her contact with MDEQ occurred before September 19, 2016.

Rather, it is provided for demonstrative purposes and may not contain every pertinent act by Brown, DPS, or others.[36]

Between April 14 and May 26, 2016	Brown began engaging Cook regarding the lack of drinking water at J.R. King.
May 2016	Brown allegedly walked to the Principals' office with Booker and they left their binders on the Cook's windowsill in her office for their performance evaluations.
May 26, 2016	Brown met with Cook to discuss various issues, including the water.
Within hours of meeting with Cook on May 26, 2016	**Cook called Brown and told her that she was being transferred to another school**.
May 27, 2016	Brown emailed Cook about the lack of drinking water.
May 27, 2016	**Brown received notice of her end-of-year evaluation – minimally effective.**
May 31, 2016	Brown filed a complaint with the OSHA.
Field Day June 3, 2016	Brown complained to Cook of a lack of drinking water.
June 5, 2016	**Cook sent an email to the teachers, in which she chastised staff who consistently complained about others and "finger pointed" urging them to stop focusing on others and instead focus on their work.**
June 6, 2016	Brown emailed Cook regarding a lack of drinking water.
June 7, 2016 at 9:16 a.m.	Brown reported a lack of drinking water to Hobbs by email.
June 7, 2016 at 9:30 a.m.	**An email was sent to Brown from Branson's account stating: "Your Fired im tired of you selling chips and snacks to those sudents when you where told not to."**[37]

[36] Further, one or more events in the timeline may be slightly out of chronological order because of vagueness or a lack of clarity in the evidence, e.g., the happenings on August 31, and Brown's contact with the Health Department. But, I have taken such possible slight disorder into account in reaching my conclusions.

[37] (Misspelling in original).

Late May or early June 2016	Brown filed a complaint with the MIOSHA.
June 21 and 24, 2016	Brown filed supplemental complaints with the OSHA.
June 22 or 23, 2016	End of 2015-2016 school year, per Brown.
Second week of summer school	**Carl Shazor, a community liaison volunteer, came into Brown's classroom with a flyer . . . .**
as of at least August 2, 2016	**Campbell-Williams was working to transfer Brown.**
August 30 or 31, 2016	**Branson called Brown to a meeting in his office regarding prep time for the union building representative and/or the union election.**
August 31, 2016	**Cook emailed Campbell-Williams (subject: "Katrina Brown's accusations"): "Given the situation between the teacher (Katrina Brown) with the Retaliatory/OSHA suit, it is becoming increasingly worse working in this environment. She has attacked my character and now she has disrespected me in front of staff members. I have worked diligently and waited patiently for answers and the outcome was to keep documenting and endure the harassment. As a leader, I cannot effectively work to assist my teachers while this teacher continues to undermine the work at this school. . . . Why would anyone have to work in conditions like this? What is my right as an employee?"**
On August 31, 2016	**Cook gave Brown a written warning for unprofessional conduct/insubordination for an exchange that occurred during the meeting on August 30 or 31, 2016, in Branson's office.**
September 1, 2016	**Email exchange among Campbell-Williams, Lauri Washington (L. Washington), who is the Deputy Executive Director, Office of Employee Relations,[38] Cook, DPS counsel Rebecca Hicks, and others regarding transferring Brown.**
September 6, 2016	School started for the students.
September 9-15, 2016	**Emails between Campbell-Williams, L. Washington, and others regarding Brown's transfer.**

[38] L. Washington T. at 30.

September 2016	Brown called the Detroit Public Health Department and was told the water should not be turned back on at J. R. King (and later allegedly contacted the EPA).[39]
September 19, 2016	**Staff meeting with Cook and a representative from DPS's headquarters regarding the drinking water at J.R. King - Cook stated that the staff was not to go to any outside agencies and report anything.**
September 20, 2016	Brown emailed Cook regarding the contaminated water at J.R. King.
September 20, 2016	Brown reported to the MDEQ that she was concerned the school's drinking water was contaminated and the water was not turned off.
September 20, 2016	Brown lodged a complaint regarding the drinking water at J.R. King with the MIOSHA.
September 22, 2016	**DPS notified Brown that she was being reassigned.**
September 26, 2016	The MIOSHA communicated Brown's complaint to Felicia Venable-Akinbode, Executive Director, DPS, without divulging the identity of the complainant.
September 26, 2016	Email from the MDEQ to michelle.zdrodowski@detroitk12.org relayed a complaint about the school's water made by a teacher, but does not identify the teacher by name.
September 26, 2016	Email from the MDEQ to Chrystal Wilson relayed a complaint about the school's water made by a teacher, but does not identify the teacher by name.
September 28, 2016	**Brown was required to report for her new assignment to Ronald Brown Academy**

D. Adverse Actions

"Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action."[40] Adverse actions are "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer

[39] *See* note 35, *supra*.

[40] *Jenkins*, ARB No. 98-146, PDF at 20 (citing *Smart v. Ball State Univ.,* 89 F.3d 437, 441 (7th Cir. 1996). *Cf. Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1178 (10th Cir. 1999) (the American with Disabilities Act, like Title VII, is neither a "general civility code" nor a statute making actionable ordinary tribulations of the workplace)).

actions alleged."[41] However, "an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity."[42] An adverse action that is materially adverse to a reasonable employee is actionable. To be deemed 'materially adverse,' such employment action must be such that it "could dissuade a reasonable worker from engaging in protected activity."[43]

Brown lists 10 distinct acts in her brief that she alleges are adverse actions under the SDWA: (1) Cook gave Brown a poor performance evaluation for the 2015-2016 school year; (2) in May 2016, Cook called Brown and told her she was being transferred to another school; (3) on June 5, 2016, Cook emailed the staff at J.R. King chastising staff who complained; (4) on June 7, 2016, Branson allegedly emailed Brown that she was fired; (5) on June 22, 2016, Shazor allegedly confronted Brown in an aggressive manner about a flyer regarding the drinking water at J.R. King; (6) during the summer of 2016, Cook, Campbell-Williams, and others at DPS exchanged emails regarding involuntarily transferring Brown; (7) in August 2016, Cook reassigned Brown from teaching 6th grade to 4th grade at J.R. King; (8) on August 31, 2016, Cook reprimanded Brown for insubordination; (9) at a staff meeting on September 19, 2016, Cook allegedly instructed staff not to report problems to outside agencies without reporting them to her first; and (10) DPS transferred Cook to Ronald Brown Academy in September 2016. (Compl. Brf. at 34-38). Further, Brown alleges that these actions created a hostile work environment. (Compl. Brf. at 38-40). I will address each of these alleged adverse actions here.[44]

1. Katrina Brown's Performance Evaluation for the 2015-2016 School Year

DPS teachers are evaluated annually. (ALJX 1, ¶ 2). Brown was rated highly effective in the 2014-2015 school year. (ALJX 1, ¶ 3). She was rated minimally effective on her 2015-2016 performance evaluation. (ALJX 1, ¶ 10).

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[41] *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR -044, PDF at 15 (ARB Dec. 29, 2010) (applying Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121); *Menedez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, 2011 WL 4915750, *10 (Sept. 13, 2011) (applying Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A).

[42] *Williams*, ARB No. 09-018, PDF at 15.

[43] *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, PDF at 19-20 (Sept. 30, 2008) (applying Surface Transportation Assistance Act, 49 U.S.C. § 31105); *Williams*, ARB No. 09-018, PDF at 15; *see Burlington Northern & Santa Fe Ry. v. White,* 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006) (applying Title VII of the Civil Rights Act of 1964); *Menedez*, 2011 WL 4915750, *11-13; *see also McNeill v. U.S. Dep't of Labor*, 243 F.3d Appx 93, 98 (6th Cir. 2007) (applying *White*'s materially adverse standard in a case under the Energy Reorganization Act, 42 U.S.C. § 5851); *Onysko v. State of Utah, Dep't of Envt'l Quality*, ARB 11-023, 2013 DOL Ad. Rev Bd. LEXIS 2, *34 (Jan. 23, 2013) (Royce, J., Dissenting) ("As the majority noted above, the AIR 21 regulations interpreted in *Williams* are very similar to the regulations pertaining to adverse action contained in the SDWA. Both are remedial statutes, and I would therefore adopt the *Williams* standards for interpreting adverse action under the SWDA.")

[44] Although Brown lists the actions she alleges are adverse actions in separate numbered paragraphs, 4 of the paragraphs, nos. 9, 11, 12, and 14, do not appear to be alleged adverse actions. Brown does not explain how or why they are adverse actions and I cannot even begin to speculate why she considers them adverse actions, either as discrete acts or in combination with other acts. Hence, I find that the allegations in paragraph nos. 9, 11, 12, and 14 at pages 34-38 of Brown's Brief are not adverse actions or bases for a hostile work environment under the SDWA.

Brown testified as follows:

> On May 27, 2016, she received notice of her end-of-year evaluation. She received a score of 53, which then was weighted a little higher – the score means ineffective, minimal. Her score included 15 points for no discipline. She had not received a score like this before; she had always received scores of highly effective. (Tr. 52-53, 112, 121-122; *see* JT 13 (evaluation dated May 27, 2016)).
>
> After 3 bad evaluations, a teacher will be fired. And, DPS used this poor performance evaluation to later justify removing Brown from J.R. King via the leveling process. (Tr. 129-130). Further, she was not able to apply for a Master Teacher position because of her poor evaluation. However, applying for the position does not mean you will receive it. (Tr. 156-157, 208).

Correspondence from DPS to Brown at JT 20 states that Brown's 2015-2016 Final Performance Evaluation rating and score is 78.2%, which is minimally effective. (JT 20). Out of a possible 100 points, Brown received the maximum number of points available for attendance, 10 points, the maximum number of points available for no discipline, 15 points, and 53.2 out of a possible 75 points for performance. (JT 20).[45]

Cassandra Washington (C. Washington) is the Director of Human Resources at DPS. (C. Washington T. at 197-198). She testified as follows:

> Leveling is a process in which adjustments or amendments to teacher service allocations or position allocations are made throughout the District, usually at the opening of schools and "after fourth Wednesday count." (C. Washington T. at 198). If an adjustment is needed, Human Resources will confer with the academic department and the schools to determine which positions need to be lost. In the event of a loss, Human Resources looks at the overall teachers' performance evaluation, including discipline and attendance, and the content area that is being reduced to identify who the appropriate individual will be for movement. (*Id*. at 199, 216-218). The Finance Department determines which schools will be involved in leveling based on the student population at the various schools. (*Id*. at 199-200). Once there is a reduction in teacher service, the Network Leader and the Principal decide which subject areas are going to be lost. (*Id*. at 212, 230, 242).

Poor performance evaluations and warning letters may constitute adverse actions.[46] Indeed, "a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline."[47]

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[45] By agreement of the parties, JT 20 is incorrectly dated July 29, 2015, and I find the same. (*See* List of Joint Exhibits accompanying the JTs).
[46] *See Onysko*, DOL Ad. Rev Bd. LEXIS 2, *32, n.5 (citing *Williams*, ARB No. 09-018).
[47] *Williams*, ARB No. 98-018, slip op. at 11.

I find that Brown received a poor performance evaluation from Cook on May 27, 2016, and a poor Final Performance Evaluation for the 2015-2016 school year. However, Brown has failed to demonstrate that either was discipline. The performance part of the evaluation from Cook did not include an option for deducting points for discipline, and Brown received the maximum number of points she could have received on the Final Performance Evaluation for no discipline. Nonetheless, this does not mean that the poor evaluation was not an adverse action.

I credit Brown's testimony that DPS may terminate a teacher's employment after 3 poor evaluations. And, as discussed below, Brown's poor Final Performance Evaluation for the 2015-2016 school year was used by DPS in deciding to involuntarily transfer her to another school in the leveling process.[48] It contributed to her transfer. It is likely that had Brown not received a poor Final Performance Evaluation, she would not have been involuntarily transferred in the leveling process. Also, the poor performance evaluation precluded her from the opportunity of applying for a promotion to Master Teacher. The increased risk of termination and involuntary transfer posed by Brown's poor Evaluation and temporary loss of an opportunity to apply for a promotion is more than trivial. It could dissuade a reasonable worker from engaging in protected activity. Thus, the poor Evaluation would be materially adverse to a reasonable employee. It was an adverse action under the SDWA.

2. Felicia Cook's May 26, 2016 Message to Katrina Brown That She Was Being Transferred

Brown testified that she met with Cook on May 26, 2016, and they discussed various issues, including water issues. Brown further testified that within hours after the meeting, Cook called her and told her that she was being transferred to another school and to call Erica McClure for details. According to Brown, McClure advised her that the transfer request was made by Cook. (Tr. 48; *see* JT 6). DPS did not transfer Brown at this point. (Tr. 52, 345). As noted below, an email from Campbell-Williams indicates that at some point before September 1, 2016, someone (whose name was redacted from an email) recommended keeping Brown at J.R. King. (*See* JT 15 at 3-5).

McClure testified as follows:

> During the end of the 2015-2016 school year, Cook emailed and talked to McClure and stated that Brown wanted a transfer. Cook did not say that she wanted Brown transferred. (McClure T. at 183-184). McClure talked to Brown within a week afterwards by phone. Brown asked whether Cook was trying to transfer her. McClure explained that a transfer within the school year could only occur upon the employee's request. Brown then wanted to know what options were available, which led McClure to research which schools were available to Brown. (*Id*. at 185-188). The next time McClure spoke to Brown, which was within a week, she indicated that she was not interested in transferring so late in the school year. (*Id*. at 188-189). McClure had no further contact with Brown or Cook about the transfer. (*Id*. at 190).

With respect to transferring Brown in May 2016, Cook testified as follows:

[48] *See* Section III.D.10., *infra*.

Q. Do you recall a situation where Ms. Brown was -- you called Ms. Brown about a transfer to another school in late May, on May 26?
A. I called her?

Q. Yes.
A. After she approached me?

Q. Well, let me ask you a question. Do you recall calling Ms. Brown and telling her to call Ms. McClure?
A. Yes, after she approached me outside at dismissal.

Q. And when she approached you, did she fill out any kind of form about a transfer?
A. No, she said it orally to me.

(Tr. 344-345).

Teacher Dowlen testified that in late May or early June, Brown approached Cook with paperwork while he was outside talking with Cook at dismissal. According to Dowlen, Brown said I have my transfer will you sign it. (Dowlen T. at 137-139). Cook said "Dowlen, did you hear this?" (*Id*. at 164). But, Dowlen did not hear Cook's response to Brown's question. (*Id*. at 137-139). Dowlen does not remember what he was discussing with Cook before Brown approached. He did not see or does not remember seeing Brown give the papers to Cook. (*Id*. at 162-163, 168).

Dowlen's testimony regarding the alleged incident after dismissal when Brown approached Cook about being transferred is not particularly strong. His recollection of the facts surrounding that incident are lacking. However, his description of Cook's response to Brown's alleged request is consistent with the acrimony between Cook and Brown. Further, Dowlen and Cook corroborate each other's testimony.

McClure, whose testimony I have no reason to doubt, said things about her conversations with Cook and Brown that can be interpreted as supporting either Cook's or Brown's version of events. The fact that Brown asked McClure whether Cook was trying to transfer her and McClure's explanation that Cook could not involuntarily transfer Brown supports Brown's version of events. However, Brown's inquiry regarding what schools were available and her failure to immediately refuse the transfer somewhat support Cook's version of events. McClure's testimony that Cook told her Brown wanted the transfer also corroborates Cook's version of events.

Regardless, in the State Action, Judge Stern expressly credited Brown's testimony over that of Cook and Dowlen, all of whom she observed testify, to find that Brown had not approached Cook and requested a transfer in front of Dowlen. As discussed below, I am giving preclusive effect to this finding by Judge Stern under the doctrine of collateral estoppel.[49]

[49] *See* Section III.H., *infra*.

Nonetheless, for the same reasons I found below that DPS's transfer of Brown in September 2016, was not an adverse action, I find that Cook's effort to transfer Brown on and before May 26, 2016, was not an adverse action under the SDWA.

3. Felicia Cook's June 5, 2016 Email to Teachers Regarding Field Day

On June 5, 2016, Cook sent an email to teachers setting out the schedule for the rest of the school year, which was less than 2 weeks away, and thanking those who participated in the field day. Cook's email also chastised staff who consistently complained about others and "finger pointed" urging them to stop focusing on others and instead focus on their work. (ALJX 1, ¶ 9l JT 9 at 1; Tr. 57-58). The email stated in part:

> Unfortunately, we see the same people doing any and everything . . . so I still say to the adults in the building who continue to make excuses as to why they can't or why they won't. John R King is NOT the place for you.
>
> * * *
>
> **<u>Stop feeding into those toxic people who don't [sic] not want to see YOU or the institution GROW!</u>**
>
> * * *
>
> **Complaining is one of those useless things, just visualize the extra problems it brings. It is like a offpitch vocalist that can't sing. It is heard, but no one is really listening!**

(JT 9 at 2 (emphasis in original); *see* ALJX 1, ¶ 9). Cook testified that the last sentence above was in reference to Field Day. (Tr. 356, 386). She later explained the relation of this sentence to Field Day as follows:

> Right, Field Day, and it's always -- and that's in everything that we do, a certain amount of people will step up and help out. Then there's other teachers that try to hide and not do some of the jobs in the works of the school. Field Day requires you to do a lot of games. We have a lot of kids outside, and sometimes our teachers like to run and hide because they don't want to be part of it or they're just trying to get away from doing their jobs. That's why I said, so don't say I don't want to do this or I got to do this. I need you to join us in and helping us get this together. . . .

(Tr. 386).

Moseley testified that he believes that the term "toxic people" in the statement "stop feeding into those toxic people who do not want to see you or the institution grow," in the email from Cook referred to Brown. Brown was the most vocal person at the school regarding the water; she complained about it a lot. (Moseley T. at 114-115; *see* JT 9 at 2).

Cook's June 5, 2016 email to staff had no effect on Brown's pay, benefits, employment opportunities, or the terms or conditions of her employment. The email did not refer to Brown by name. And, the language in the email (i.e. "we see the same people") makes it clear that at least one of Cook's comments refers to multiple people. Of course, Cook did not deny that the references to people in the email did not include Brown. Further, the close temporal proximity between Brown's complaint of a lack of drinking water on June 3, 2016, and the email 2 days later suggests that the people Cook was referring to in the email included Brown. At least one other teacher believed that part of the email referred to Brown. However, I credit Cook's testimony that the email referred to multiple people; that is consistent with the language of the email and Cook's testimony that others complained to her about a lack of water at Field Day. (*See* Tr. 356, 386). I find that the June 5, 2016 email referred to multiple people, including Brown. But, I do not find that the email would dissuade a reasonable teacher at DPS from engaging in protected activity. The email was just too vague and general to have that effect.

4. June 7, 2016 Email to Katrina Brown From Ivan Branson's Email Account

At 9:30 a.m. on June 7, 2016, Brown received an email from Assistant Principal Ivan Branson's email account stating: "Your Fired im tired of you selling chips and snacks to those sudents when you where told not to." (JT 11 (misspelling in original); Tr. 62-63). This email was sent 14 minutes after Brown had emailed Hobbs regarding the lack of drinking water at J.R. King and backlash she was receiving from the administration for speaking up. (JT 10). Brown testified that she subsequently found out from Human Resources that she was not fired. She missed a day or two of work. (Tr. 63). She did not know that the Assistant Principal could not fire her. (Tr. 162). When she spoke with Branson regarding the email, he apologized. She does not remember if Branson also said that he did not send the email. (Tr. 162).

Branson testified that he did not send an email to Brown stating she was fired. It was sent from his account from the computer lab after he failed to log out of his account. He believes someone else sent the email. He told Brown he did not send the email and apologized to her. (Branson T. at 130-132).

I credit Branson's testimony that he did not send the email at JT 11 to Brown. The bad grammar and spelling in the email, Branson's lack of authority to fire Brown, the rationale provided for the alleged firing in the email, Branson's explanation for what happened, and his apology to Brown all convince me that the email was not sent by Branson nor did he intend for it to be sent, despite the fact that it was sent such a short time after Brown had engaged in the protected activity of emailing Hobbs. This was not an intentional act of harassment by Branson or DPS. Thus, it was not adverse action under the SDWA either standing alone or in conjunction with other acts.

5. Katrina Brown's Encounter with Carl Shazor During Summer School in 2016

Brown testified that during the second week of summer school, Carl Shazor, a community liaison person who volunteers at J.R. King, aggressively came into her classroom with a flyer while she was teaching students, got in her face, and demanded that she tell him who was giving out the fliers; he accused her of doing so. (Tr. 68-71). According to Brown, Shazor told her that he obtained the flyer from Cook and Cook told him where to find her. (Tr. 72). Brown testified that Shazor stated, "he was going to take it downtown and he was going to make sure that I get fired." (Tr. 73). Although Branson said he would talk to Shazor and assure that Shazor would not bother her again, Brown did not feel comfortable with that resolution. (Tr. 163).

Cook testified that she did not give the flyer to Shazor. (Tr. 323-324).

Shazor only volunteers at J.R. King and has never been an employee of J.R. King. (Shazor T. at 8-10). He testified as follows:

> He approached Brown in her class room about a flyer that was being circulated by protesters outside. He did not run up to her and shove the flyer in her face demanding to know why she was feeding them false lies about lead in their water. (*Id*. at 10-16). Cook did not send him to talk to Brown about any flyer. Shazor did not speak to anyone in the administration about the flyer before approaching Brown. The flyer was sitting on his desk in the hallway. The protestors were handing them out and parents were bringing them into the school. (*Id*. at 16, 18, 31-32). He did not curse at Brown or raise his voice and was not angry or hostile towards her. (*Id*. at 16, 28-29, 31). Shazor was standing pretty close, 2-3 feet away from Brown during this conversation. (*Id*. at 29). Shazor is an emotional and physical person; he talks with his hands, but he does not recall gesticulating while talking to Brown. (*Id*. at 29-30). Brown told him to go ask the protesters and he left. (*Id*. at 16, 28-29). Brown raised her voice to Shazor. (*Id*. at 30).

Branson testified that Brown spoke to him about an incident when Shazor came to her classroom asking questions about a flyer. Brown was upset. Branson testified that he said he would talk to Shazor and he did. (Branson T. at 133-134).

Although I did not have occasion to observe Shazor testify, I credit his account of his discussion with Brown regarding the flyer over hers. As previously noted, I have found Brown to be emotional, prone to exaggeration, and not credible. Brown may have felt threatened by the way Shazor admittedly gesticulates with his hands while talking, but that does not mean her feeling was reasonable. Based on Shazor's description of the incident, which I credit, it was not physically threatening, humiliating, or offensive, nor did it unreasonably interfere with Brown's performance as the conversation was not of long duration. I also credit Cook's testimony that she did not give the flyer to Shazor, in part because it is corroborated by Shazor's testimony. Based on Shazor's description of the incident, I find it would not dissuade a reasonable teacher at DPS

from engaging in protected activity. The incident was not harassment and it was not intended by Cook or DPS.

6. Communications Among Felicia Cook, Leenet Campbell-Williams, and Others at DPS Regarding Involuntarily Transferring Katrina Brown

As of at least August 2, 2016, Campbell-Williams was working on the involuntary transfer of Brown. (*See* JT 15 at 1). On August 31, 2016, at 11:23 a.m., Cook sent Campbell-Williams an email with the subject line: "Katrina Brown's accusations." The email stated:

> Given the situation between the teacher (Katrina Brown) with the Retaliatory/OSHA suit, it is becoming increasingly worse working in this environment. She has attacked my character and now she has disrespected me in front of staff members. I have worked diligently and waited patiently for answers and the outcome was to keep documenting and endure the harassment. As a leader, I cannot effectively work to assist my teachers while this teacher continues to undermine the work at this school. . . . Why would anyone have to work in conditions like this? What is my right as an employee?

(JT 15 at 2; *see* Tr. 312). The next day, on September 1, 2016, there was an email exchange among Campbell-Williams, L. Washington, Cook, DPS counsel Rebecca Hicks, and/or others. Some of the exchange is redacted. (*See* JT 15 at 3-5). The subject line in the emails is: "Katrina Brown's accusations//Please remove this teacher from John R King." The exchange includes the following:

> At 1:32 p.m., there is a redacted email from Hicks to Campbell-Williams and Cook with a copy to L. Washington and Alvin Wood (who is unidentified).
>
> At 2:24 p.m., Campbell-Williams emailed Cook and Hicks (with copies to L. Washington and Wood), inquiring when Brown could be transferred to another school; "[t]he sooner we can move on this, we avoid the potential for further conflict; the principal is able to repair the work environment and move forward with the business of educating students." (JT 15 at 4).
>
> At 3:16 p.m., there is a redacted email from Hicks to Campbell-Williams and Cook, with a copy to L. Washington and Wood.
>
> At 3:18 p.m., L. Washington emailed Hicks, Campbell-Williams, and Cook (with a copy to Wood) inquiring whether there is "[a]ny anticipated timeframe expected with the Hearing Officer's report?"
>
> At 3:22 p.m., there is a redacted email from Hicks to L. Washington, Campbell-Williams, and Cook.
>
> At 3:23 p.m., there is a redacted reply from L. Washington.

At 4:25 p.m., Campbell-Williams responded to L. Washington:

> Can we please move on this one? I worked with Ms. Hamilton to place her at Thirkell before [redacted] recommendation to keep her at JR King. It is very toxic right now and I would like to 'pull the trigger' on this one. With your consent, I will reach out to Ms. Hampton to send a new assignment letter to Ms. Brown.

(JT 15 at 3-5).

There are subsequent emails among Campbell-Williams, L. Washington, James Baker, and C. Washington on September 9 and 15, 2016, regarding Brown's transfer. (JT 15 at 6-7). Baker was DPS's Deputy Superintendent of Human Resources – the leader of the entire Human Resources Division. (C. Washington T. at 251-252).

Campbell-Williams testified as follows:

> She received an email from and met with Cook about Brown on or about July 21, 2016. (Campbell-Williams T. at 73). Cook expressed having difficulties with Brown, including Brown being disruptive, not getting along with staff, and inciting other teachers; the environment had become very toxic. Cook had been trying to discipline the teacher. (*Id*. at 74-75). Cook "felt like her hands were tied, that she was not able to properly mete out discipline because some of the other things that she had sent up had not been addressed and had not been dealt with." (*Id*. at 76). During the meeting with Cook, Campbell-Williams was or became aware of Brown's complaints regarding the water issues at J.R. King. (*Id*. at 76-77). Cook was concerned that the perception was that she was responsible for the problems with the water. Cook asked Campbell-Williams to move Cook from J.R. King. Cook did not ask Campbell-Williams to transfer Brown because of her complaints regarding the water. (*Id*. at 78-79).
>
> Campbell-Williams did not need Employee Relations' approval to effect an involuntary transfer. (*Id*. at 100). Campbell-Williams was trying to move Brown from J.R. King as early as August 2, 2016. She was not trying to move Brown because of her OSHA complaint. Campbell-Williams did not really understand that the OSHA complaint was alleging retaliation by Cook for Brown complaining about the water. (*Id*. at 81-83). After L. Washington advised Campbell-Williams to talk with the general counsel about involuntarily transferring Brown, Campbell-Williams abandoned her efforts to involuntarily transfer Brown. (*Id*. at 83-84). After an incident on August 31, Campbell-Williams resumed her efforts to have Brown involuntarily transferred. Again, she ceased her efforts. L. Washington, Baker, and C. Washington were hesitant about moving forward. They did not want it to look as though they were retaliating. (*Id*. at 84-86; *see* 98-102).
>
> During the leveling process, Campbell-Williams told Cook how many positions J.R. King was losing and asked Cook are those positions going to be homeroom

positions. Cook answered "yes." Homeroom positions were lost at all the schools because homeroom is generally in K-8 where you can afford to combine some students and the pool for homeroom teachers is generally larger than any of the other pools of teachers. Campbell-Williams and Cook did not identify specific teachers at J.R. King to be leveled. Campbell-Williams did not know which specific teachers this would effect. Campbell-Williams was not trying to do via leveling what she could not do via involuntary transfer, it just happened that way. (*Id*. at 87-89, 122).

Campbell-Williams' statement in an email that she wanted to "pull the trigger" on this one was a metaphoric statement. She meant that she wanted to move on the transfer of Brown. (*Id*. at 89-90).[50]

Brown does not explain how these emails exchanged among Cook, Campbell-Williams, and others at DPS would have dissuaded a reasonable teacher at DPS from engaging in protected activity, especially since Brown testified that she received the emails from her attorney in January 13, 2017, long after she had already been transferred. (*See* Tr. 178-181). Instead, Brown argues that the email exchange is evidence of a conspiracy within DPS to involuntarily transfer her because of her protected activity. Without regard to the motivation for the email exchange, I find that the emails made available to Cook long after her transfer, in and of themselves, would not dissuade a reasonable teacher at DPS from engaging in protected activity. They do not constitute an adverse action under the SDWA.

7. Katrina Brown's Reassignment to Teach 4th Grade at J.R. King

Brown testified that although there is a critical shortage of science teachers in the district, she was reassigned to teach 4th grade in the fall of 2016. (Tr. 75-77).[51]

Cook testified that in August 2016, she rearranged the 6th grade team and assigned Brown to teach 4th grade. (Tr. 297). She expected Brown to return in September 2016. (Tr. 298). She moved Brown out of the 6th grade team instead of Jackson because:

> I left Ms. Jackson there because I know she was [sic] math, and that there was so many issues going on in that cohort that I moved Ms. Brown to give her like a reset as far as a new way of handling. And then the 4th grade would have a

[50] Brown interpreted the comment in the September 1, 2016 email from Campbell-Williams, that she would like to 'pull the trigger' on this one, as a death threat and she went to the police when she received the email from her attorney on January 13, 2017, over 4 ½ months after the email had been sent. (Tr. 178-181). According to Brown, her attorney advised her to go to the police. (Tr. 203-204). And, in April 2018, when Campbell-Williams showed up at a school where Brown was teaching, Brown obtained a personal protection order against Campbell-Williams. (Tr. 181). Brown admitted that from the time of Campbell-Williams' September 1, 2016 email through Campbell-Williams showing up at the school where Brown taught in April 2018, they never had a face-to-face confrontation. (Tr. 190-191). I find these incidents troubling. Even with a heightened state of awareness of the possibility of school violence, which is justified by the experiences of our society in recent times, I cannot find that Brown's actions of reporting Campbell-Williams to the police or obtaining a protection order against her were even remotely close to reasonable. Bad advice from Brown's attorney does not change this conclusion. I view these incidents regarding the police and protective order as further evidence supporting my conclusion that Brown is prone to exaggeration, which diminishes her credibility.

[51] Devette Brown (D.B.) replaced Brown as the 6th grade science teacher. (Tr. 75-77).

chance to have a science teacher, which she had science, she was endorsed for that, and that she would have a chance for the 4th grade to be there. . . . [I left Jackson were she was because of h]er certification, and she did well. She did well in her – where she was.

* * *

Q. There's testimony from both Ms. Brown and Ms. Booker that they had no problems working together, but the problems all centered around Ms. Jackson. I'm just --
A. According to them -- I'm listening -- according to them.

Q. I'm just wondering why, in light of all that, Ms. Brown was the one selected to be moved out for the good of the team? Just asking.
A. According to what was going on with multiple issues with Ms. Brown and other people, I made that decision to move her.

Q. In effect, you --
A. I kept her in the building.

Q. You could have kept Ms. Jackson in the building as well. You could have placed her in 4th grade as well.
A. I chose Ms. Brown because of multiple issues with other people.

Q. But the issues -- that had nothing to do with her team, that had to do, by your testimony, that she had problems with a few other people, but I'm talking about the team. You could have put -- just as easily put Ms. Jackson in that 4th grade class? Yes or no?
A. I chose Ms. Brown. She can work with another team. All the teams at John R. King work together; no matter where you're placed in the building, doesn't matter.

(Tr. 298, 375-376; *see* Tr. 299-300). On re-direct, in response to a series of leading questions by DPS' counsel, Cook testified that she transferred Brown to teach 4th grade because she needed a seasoned 4th grade teacher. (Tr. 388). Cook testified that Brown's assignment to teach 4th grade was not intended to be a punishment. (Tr. 300). She testified that she did not move Brown from teaching 6th grade to 4th grade because of her complaints about the water issues. (Tr. 327-328).

Branson testified that Brown was changed from teaching 6th grade to 4th grade because she had some problems getting along with one of the sixth grade teachers, and they were not a cohesive group. Brown and Jackson had an ongoing struggle. (Branson T. at 147-148). He testified that Jackson was not moved because she was middle school certified only. (*Id*. at 147).

I do not credit either Cook's or Branson's explanations for Brown's reassignment to teach 4th grade. First, Branson's testimony that Jackson was not moved because she was middle

school certified only is contrary to Jackson's own testimony that she was certified to teach all subjects in kindergarten through 5th grade and math in 6th through 8th grades. (*See* Tr. 397).

Second, based on testimony from Brown, Booker, and Jackson, it appears that Brown and Booker got along better with each other than either of them did with Jackson. Thus, Cook's decision to reassign Brown instead of Jackson seems counterintuitive if the goal is to strengthen the 6th grade teaching team.

Third, Cook's testimony regarding her reason for reassigning Brown was equivocal, and thus, not credible. Initially, Cook explained that she reassigned Brown because of the problems with the 6th grade teaching cohort, to give Brown a reset, so the 4th grade would have a science teacher, and because Jackson had a math certification and did well where she was. Absent from this explanation is that Brown had trouble with other teachers, outside the 6th grade teaching cohort. Also, it could be concluded that Jackson did not do well where she was since she took sick leave for the remainder of the 2015-2016 school year because of stress.

Subsequently, upon cross examination, when confronted with the actual dynamic of the 6th grade cohort, Cook added that she transferred Brown instead of Jackson because Brown was having problems with teachers outside the 6th grade teaching cohort. She further testified that the reassignment was not punishment. However, she did not explain and it is not at all apparent why Brown having problems with teachers outside her cohort justifies removing her from her cohort. After this equivocation, I also do not credit her explanation that Brown was reassigned because Cook wanted an experienced science teacher teaching 4th grade. I find that Cook's and Branson's explanations for Brown's reassignment to teach 4th grade are pretextual.

Nonetheless, there is no evidence that the reassignment to teach 4th grade had any effect on Brown's pay, benefits, or future employment opportunities. There is no evidence that the reassignment, in and of itself, was undesirable or so undesirable that it would dissuade a reasonable teacher at DPS from engaging in protected activity. Brown's major complaint about being reassigned to teach 4th grade is that it led to her transfer to Ronald Brown Academy. If I find that Brown's transfer to Ronald Brown Academy is an adverse action and that her reassignment to teach 4th grade led to that transfer, I will find that the entire course of action is an adverse action. However, the reassignment alone is not adverse action under the SDWA.

8. The Meeting in Branson's Office and Reprimand of August 31, 2016

Brown testified as follows:

> On August 30 or 31, 2016, Branson called her to a meeting in his office regarding her election to the position of building representative. Dowlen, the former union building representative, and Teacher Beattie were in the meeting and Booker joined later. (Tr. 78, 80-81). At some point, Cook entered Branson's office and instructed everyone to be quiet because there were parents registering their children for school. Brown turned around and said, "'I thought you were gone.'" Cook said, "'excuse me.'" And, Brown responded, "'I thought you were gone; good bye.'" (Tr. 82). On August 31, 2016, Cook gave Brown a

written warning for unprofessional conduct/insubordination for this exchange. (Tr. 82; JT 16). No one else in the meeting was written up. (Tr. 82-83).

According to the warning letter given to Brown, she was written up for "vehemently" turning around and telling Cook, "I thought you said you were leaving . . . get out." (JT 16; *see* Tr. 314-315). Booker's description of the exchange between Brown and Cook was the same or similar to Brown's. (*See* Tr. 258-259). Booker believes that Brown's statement to Cook was not dismissive, but it was not appropriate either. (Tr. 267-268). Cook testified that she believed it was disrespectful and unprofessional and wrote Brown up. (Tr. 314-315). Cook discussed this incident with Campbell-Williams. (Tr. 315).

Beattie has been employed by DPS for about 17 years. He has been a teacher at J.R. King for 5 years. He was the union representative during the 2014-2015 school year. (Beattie T. at 77-79). He testified regarding the August 30, 2016 meeting as follows:

> The meeting pertained to whether the union representative got a "prep." Brown, Dowlen, and Branson were in the meeting. Booker was then called and joined the meeting. The meeting got very loud. (*Id*. at 79-85). Cook came in and said she wanted it to quiet down. As Cook was leaving, "Brown said, I thought you said you were leaving. You can leave now. Ms. Cook's comment was, what did you say? [Brown] said, I told you that you could leave." (*Id*. at 86). Cook did not ask that the meeting stop. (*Id*. at 100).

Dowlen has worked for DPS for roughly 19 years and been at J.R. King the last 4 or 5 years. He was the union building representative during the 2015-2016 school year. (Dowlen T. at 122). Dowlen testified that in about August 2016, he attended a meeting with Branson, Brown, Beattie, and Booker regarding whether a union representative should receive extra prep time. (*Id*. at 123-124, 128-129). Cook came to the door and let us know the meeting was getting loud. (*Id*. at 133). According to Dowlen, Brown made a dismissive comment to Cook that she could go. (*Id*. at 134).

Branson testified that he met with Beattie, Dowlen, Brown, and Booker about the union representative and prep time for the representative on August 30 or 31, 2016. He asked all these people to the meeting. He wanted witnesses at the meeting; he was leery of Brown. Branson testified that he did not interrogate Brown on how she became the building representative or ask about the procedures and voting. (Branson T. at 137-141, 154). According to Branson, Cook came in and Brown told her to get out. (*Id*. at185).

There is no evidence that the August 31 written reprimand given to Brown by Cook, JT 16, had an effect on Brown's pay, benefits, employment opportunities, or the terms or conditions of her employment. As DPS points out in its brief, there is no evidence that the reprimand was even placed in Brown's personnel file. (*See* Resp. Brf. at 17). Further, although DPS takes discipline into account in teachers' Final Performance Evaluation scores, there is no evidence that the August 31 reprimand was counted against Brown's score for the 2016-2017 school year. Brown has failed to establish that a reasonable teacher would be dissuaded from engaging in protected activity by the August 31 reprimand.

9. The September 19, 2016 Staff Meeting Regarding the Water

With respect to the September 19, 2016 staff meeting with Cook and a representative from DPS's headquarters regarding the drinking water at J.R. King (discussed above),[52] Brown testified that it was stated at the meeting that the staff was not to go to any outside agencies and report anything. Brown was unclear regarding whether this statement was made by Cook or the representative from DPS's headquarters. Brown testified that she took this as a reprimand and other teachers approached her and told her that it would be okay. Additionally, according to Brown, a male staff member stated "snitches get stitches" very loud. Brown implied that Marvin McCallum made this statement. (Tr. 96-97).

Cook did not respond to McCallum's alleged statement at the meeting. (Tr. 96-100; *see* Tr. 93-95; JT 24). Cook testified that she neither singled out Brown nor heard anyone say, "snitches get stiches." (Tr. 326). Cook testified that she,

> addressed the group, the staff meeting as to making sure that if we have any concerns or anything like that, let's work together and get these things together, come to me for professional courtesy as a leader, and let me know some of these things that's going on so we can give it to the right people to address them.

(Tr. 327). She explained that she did not instruct her staff not to make complaints to any other entities "because the experts are, you know, downtown to let us know what's going on and what have you, so." (Tr. 327; *see* Tr. 377-378).

Moseley testified that during the meeting, Cook "was just talking to us about how if we wanted to find out anything about the water, to go to her first and to not go above her head or to go outside and try to learn anything, that if we wanted to have questions or anything like that, that we should direct our questions and concerns to her and that she would find out the answers to get that done, and that's pretty much what the meeting was about." (Moseley T. at 123-124). Mosely further testified that he was aware that Brown had made an OSHA complaint and had been investigating whether the water was safe to drink in September. He was not aware of anyone else making an OSHA complaint. (*Id*. at 125-126). Moseley believes that Cook's comments were the result of what Brown had done. (*Id*. at 131).

Nyla Moore has been employed by DPS for almost 20 years and has been at J.R. King since 2012. (Moore T. at 141). She testified that the protocol that Cook wanted followed was shared at the staff meeting. The protocol was for things to be brought to Cook's attention before being made known to anyone outside the school (*Id*. at 143). Moore felt this was directed at Brown because Brown "was being vocal about getting the concerns about the water out to OSHA and to different people that she felt would be able to make a difference. . . ." (*Id*. at 144). Moore interpreted Cook's comments as meaning that Cook wanted to keep the water issue in-house. (*Id*. at 149).

McCallum testified that he was at a meeting called by Cook in September 2016, regarding the water at J.R. King. He testified that at the meeting, he did not make a comment that

[52] *See* Section III.A.6., *supra*.

"snitches get stiches" or anything similar in response to anything Brown said. (McCallum T. at 54-55, 59). He did observe Brown verbally attack or insult another teacher at the meeting. (*Id*. at 57).

Further, McCallum described an incident he had with Brown at the school gym during a fundraiser in May 2016, in which she allegedly cussed him out and verbally attacked another teacher, Dowlen. (*Id*. at 60-66, 79; *see* Moseley T. at 115). Moseley testified regarding the same incident and indicated that Brown and Dowlen had a heated argument in front of students in which swear words were used. (*See* Moseley T. at 115-122).

Beattie testified that he was in the staff meeting in September 2016, in which Cook talked about the water issues in the school. He did not hear Mr. McCallum say "snitches get stitches" to Brown. (Beattie T. at 89).

Dowlen also testified that he was in the meeting and he did not hear McCallum state "snitches get stitches" in response to comments by Brown. (Dowlen T. at 140).[53]

Moore testified that she heard McCallum say "snitches get stiches."[54] Moore believes McCallum's statement was directed to Brown because she was the one being vocal about what was going on. (Moore T. at 144). Moore believes Cook would have heard the statement. She did not observe Cook react to it. (*Id*. at 145).

Moseley testified that during the staff meeting and after Cook spoke, he heard McCallum say to Brown that "snitches get stiches." (*See* Moseley T. at 123-124).[55] Moseley believes this comment referred to Brown. (*Id*. at 129). Moseley believes that Cook would have heard this statement. (*Id*. at 132).

"[I]t is a long-standing principle of whistleblower case law, established by the Secretary and further developed by [the] Board and the United States Courts of Appeals, that it is a prohibited practice for an employer to retaliate against an employee for not following the chain of command in raising protected safety issues."[56] However, there is a difference between instructing an employee not to report safety issues to outside agencies and to report safety issues to the employer with the clarification that the employee is free to also report those issues to outside agencies.[57]

While Brown testified that instruction was given to staff not to report anything to outside agencies, Cook denied saying this, and Moseley and Moore testified that Cook said to come to her first. However, Moore also testified that it was her impression that Cook wanted to keep the water issues in-house. And, Moseley testified that Cook also told the staff not to go to outside agencies. Further, Cook did not testify that she told her staff at the meeting they were free to

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[53] No foundation was provided that Beattie or Dowlen were in positions to have heard such a statement had McCallum made it.
[54] Moore testified that McCallum is also known as "Mr. Mack."
[55] Mosley referred to McCallum as Mr. Mack.
[56] *Williams*, ARB No. 98-030, PFD at 12.
[57] *See Hall*, ARB Nos. 02-108 & 03-013, PDF at 23.

report issues to outside agencies. I find that Cook told her staff to report issues to her first, but also expressly or impliedly instructed them not to report those issues to outside agencies. This finding is consistent with Brown's and Moseley's testimony and Moore's interpretation of what Cook said. Further, I infer from the subject matter of the meeting, the condition of the drinking water at J.R. King, that Cook's instruction not to report issues to outside agencies referred to issues regarding the school's drinking water.

To the extent Cook's testimony contradicts this interpretation of the evidence, I give her testimony no weight on this issue. Her explanation of why she said what she said, "because the experts are, you know, downtown to let us know what's going on and what have you, so," was unclear at best.

Further, this staff meeting occurred 19 days after Cook expressed her strong feelings to Campbell-Williams about Brown's OSHA complaint:

> Given the situation between the teacher (Katrina Brown) with the Retaliatory/OSHA suit, it is becoming increasingly worse working in this environment. She has attacked my character and now she has disrespected me in front of staff members. . . . Why would anyone have to work in conditions like this? What is my right as an employee?

Cook testified that she felt like Brown's OSHA complaint was an attack on her character and could have been handled differently, more collaboratively. (Tr. 309-310). According to Campbell-Williams, Cook was concerned that the perception was that she was responsible for the problems with the water. (Campbell-Williams T. at 78-79). I infer from these strong statements by and sentiments of Cook that she did not want teachers, including Brown, reporting negative issues about the school or her to outside agencies and that it was her intent to discourage them from doing so. Further, I find that Cook's September 19 statement was directed, at least in part, towards Brown and that one or more other teachers at the meeting reasonably concluded that the statement was being addressed towards Brown.

Brown testified that a teacher stated, "snitches get stiches" at the meeting. Mosely and Moore testified that McCallum said this at the meeting. McCallum denied making the statement. Cook denied hearing the statement. Beattie and Dowlen denied hearing McCallum make the statement. Cook's, Beattie's, and Dowlen's testimony is insufficient to establish that the statement was not made by McCallum because there is an inadequate foundation in the record for me to find that they likely would have heard the statement had McCallum made it. I credit Mosely's and Moore's testimony over McCallum's on this point because of their numerical superiority. Also, by McCallum's own admission, he had previously been involved in an incident with Brown in which she used profane language towards him. This previous incident increases the likelihood that McCallum might have made the statement towards Brown because of hard feelings or some similar impetus.

However, for the same reason I discounted Cook's, Beattie's, and Dowlen's testimony regarding whether McCallum said, "snitches get stiches," I discount Moseley's and Moore's testimony that Cook should have heard the statement. There is an inadequate foundation

regarding where everyone was located to credit Moseley's and Moore's testimony on this point. Instead, I credit Cook's testimony that she did not hear the statement. And, even without Cook's testimony on this point, there is inadequate evidence to establish that Cook heard the statement. Hence, there is inadequate evidence that DPS was aware of this statement such that it should have taken preventative and remedial action.

But, the statement made by McCallum that "snitches get stiches," if not an intended consequence of Cook's statement, certainly was a reasonably foreseeable consequence of Cook's statement. Cook's statement at the staff meeting did not affect Brown's pay, benefits, employment opportunities, or the terms or conditions of employment. Nonetheless, I find that Cook's statement was designed to have a chilling effect on whistleblowers, including Brown. Cook's statement had greater effect given that it was delivered at an in-person meeting instead of by email or other correspondence. Further, Cook making that type of statement at a staff meeting with someone from DPS's headquarters in attendance, along with the reasonable foreseeability that a staff member might make a disparaging and threatening statement towards Brown, certainly could dissuade a reasonable teacher at DPS from engaging in protected activity. Cook's statement at the meeting was an adverse action against Brown under the SDWA.[58]

10. Katrina Brown's Transfer From J.R. King in September 2016

Brown testified that she returned to J.R. King in the fall before school started for the students, which was on September 6, 2016. (Tr. 75-77). On September 22, 2016, DPS notified Brown that she was being reassigned to Ronald Brown Academy, effective September 26, 2016. (Tr. 101, 170; JT 23 at 1). An amended notice of reassignment dated September 23, 2016, changed the effective date of the reassignment to September 28, 2016. (JT 23 at 2). The notices of reassignment were signed by C. Washington, Executive Director, DPS. (JT 23). DPS transferred Brown to Ronald Brown Academy and required her to report there on September 28, 2016. (ALJX 1, ¶ 12). The notice of transfer was provided to Brown only 2 days after she had sent an email to Cook complaining of the condition of the water at J.R. King**.** (*See* Tr. 100-101, 170; JT 22 at 1; JT 23 at 1).

Brown testified that she contacted Valerie Hampton and James Baker at DPS's Human Resources to find out more information about the transfer, including why she was being transferred. (Tr. 103-104, 106; JT 18). Brown was told "that it was up to Mrs. Cook or Mrs. Leenet Campbell." (Tr. 104). According to Brown, Baker told her that her reassignment was due

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[58] Even had McCallum or another teacher not stated, "snitches get stiches," I would still have found Cook's statement at the September 19 staff meeting to be an adverse action. The clear intent of the statement combined with all the circumstances surrounding its making could reasonably dissuade a worker from engaging in protected activity.

It may seem incongruous that I have found Cook's statement at the September 19 meeting an adverse action despite the lack of any demonstrable effect on Brown, but did not find Brown's transfer, which had an effect on her, albeit insubstantial, to be an adverse action. One major difference between the two acts is that there can be no other purpose for telling staff not to complain to outside agencies other than to dissuade them from doing so. The purpose of such adverse action is clear and patent. Assuming, without deciding, that Brown's protected activity was a motivating factor in the decision to transfer her, would not make the purpose of the transfer, i.e., to dissuade, as clear and patent as the purpose of Cook's September 19 statement. The clarity and singular purpose of Cook making her September 19 statement increases the likelihood that the intended effect of the statement would be realized. That was not the case with Brown's transfer.

to the leveling process. (Tr. 106). Brown testified that she could have stayed at J.R. King and taught 7th or 8th grade. (Tr. 141-143).

Booker testified that DPS has the right to involuntarily transfer teachers, and the discretion to assign them to teach different grades for which they are certified. (Tr. 266, 278).

C. Washington, DPS's Director of Human Resources testified as follows:

> In the leveling process, once there is a reduction in teacher service, the Network Leader and the Principal decide which subject areas are going to be lost. (C. Washington T. at 212, 230,242). For 6th through 8th grades, the subject areas are specific to the content area, math, science, social studies. For kindergarten through 5th grade, the subject areas are the homerooms. So, if a homeroom position is being eliminated in kindergarten through 5th grade, the performance evaluations of all the homeroom teachers in kindergarten through 5th grade are examined; the process is not grade specific within kindergarten through 5th grade. (*Id*. at 213-214, 216; *see id*. at 246).
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> Leveling usually occurs the fourth Wednesday in October, but leadership decided to begin it early in the 2016-2017 school year. (*Id*. at 200-201). Human Resources received an initial projection of how many teachers would be at each location in late July. (*Id*. at 201, 229). Human Resources shared that data with the Network Leaders and Principals. The projected data indicates how many teachers will be lost or gained by each school, not any guidance on the positions that will be lost or gained. (*Id*. at 229).
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> J.R. King lost 3 teachers in the leveling process during the 2016-2017 school year. (*Id*. at 203). They were the teachers with the lowest score in the subject area being leveled. C. Washington was aware of Brown's complaints to the administration about water conditions, but her transfer was not based on those complaints or any discipline imposed by Cook. (*Id*. at 220).
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> Teachers can be involuntarily transferred as a discipline matter. Such requests are handled by the Employee Relations Department. The Network Leader would recommend an involuntary transfer with her rationale to Employee Relations. The request would then be raised to the deputy superintendent in Human Resources who would make the final decision to involuntarily transfer a teacher. (*Id*. at 226-227, 255-257). Cook had no input in whether Brown should be transferred as part of a disciplinary matter. (*Id*. at 226-227). As far as C. Washington is concerned, Brown was transferred as a result of leveling and not because of any efforts by Cook or Campbell-Williams. (*Id*. at 228).
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> As far as C. Washington knows, Cook did not indicate to Human Resources any specific teacher she wanted transferred. And, even if she had, Human Resources would not have considered such preference because it is against policy and procedure. (*Id*. at 215).

If a teacher were on FMLA leave, a vacancy would not have been created that Brown could fill because the teacher's job is protected under the FMLA for 12 weeks. (*Id*. at 223-224).

L. Washington, Deputy Executive Director, Office of Employee Relations testified as follows:

She is not involved in the leveling process. Part of her duties involve dealing with employee discipline. (L. Washington at 30-31).

L. Washington received complaints from Cook that Brown was being unprofessional, rude, and insubordinate. These complaints probably started in the 2015-2016 school year. (*Id*. at 31-32). L. Washington's office never began the process of involuntarily transferring Brown. (*Id*. at 33). Sometimes teachers are involuntarily transferred because of issues in a school, but it is not a disciplinary action. (*Id*. at 34-35). L. Washington's office does not actually effectuate such transfers. (*Id*. at 36).

In the 2015-2016 school year, L. Washington spoke with Cook regarding Brown not getting along with other teachers. (*Id*. at 38, 42). Cook also reached out to L. Washington's office regarding Brown at the beginning of the 2016-2017 school year. (*Id*. at 41). L. Washington referred Cook's request to have Brown transferred to James Baker. (*Id*. at 63). When asked "isn't the reason why you're involved in all of [the communications regarding Brown's transfer] because the transfer was regarded as a discipline matter," L. Washington responded, "[n]o." (*Id*. at 60). L. Washington does not remember whether Cook asked her to investigate or issue discipline to Brown. (*Id*. at 66-67).

A principal can issue a reprimand without the involvement of Employee Relations or send someone home for the day. (*Id*. at 50, 52).

Cook testified as follows:

She never requested Brown be transferred because of any of her complaints about the water issues at J.R. King. (Tr. 327-328). She told Campbell-Williams about the OSHA complaint, but did not ask Campbell-Williams to transfer Brown at that time. (Tr. 310). Cook asked Campbell-Williams that she herself be moved to a different school, but Campbell-Williams refused the request and said she will work on something else, maybe with a staffing solution – a change in the culture; Campbell-Williams did not suggest moving Brown. (Tr. 310-312).

As of August 31, 2016, when Cook wrote Brown up, she expected Brown to be at J.R. King for the school year. (*See* Tr. 315). Cook did not communicate with C. Washington about projections of school staffing levels made in early July. (Tr. 373). In the later part of September 2016, Cook learned that J.R. King had to lose 3 teachers in the leveling process. (Tr. 301).

Cook described the leveling process as follows:

> When you do not have enough students that you thought you were going to get, you start to lose staff members, and so you have to choose what teachers are you going to – what's going to make an impact or what's not going to make as much of an impact. . . . And so when the position – they tell you there are certain positions that's going to have to leave and so you have to decide what positions have to leave, but there's also other schools ready to pick up your teachers because they probably -- enrollment increased based on the count.

(Tr. 302).

According to Cook, when she learned that she had to lose 3 teachers, she discussed which positions to give up with Campbell-Williams. (*Id.*) In Cook's opinion, it made more sense to combine the lower grades and lose teachers from those lower grades. (Tr. 303-304). Cook testified that at the time, she did not know what criteria were used for transferring specific teachers during the leveling process or which 3 teachers would be reassigned. (Tr. 305). And, she did not have input into which specific teachers would be reassigned, but she could provide input on which positions would be reassigned. (Tr. 306). J.R. King lost 3 teachers. (*Id.*) Further, Cook testified that the other 4th grade teacher, Markeeta Burr, could not be transferred because she was on FMLA leave. (Tr. 324). Cook testified that she made the decision of which positions were leveled. (Tr. 374).

According to Cook, J.R. King had an opening for a special education teacher at the beginning of the 2016-2017 school year. And, DPS offered the position to Brown because "she knows the building and she also taught special ed before. . . . [a]nd I needed a position" (Tr. 325-326).

Brown testified that it took her 10-15 minutes to get to work at J.R. King. Ronald Brown Academy is "east over 30, 45-minute drive away from home." (Tr. 104). One of the reasons Brown was upset about her transfer was because of the increased distance of that school from her home. (Tr. 173-175). Brown also mentioned child care arrangements being a reason she was upset about the transfer, but her explanation regarding child care arrangements was unclear:

> Well, when you have small kids, that means you have to leave home a little bit earlier, school had already started for them. So I had to find someone to assist me, and basically I was told that it was up to Mrs. Cook or Mrs. Leenet Campbell.

(Tr. 105). The other reasons were that Ronald Brown Academy had high levels of lead in the water, there was no parking or gates, and there were safety issues. (Tr. 186-187).

In *Jenkins*,[59] the Board analogized a complainant's reassignment to lateral transfers, and found that because the record failed to show a consequential loss of promotional opportunities or other perquisites of employment, complainant's reassignment was not an adverse action. The Board's discussion of lateral transfers is informative:

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[59] ARB No. 98-146, PDF at 21-22.

> As a general proposition lateral transfers, i.e., those not entailing "'a demotion in form or substance, [do] not rise to the level of a materially adverse employment action.'" Such transfers would not become actionable unless some other consequences attached that adversely affected the terms, conditions or privileges of employment or future employment opportunities upon which to base a finding that the employee 'has suffered objectively tangible harm.' A lateral transfer whereby the employee maintains the same title, benefits, duties and responsibilities has been held not to constitute an 'ultimate employment decision,' e.g., 'hiring, granting [or restricting] leave, discharging, promoting, and compensating.'
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> * * *
>
> However, because evaluation of whether an action is adverse contemplates its entire effect on the employee's employment, a lateral transfer to a position with different job responsibilities and employment conditions, for example exposure to greater risks, may constitute adverse action even absent reduction in salary or benefits. Transfer to a job that the employee knows he cannot perform may constitute adverse action in that the employee reasonably can expect his employment situation to worsen substantially. Assignment to work on a less desirable shift perceived by co-workers as a 'punishment shift' may constitute retaliation.[60]

Of course, the Board decided *Jenkins* before the Supreme Court articulated its 'materially adverse' standard in *White*,[61] and before the Board adopted or otherwise articulated how that standard applied to the various whistleblower cases adjudicated by the Department of Labor.[62] In analyzing whether Brown's transfer to Ronald Brown Academy was an adverse action, I have considered the Board's discussion of lateral transfers in *Jenkins*, tempered by its later pronouncements regarding the 'materially adverse' standard.

I credit C. Washington's testimony that DPS transferred Brown as part of the leveling process and both C. Washington's and L. Washington's testimony that Brown's transfer was not discipline. There is no credible evidence that Brown's transfer was discipline. Hence, I find that Brown's transfer was not a form of discipline.

Further, there is no evidence that Brown's transfer had any effect on her pay, benefits, or future employment opportunities. There is no evidence that the transfer had any effect on Brown's title, duties, or responsibilities, other than possibly the subject or grade she would have taught. But, there is no evidence that a reasonable teacher at DPS would be dissuaded from engaging in protected activity by the risk of being reassigned to teach a different subject or grade that the teacher was certified to teach.

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[60] *Id*. (internal citations omitted).
[61] *See* 548 U.S. 53.
[62] *See Melton*, ARB No. 06-052; *Williams*, ARB No. 09-018, PDF at 15; *Menedez*, 2011 WL 4915750, *11-13; *Onysko*, 2013 DOL Ad. Rev Bd. LEXIS 2, *34 (Royce, J., Dissenting).

Further, I do credit Brown's testimony that it took her 15 to 35 minutes more to get to and from Ronald Brown Academy than to and from J.R. King. The amount of time it takes someone to commute to and from work can be a very important issue to a worker. It can effect decisions about where to live, which jobs to take or leave, child care, and a whole host of quality of life issues. Further, the amount a worker spends on gasoline for commuting can have a significant impact on that worker's economic prosperity. Additionally, longer commutes require more frequent vehicle maintenance, which further impacts a worker's economic prosperity. Although DPS had the right to involuntarily transfer teachers, a DPS teacher's duty location remains a term or condition of employment. How could it be otherwise when teachers are not free to work where they like.

Although I believe that a 35-minute increase in regular or frequent commuting time each way is a substantial increase, I do not feel the same about a mere 15-minute increase in commuting time each way or an infrequent or occasional 35-minute increase. And, Brown did not provide any amplifying information regarding the range of her increased travel time, such as when and how often it might take 35 minutes instead of 15 minutes to reach Ronald Brown Academy, or a clear explanation of how it affected her child care arrangements. I find that a substantial increase in commuting time resulting from a transfer would dissuade a reasonable teacher at DPS from engaging in protected activity, but that Brown has not demonstrated a substantial increase in her commuting time.

Brown's other reasons for being upset about her transfer, there were high levels of lead in the water at Ronald Brown Academy, there was no parking or gates, and there were safety issues, are also unavailing. Although an employment action that exposes an employee to greater risk may constitute an adverse action, Brown has not demonstrated that the risk from contaminated drinking water was any greater at Ronald Brown Academy than at J.R. King. And, her mention of safety issues and no parking or gates is too vague to prove an increased exposure to risk or non-trivial, adverse effect on the terms, conditions, or benefits of her employment. Brown has not demonstrated that her transfer would dissuade a reasonable teacher at DPS from engaging in protected activity. Accordingly, Brown's transfer was not an adverse action under the SDWA.

11. Hostile Work Environment

Although a discrete act may not constitute an adverse action in its own right, in combination with other acts, it can create a hostile work environment. And, a hostile work environment can be a basis for an unlawful whistleblower discrimination claim.[63] "A hostile work environment occurs where 'the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's

[63] *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, PDF at 6 (Dec. 19, 2013) (citing *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 1997-ERA-014 et al., slip op. at 11 (Nov. 13, 2002)).

employment and create an abusive working environment . . . .'"[64] "Hostile work environment claims involve repeated conduct or conditions that occur 'over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment' may not be actionable on its own."[65]

"To determine whether there is a hostile work environment, a court must look at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[66] "'Discourtesy or rudeness should not be confused with harassment; nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing, actionable.'"[67] "Circumstances germane to gauging a work environment include 'the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.'"[68]

To establish that an employer subjected a complainant to a hostile work environment, the complainant "must prove by a preponderance of the evidence that: (1) he engaged in protected activity of which [the employer] was aware; (2) [the employer] intentionally harassed him because of that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of [the complainant's] employment and to create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect [the complainant]."[69] Further, in order to hold the employer liable for a hostile work environment, the complainant must also prove by a preponderance of the evidence that the employer knew, or in the exercise of reasonable care should have known, that the employee's supervisors or co-employees were harassing her and that the employer failed to take prompt preventative and remedial measures to address workplace harassment.[70]

I have found that Brown's May 27, 2016 poor performance evaluation and Cook's statement at the September 19, 2016 staff meeting are adverse actions by DPS under the SDWA. Conversely, I have not found any of the other discrete acts alleged by Brown to be adverse actions. I will now consider all of these discrete acts in combination to determine whether DPS

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[64] *Id*. (quoting *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993)); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, 2019 WL 3293920, *9 (June 17, 2019); *Belt v. U.S. Dep't of Labor*, Nos. 04-3487, 04-3926, 63 Fed. Appx. 382, 389 (6th Cir. Jan. 25, 2006).

[65] *Lewis v. U.S. Envt'l Protection Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-006, 2003-CAA-005, PDF at 5 (June 30, 2008) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002)).

[66] *Williams*, ARB No. 12-068, PDF at 6 (quoting Harris, 510 U.S. at 23).

[67] *Id*. (quoting *Belt v. U.S. Enrichment Corp*., ARB No. 02-117, ALJ No. 2001-ERA-019, slip op. at 8 (Feb. 26, 2004), *aff'd*, 63 Fed. Appx. 382).

[68] *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, PDF at 35 (Jan. 30, 2004) (quoting *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 16 (Feb. 29, 2000)).

[69] *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108 & 03-013, ALJ No. 1997-SDW-00005, PDF at 4 (Dec. 30, 2004) (citing *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ. No. 98-CAA-7, slip op. at 34 (Jan. 30, 2004) and cases cited therein).

[70] *Overall v. Tennessee Valley Authority*, ARB No. 04-073, ALJ No. 99-ERA-25, 2007 WL 2141757, *9, 12 (July 16, 2007).

created a hostile work environment for Brown, with the exception of Brown's poor performance evaluation for the 2015-2016 school year, the June 7, 2016 email from Branson's email account, Brown's incident with Shazor during the summer of 2016, and Cook's reprimand of Brown on August 31, 2016. I have not considered Brown's poor performance evaluation and Cook's August 31 reprimand of Brown because I have found below that Brown's protected activity was not a motivating factor in Cook taking these actions against her, and these actions by Cook were not harassment.[71] I have not considered the June 7, 2016 email from Branson's email account and Brown's incident with Shazor in my analysis because I have already found that they were not intentional acts by DPS, which is a required element for a hostile work environment. Further, I have not considered the "snitches get stiches" comment in my analysis because I have found insufficient evidence to establish that DPS was aware of that comment.

In addition, in my discussion below of whether Brown's protected activities were a motivating factor in Cook giving her a poor performance evaluation,[72] I found that such protected activities were not a motivating factor in Cook contacting McClure and Brown on and before May 26, 2016, regarding transferring Brown. Accordingly, such action by Cook was not harassment for Brown's protected activities, and thus, will not be considered in determining whether DPS created a hostile work environment.

DPS was aware of all of Brown's protected activity in the form of Brown's reports to DPS about the water or lack thereof at J.R. King. DPS was aware of Brown complaining about the lack of drinking water at the school as early as April or May 2016, and most certainly by May 26, 2016, when Brown met with Cook to discuss various issues, including the lack of water. And, I previously found that in July 2016, Campbell-Williams was aware of Brown's complaint to OSHA, and Cook was aware of the OSHA Complaint in June 2016. Conversely, I previously found that Brown failed to establish that DPS was aware that Brown had complained to the MIOSHA, the Detroit Public Health Department, the MDEQ, or the EPA regarding the water at J.R. King.[73] Thus, DPS was aware of some protected activity by Brown before each act that is alleged to have culminated in a hostile work environment.

Further, all of the acts alleged to have culminated in a hostile work environment that I will consider were intentional acts by DPS. These acts are: (1) Cook's June 5, 2016 email chastising staff for complaining; (2) Cook's, Campbell-Williams's, and others' emails during the summer of 2016, regarding involuntary transferring Brown; (3) Brown's reassignment to teach 4th grade; (4) Cook's instruction at the September 19, 2016 staff meeting not to go to outside agencies; and (5) Brown's transfer to Ronald Brown Academy on September 28, 2016 (including the notice of same on September 22) (collectively the HWE Acts).

Brown explained that she was upset because it seemed like every week, every month she faced some harassment. (Tr. 202). The HWE Acts occurred over a period of approximately 4 months, June through September 28, 2016. They include the reassignment of Brown to teach 4th grade and then her transfer to another school, which happened in the course of less than 30 days. They also include emails among DPS's management, which Brown did not become aware of

[71] *See* Section III.E.1., III.E.3., *infra*.
[72] *See* Section III.E.1., *infra*.
[73] *See* Section III.B.3., *supra*.

until more than 4 months later, and until after she had transferred from J.R. King and gone on FLMA leave for the remainder of the 2016-2017 school year. (*See* Tr. 106, 109, 156; *see also* JT 27; JT 29 (Brown started FMLA leave in September 2016)). The HWE Acts occurred at an average of approximately 1 act per month over an approximately 4 month period, and Brown was not even aware of one of the acts until months later when she was informed by her own attorney. Although such a frequency of the occurrences could support a finding of a hostile work environment over a long period of time, e.g. a year, the short duration involved, approximately 4 months, lessens the import of the frequency here.

Although Brown called the police in response to one of Campbell-Williams' emails, I have already found that Brown's response was unreasonable. Similarly, I do not find that any of the HWE Acts were physically threatening. And, although Brown testified about being shocked and upset by different actions, including her transfer and Cook's June 5, 2016 email, (Tr. 59, 103), she did not describe being humiliated or embarrassed. And, I have found that only one of the HWE Acts was severe enough to be considered an adverse action under the SDWA – Cook's instruction not to go to outside agencies.

In terms of a tangible effect on Brown's work performance, as discussed below, she had already started preparing or obtaining paperwork to request FMLA leave before being notified of her transfer on September 22, 2016.[74] She submitted a FMLA leave request on September 16 or 22. One of or her sole reason for requesting such leave was stress allegedly due to the harassment she faced. (*See* Tr. 106-112; *see also* JT 27; JT 29). I credit Brown's testimony that she was stressed. Further, I see how a grade reassignment and involuntary school transfer on short notice all within 30 days, Brown's adverse relationship with Cook, Cook's June 5 email and September 19 instruction to staff, and other acts that are not HWE Acts could all have contributed to Brown's stress. But, I do not find that the few HWE Acts would cumulatively have adversely affected a reasonable teacher's work performance. And, other than Cook's FMLA leave, there is no evidence the HWE Acts in combination with non-HWE Acts adversely effected Brown's work performance. There is also insufficient evidence to conclude that the few HWE Acts alone would have led to enough stress for Brown to take FMLA leave.

Weighing all of the above considerations together, I find that the frequency, duration, and nature of the HWE Acts were not severe or pervasive enough to alter the conditions of Brown's employment and create an abusive working environment. I further find that the HWE Acts would not have detrimentally affected a reasonable person. Accordingly, Brown cannot recovery in this proceeding under a hostile work environment theory of liability.

There are a few other alleged acts or incidents that should be addressed in this hostile work environment analysis. First, Brown testified that she believes she was given a written reprimand for talking out at a professional development meeting with other staff on April 27, 2016. But, Brown also testified that this reprimand never actually appeared in her disciplinary record and aside from the August 31, 2016 reprimand, she was never written up for anything dealing with her fellow workers. (Tr. 131-133). No written reprimand arising out of this professional development meeting is in the record. And, Brown did not allege that this was an adverse act under the SDWA. Given Brown's questionable credibility and the weakness of her

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[74] *See* Section III.G.1., *infra*.

testimony ("I believe I was written a reprimand," without any explanation of why she believed this), I find that Brown has not established that she received a written reprimand from the April 27 meeting.

Second, Brown testified that when she reported to Ronald Brown Academy, the Principal, Georgina Tait, told her that it was the protocol for her school that staff were to come to her first before talking to anyone else about any issues at the school. Brown described Tait as a "nice lady." (Tr. 106). When Tait testified in the State Action, she was in her third year as the Principal of Ronald Brown Academy. (Tait T. at 4-5; JT 23 at 1). Tait testified as follows:

> The first time Tait met Brown was on October 3, 2016, when Brown reported for work at Ronald Brown Academy. (*Id*. at 5). They met for about 10 minutes. (*Id*. at 6). Before October 3, Tait had never communicated with Cook about Brown and did not know that Brown had filed a complaint with the OSHA. (*Id*. at 10). Tait does not believe she talked to anybody in the DPS administration about Brown before the October 3 meeting; she did speak to Ivy Bailey. (*Id*. at 13, 16, 22, 26).[75] Tait did not threaten Brown during the meeting. She did not know about Brown's complaints regarding the water conditions at J.R. King before the October 3 meeting. (*Id*. at 14). She did not tell Brown to get her approval before making complaints. (*Id*. at 15). She does not recall telling Brown that she was the "disciplinarian" at her school. (*Id*. at 25). During the meeting, Brown said that she gets headaches and that her doctor probably will restrict her from work for 2 weeks. ((*Id*. at 12).

Tait's alleged statement to Brown differs from Cook's statement during the September 19, 2016 staff meeting. Unlike Cook, there is no evidence that Tait told Brown not to go to outside agencies with complaints. If Brown is to be believed, Tait stated merely that Brown was to come to her first. Tait does not directly contradict Brown's testimony. However, there is also no evidence that Tait had knowledge of any of Brown's protected activity. I find that Tait's statement to Brown would not dissuade a reasonable teacher at DPS from engaging in protected activity. It was not an adverse action and it was not motivated by Brown's protected activity. Thus, it was not harassment and does not change my analysis of whether DPS created a hostile work environment.

Third, Brown raised DPS's failure to consider the appeal of her poor performance evaluation in her supplemental OSHA complaint dated June 13, 2018, (JT 5), but does not argue that such failure is an adverse action under the SDWA. (*See* Compl. Brf. at 34-38). Instead, she argues that this failure was part of a continuing scheme by DPS to involuntarily transfer her via

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[75] Ivy Bailey testified that she has been the President of the DFT for about a month. Previously, she was the Interim President for about a year and a half. (Bailey T. at 34). She testified primarily regarding union issues. She also testified regarding the leveling process. (*See* Bailey T.) One or more times, when asked whether Brown would be correct if she said this or that, Bailey testified that Brown would be incorrect. (*See, e.g. id*. at 38). Additionally, Bailey testified that she came to J.R. King and met with Cook for about 5 or 10 minutes because the union had received calls that there were issues at J.R. King regarding the election of the building representative. (*Id*. at 35, 41-43). According to Bailey, she advised Cook to stay out of union business. (*Id*. at 41). Bailey testified primarily as to collateral matters. Although I reviewed her testimony for background purposes, I did not find it helpful or necessary in resolving this claim.

the leveling process, after deciding that it could not otherwise involuntarily transfer her. (*See* Compl. Brf. at 43-45).

Brown testified that after she received her poor performance evaluation for the 2015-2016 school year, Cook refused to meet with her regarding her evaluation score. Brown testified that she went to Human Resources and asked approximately 6 times about appealing her score; she kept appealing, but no one acknowledged her; they did not let her appeal. (Tr. 112, 120-122; *see* JT 13 (evaluation dated May 27, 2016)).

According to Brown, she obtained instructions for appealing her evaluation from the State of Michigan Department of Education website. (Tr. 122-123). The instructions she obtained are entitled Teacher Performance Observations and Appeals, and they state:

> There are a couple of ways for teachers to appeal their teacher performance results. They can submit a rebuttal for a specific observation into the artifacts/evidence section in eTPES. This rebuttal will be attached as evidence to the evaluation documentation and taken in to account when the final scores are given. Teachers may also appeal their final teacher performance sore by sending a written Request by a written Request for Review to Human Resources within ten working days of receiving their final scores. The Peer Review Panel will review the evidence and provide a summary of their review to the Superintendent who will act on the appeal.

(CX 9 at 3; *see* Tr. 123-129). Brown believes she obtained the instructions within 10 days of receiving her Final Performance Evaluation, so she could meet the appeal deadline. (Tr. 125).[76]

CX 10 includes 3 documents, including email correspondence and a note from Brown to DPS dated September 15, 2016, September 27, 2016, and December 7, 2016, appealing or attempting to appeal her evaluation for the 2015-2016 school year. The subject line of the September 15 email is addressed to C. Washington, James Baker, et al. It states: "Second Request for a hearing/review related to my Teachers Final Performance Evaluation 2015-2016 school year." (CX 10 at 1). The September 27 correspondence is addressed to Baker, et al. and states that since August 5, 2016, Brown has requested several times to schedule a hearing regarding her evaluation. (CX 10 at 2; *see* Tr. 130-131). The December 7 note indicates that it is her 6th appeal request, and states: "Attn: James Baker." (CX 10 at 3).

C. Washington testified that the vehicle DPS teachers are instructed to use to appeal their performance evaluations is as follows:

> There is a process where the teachers receive their end of the year performance evaluation score letters in the mail. And in that particular letter is a link that

[76] Brown also testified in passing that she followed the guidelines given by Branson. (Tr. 127). However, she did not provide any amplifying information regarding the guidance Branson allegedly gave her or when this occurred. Further, there is no evidence that Branson was familiar with the proper procedure for Brown to appeal her poor performance evaluation. Hence, even were I to credit Brown's testimony, I do not find it persuasive to establish the proper means for a DPS teacher to appeal a poor performance evaluation in 2016.

> directs them to a survey on the District's website where they can actually complete a survey for one of the three components -- three or four components of the performance evaluation, and identify -- well, make a comment or inquiry, based upon either their PD 360 attendance or discipline.

(C. Washington T. at 224-225). DPS's letter to Brown advising her of her score stated: "Should you have questions related to the Teacher Performance Evaluation System, please refer to the frequently asked questions (FAQ) on the District's HUB via the Human Resources link [and provided the link]." (JT 20). The letter is erroneously dated "July 29, 2015." Since it applies to Brown's Final Performance Evaluation for the 2015-2016 school year, I assume it should have been dated July 29, 2016.

C. Washington further testified that the closing period for Brown's appeal was December 31, 2016, and C. Washington did not see any appeal by Brown online. (C. Washington T. at 225-226, 252-253).

C. Washington testified that she is familiar with the policy posted on the State website that advises teachers that they can appeal a performance evaluation either through a particular website or by letter to Human Resources. An appeal by letter would have to come to DPS's Human Resources. If it did, either C. Washington or one of her staff would have reviewed such a letter. When shown an appeal letter, C. Washington testified that she had not seen it before and does not know why. If she had seen it, she would have contacted Brown and instructed her to submit the survey through the website; and once Brown had done that, C. Washington would have reviewed the matter. (*Id*. at. 247-249). Brown would not be afforded a hearing at any point in the process. (*Id*. at 249). According to C. Washington, DPS will notify a teacher if it decides not to take any action on an appeal. (*Id*. at. 225, 249).

I credit C. Washington's testimony and find that Brown did not use the proper procedure for appealing her performance evaluation, which is referenced in the letter Brown received with her Final Performance Evaluation score. Also, Brown requesting a meeting with Cook was not part of the procedure to appeal her performance evaluation.

However, because C. Washington testified that she would have instructed Brown how to appeal had she seen an email by Brown requesting to appeal, the question remains whether DPS's failure to respond to Brown's attempts to appeal was intentional harassment or motivated by Brown's protected activity. C. Washington denied seeing an email regarding Brown's appeal request. Baker did not provide testimony and there is no evidence that he received Brown's email or note and, if he had, that he would have been obligated to instruct her how to appeal. If such testimony by C. Washington is credited, then Brown has failed to establish that DPS intentionally thwarted her attempts to appeal.

C. Washington testified that DPS's Employee Relations made her aware that Brown had complained to the administration about water conditions. (C. Washington T. at 220). According to Campbell-Williams, at some point after August 31, 2016, she ceased her renewed efforts to involuntarily transfer Brown because L. Washington, Baker, and C. Washington were hesitant about moving forward. They did not want it to look as though they were retaliating. (Campbell-

Williams T. at 84-86; *see* 98-102). I infer from C. Washington's and Campbell-Williams' testimony that C. Washington knew of Brown's protected activity before Brown was transferred in the leveling process, which would have been at least before Brown's September 27, 2016 email regarding appeal.

However, I do not find that C. Washington's knowledge motivated her to ignore Brown's appeal attempts. C. Washington was part of the group whose consensus was against transferring Brown because of the appearance of retaliation. There is no evidence that C. Washington decided to act and did act contrary to such consensus. Thus, I credit C. Washington's testimony on not seeing an email from Brown regarding appeal. And, I find that Brown has not established that someone in DPS's Human Resources who may have been responsible for responding to her requests received one of her requests and intentionally ignored it. Brown has not established that DPS's failure to respond to her attempts to appeal was intentional harassment or motivated by her protected activity. Accordingly, DPS's alleged failure to respond to Brown does not change my analysis of whether DPS created a hostile work environment for Brown.

E. Motivating Factor Causation

"'A complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing' factor. A 'motivating factor' is 'conduct [that is] . . . a ''substantial factor'' in causing an adverse action."[77]

1. Brown's Performance Evaluation for the 2015-2016 School Year

Brown testified as follows:

> The normal teacher evaluation process involves 3-4 documented, classroom observations of 30-45 minutes each by the administration. Brown did not receive any such observations in the 2015-2016 school year, which was unusual. (Tr. 113-115, 119). There were state assessment tests (MAP tests) for language arts and math, but not for science in 2015-2106. For science, the Data Director from the District was used and the sixth grade science was the highest in the school. (Tr. 115-117).
>
> As part of the evaluation process, the teachers provide the Principal with their binders, which include things done in the classroom, extracurricular activities, lesson plans, a cover letter, the teacher's resume and philosophy, etc. In May 2016, Brown walked to the Principal's office with Booker and they left their binders on the Principal's windowsill in her office, which was standard procedure. (Tr. 117-119, 222-223).

Booker testified that she received about 4 classroom observations during the 2015-2016 school year and she believes this was the regular procedure prior to that school year. (Tr. 252-253). Booker confirmed that she walked to the Principals' office with Brown and they left their

[77] *Onysko v. State of Utah, Dep't of Envt'l Quality*, ARB 11-023, 2013 DOL Ad. Rev Bd. LEXIS 2, *26 (Jan. 23, 2013) (internal citations omitted).

binders on the Principal's windowsill. (Tr. 250-251). She testified that she received her performance evaluation without meeting with Cook. (Tr. 268-269).

Cook testified that she believes she met with Booker. (Tr. 346). And, that Brown and Booker did not come to her together; Booker made that up. (*Id*).

Cook testified that it was her practice to meet with teachers to complete their evaluations and they were required to bring their binders to show evidence of their work. (Tr. 317). She testified that she did not see Brown's binder for the 2015-2016 school year; Brown showed up without her binder. (Tr. 318). When asked whether teachers ever put their binders on her window sill in her office, she responded: "No, the window sill – in my office, but not in the window sill. I did not see hers." (Tr. 380). She elaborated that sometimes teachers would drop off their binders in her office. (Tr. 381). Cook confirmed that she received binders and met with all her teachers about their evaluations, except Brown; Cook did not receive Brown's binder or meet with her regarding her evaluation. (Tr. 380-382).

Brenda Jordan performed clerical work in the main office at J.R. King before she retired in June 2016. She testified as follows:

> She was responsible for scheduling end of year teacher evaluations. Teachers who did not come in for an evaluation or who had not brought in everything they needed did not have an okay sign by their name, so Jordan would call them to reschedule. Jordan had to call Brown to reschedule. Apparently, when Jordan talked to Cook, Cook had said Brown is not finished. But, Brown then met with Jordan and told Jordan that she had turned in everything Cook needed. (Jordan T. at 130-133). Jordan told Cook what Brown had said and Cook stated, "is that what she said." (*Id*. at 133-134). Cook then had Jordan write a statement regarding what Brown had said, sign it, and give it to her. (*Id*. at 134).
>
> Jordan identified a scheduling sheet that she created and used for scheduling year-end teacher evaluations. (*Id*. at 135). (Although not specifically identified in her testimony, it is clear that she is referring to JT 14).[78] Jordan believes, but is not certain, that she spoke with Brown by phone about rescheduling before making the entry on the May 11, 2016 page of the schedule: "Reschedule for Thursday May 12 . . . ." (*Id*. at 134-137; *see* JT 14).

I note that the statement Jordan alleges she prepared and signed regarding her discussion with Brown is conspicuously absent from evidence.

Cook further testified that it was her practice for her or Branson to perform observations of teachers during 2015-2016. The observations account for a percentage of a teacher's performance evaluation. Of the 35 teachers at J.R. King, Brown was the only teacher not observed during the school year, which was unusual. (Tr. 320-321, 379-380). The evaluation also accounts for growth on the students' MAP testing. Cook evaluated Brown on growth in science because she was a science teacher, but there was no growth in those scores by Brown's students

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[78] JT 14 is a schedule kept by Jordan. Brown's name appears on the pages of the schedule dated May 11 and 13, 2016. (JT 14; Tr. 318-319).

for 2015-2016. Brown could have recouped those points with her binder. (Tr. 322-323). According to Cook, there was MAP testing for science. (Tr. 347). And, Brown's students should have been tested, but they were not. (Tr. 348). Cook testified that Brown did not provide any other testing scores to her. (Tr. 348-349). Cook testified that there may have been other teachers at J.R. King that school year that received minimally effective evaluation levels. (Tr. 382).

When asked why Branson did not observe Brown during the school year, Cook testified that: "He was the type that didn't want to deal with confrontation. She was combative, so her -- just her aggressive nature toward -- and I'm just saying based on what I see or believe -- he's kind of straight away, he just was kind of walking softly around that." (Tr. 384). Cook further testified as follows:

> JUDGE GOLDEN: Okay. So you get to evaluation time when you've got one of your teachers and she hasn't had any observations for the school year, all your other teachers had evaluations, she doesn't have a binder that she's given you, all of your other teachers have given you binders, her kids don't have any test scores that you've been provided or that you're being provided. I mean, doesn't that concern you in a way that you would say, hey, I really have to sit down with her and we really have to discuss this before giving her [] evaluation?
> THE WITNESS: Definitely that posed a red flag, and given the whole situation of, you know, the combativeness or what have you, we needed someone to stand in and we were asking for HR Employee Relations to come to stand in and help us. One of the e-mails I got from DeLaura, which was the Network Leader, was saying definitely higher-ups, higher authorities need to come in to assist, because the school level, as far as the assistant principal and the principal, powers are being undermined.

(Tr. 384). Lastly, Cook denied giving Brown a poor performance evaluation because of her complaints about the water issues. (Tr. 327-328).

Branson testified that he tried to observe Brown 4 times during 2015-2016, but she told him she was not ready, she was doing other things. He did not complete an observation of her that school year. (Branson T. at 186-187).

Brown testified that she was evaluated as a science teacher, not as a homeroom teacher. (Tr. 120). However, she found out that she was being transferred from J.R. King in the leveling process because she had a low evaluation and test scores. (Tr. 132). She testified that the test scores were low because her homeroom class had not received the MAP test. (*Id.*)

Brown testified that when she tried to raise the issue of her students not receiving this test at a staff meeting, she raised her hand, Cook did not call on her, and she blurted out: "I know you see me with my hand raised up. My students never were tested." (Tr. 131).

Yancy Gideon, III has worked at J.R. King for over 20 years. (Gideon T. at 145-146). He testified as follows:

> He was present at a professional development meeting with Cook, Brown, Instructional Specialist Nicole Samuel, and Instruction Specialist Sabrina McConnel on April 27, 2016. (*Id*. at 146). During the meeting, Brown asked a question regarding her testing not being complete. McConnel stated that she could help Brown with that. There was some back and forth between them and they started having words. Samuel also said she could help. Cook tried to redirect the staff back to the meeting. According to Gideon, Brown kept blurting out and continuing to say things. Brown's behavior was hostile towards Samuel. (*Id*. at 146-151).

Sabrina McConnel is retired after working for DPS for 18 ½ years. For the last 1 ½ of those years, she was assigned as an instructional specialist at J.R. King. (McConnel T. at 88-89). McConnel testified that as an instructional specialist, she facilitated curricula for the teachers and assisted with testing, materials, and discipline. Her main grades were 6th through 8th. (*Id*. at 90-91).

McConnel also testified regarding the professional development meeting in April 2016, at which Brown expressed concern about having her students tested. McConnel felt that Brown's behavior or comments during the meeting were unprofessional. (*Id*. at 106-107). McConnel also testified about an incident with Brown on May 4, 2016, regarding an attempt to administer the MAP test to Brown's students; about how Brown missed having her students take the MAP test. (*See id*. at 90-102, 108, et al.). According to McConnel, Brown cussed loudly at her in front of students. (*Id*. at 102). McConnel believes that all of Brown's students that were present that day started the test. (*Id*. at 117).

Nicole Samuel is an instructional specialist and has been employed by DPS for 20 years. She works at J.R. King and helps with testing as part of his job duties. (Samuel T. at 157-158). Samuel testified as follows:

> The teachers are responsible for testing their students. Samuel would assist teachers to schedule the tests. Samuel noticed that Brown's students "didn't test at all. It was the math, and a large percentage of students didn't test in science." (*Id*. at 158-159).
>
> Samuel was in a professional development meeting with Cook and Brown on April 27, 2016. Brown asked who was responsible for testing the kids. (*Id*. at 158). When she was told it was the teachers, she said that was not her job and the instructional specialists should do it. (*Id*. at 159-162). The meeting occurred after the testing period had closed, but a request had been made to extend the testing period because so many students had not been tested. (*Id*. at 162-163).
>
> The teachers were told their students did not get tested and you, the teachers, need to test them before the April 27, 2016 meeting. (*Id*. at 163-164).

Samuel's description of Brown's statements and behavior during the meeting paints a picture of Brown as being disruptive and confrontational. (*See id*. at 159-162). Samuel testified that she was aware of a few incidents during which Brown was unpleasant during the 2015-2016 school year. (*Id*. at 164-165, 170). Samuel elaborated on those incidents during her testimony.

(*See, e.g., id*. at 165-170). Samuel acknowledged that she had hostility towards Brown and reported her to Cook on one occasion. (*See id*. at 178-179).

Moore also testified regarding the staff meeting in April 2016. She testified that she observed Brown trying to get McConnell's attention by raising her hand to make her aware that she had not tested her class. (Moore T. at 141-143). According to Moore, Brown was not being rude or intimidating, and she was not being called on. (*Id*. at 142-143). Moore believes that Brown was easy to get along with. Moore sometimes socialized with Brown outside of school. (*Id*. at 145-147).

I credit Cook's testimony that she did not see Brown's binder for the 2015-2016 school year. Cook's testimony is supported by Jordon's testimony that Cook told Jordan that Brown was not finished and by Jordan's scheduling sheet. Further, I have no reason to discredit Jordan's testimony but, as discussed below, I have not credited Brown's or Booker's testimony regarding the presentation of Brown's binder.

Nonetheless, I am troubled by the fact that Cook gave Brown a performance evaluation that school year without confirming whether Brown had a binder and without Cook or Branson performing any classroom evaluations of Brown that school year. Cook acted differently towards Brown than the 34 other teachers under her supervision with respect to Brown's performance evaluation, including classroom observations. Of course, if Cook had to track down binders for all 35 of her teachers I would understand her not going out of her way to make sure that every teacher turned in their binder. But, there is no such evidence in the record. Cook and/or Branson evaluated every teacher at the school, except Brown. Brown was supposed to be observed 4 times. She was observed zero times. And, Cook received binders from every single one of her teachers, except Brown. Under the circumstances, I would have expected Cook to personally reach out to Brown and ask her for her binder. There is no evidence that happened.

My observations regarding how Cook treated Brown differently lead me to conclude that the reason for the different treatment is that Cook held no small amount of animus towards Brown. The record is replete with descriptions from different witnesses of how Brown did not get along with other teachers. It is undisputed that the 6th grade teaching team did not get along with one another. At one point, Cook switched the 6th grade teachers from a system of platooning to self-contained teaching because of their discord. Cook's view of Brown is epitomized in her statement that Brown's effect on J.R. King was a "strain on it, tension, toxic." (Tr. 308). The question is whether Brown's protected activity was a substantial factor in causing such animus and the resulting poor performance evaluation.

Brown had a meeting with Cook on May 26, 2016, in which she raised several issues including the lack of adequate drinking water at J.R. King. She began engaging Cook on this issue before May 26. However, there is no evidence in the record whatsoever that Cook had any animus towards Brown because of a few water complaints, except arguably the temporal relationship between Brown's complaint on May 26, and Brown's call to her within a few hours regarding a transfer and the evaluation given the following day. But, Brown has provided no explanation for why Cook would have been upset about a few internal complaints of a lack of water on and before May 26. Brown had not even filed her OSHA complaint at the time she was

given the performance evaluation. When comparing likely reasons for Cook's animus towards Brown, it is far more likely that Brown's past behavioral problems were the sole cause of Cook's animus towards Brown on or before May 27, 2016, than that Brown's water complaints up to that time contributed at all to the animus. This does not mean that Cook did not develop additional animus and hostility for Brown at a later time because of Brown's protected activity, like after Cook found out about Brown's OSHA complaint. The evidence just does not show that any such animus for Brown's protected activities played any role in Cook giving her a poor performance evaluation on May 27, 2016.[79] And, I find the same regarding Brown's effort to transfer Cook on or before May 26, 2016, for the same reasons.

Further, based on the testimony of Samuel and McConnel, I find that it was Brown's responsibility to have the MAP test administered to her students and she did not. This testimony was unchallenged, accept by Brown whose testimony I give little weight to on the issue. And, I find that Brown did not place her binder on the windowsill in Cook's office, contrary to her and Booker's testimony.

I give Booker's testimony no weight on the issue of Brown turning in her binder because I have already found Booker's testimony regarding Brown's May 26 meeting with Cook questionable and because I reject Brown's testimony regarding turning in her binder *in toto*.

With respect to the binder, CX 7, Brown testified as follows:

> A. This is my binder. Tells you a cover letter about myself, my resume, my philosophy, to protect and serve, my mission, the case study, classroom management plan, letters of recommendation, awards, lesson plans.
>
> Q. When did you prepare that binder?
> A. We would prepare it during the school year.
>
> Q. And is that the binder that you brought down to show Ms. Cook?
> A. Yes.
>
> Q. And you left it there?
> A. Yes.
>
> Q. How is it that you have it now?
> A. Well, it was returned. We all get them back. Every year you get your binder back.

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[79] The Board has held that to establish contributing factor causation, "an employee need not prove retaliatory animus, or motivation or intent, to prove that this protected activity contributed to the adverse employment action at issue." *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, 2017 WL 262014, *10 (ARB Jan. 6, 2017) (*en banc*) (internal citations omitted). Although the motivating factor causation standard applicable here is more demanding than the contributing factor standard, I have not required Brown to prove retaliatory animus or motive flowing from her protected activity in order to prove a violation of the SDWA. Instead, I have merely considered the presence or absence of such animus or motive along with other factors in deciding whether Brown has established motivating factor causation.

(Tr. 119)

> Q. Ms. Brown, can you identify what is -- I believe it's Proposed Exhibit. Can you identify the document?
> A. This is my binder for the 2015-2016 school year at John R. King.
>
> Q. And have you gone through that binder prior to today?
> A. Yes.
>
> Q. When did you go through it?
> A. Back in 2016.
>
> Q. Have you gone through it in the last two days as well?
> A. Yes.
>
> Q. And is it identical -- is this the binder you presented to Principal Cook on the day of your evaluation or at least presented to her office when you went down for your evaluation in May of 2016?
> A. This is the binder I submitted to her, yes.
>
> Q. And is it identical to that binder?
> A. Yes.
>
> Q. And this is the binder that you regularly submit every year; it's similar to the binders that are submitted every year as part of your evaluation?
> A. Yes.
>
> Q. And there are no documents that were added to that binder subsequent to the [sic] May of 2016?
> A. No.

(Tr. 220-221). At the time of the hearing before me, Brown was teaching at Marion Law Academy. (Tr. 168).

Brown's binder, CX 7, has a little over 2 inches of material in it. A review of CX 7 reveals that many of the documents therein are from school years prior to the 2015-2016 school year. This alone does not give me pause. But, some of the older documents seem out of place in the binder, such as 2 separate Office Referral's dated May 6, 2015 (from the 2014-2015 school year) for student disturbances, etc. Additionally, some of the older dates have been crossed out or altered to reflect the 2015-2016 school year or dates within that school year. For example, there is a Professional Learning Plan (PLP) with the school year 2014-2015 marked out and replaced with 2015-2016. Even the date at the end of that document has been altered.

What is significantly more troubling is that CX 7 includes documents from school years after the 2015-2016 school year, and documents that were clearly altered after May 2016. For instance, there is a document entitled "Marion Law Academy Safety Procedures @ a Glance

2017-2018," with the words "Marion Law Academy" and "2017-2018" blacked out with marker. Marion Law Academy is where Brown was teaching at the time of the hearing. Another document (on purple paper) is entitled, "Marion Law Parent Survey." There is white-out over the words preceding "Parent Survey," and "Marion Law" is handwritten on top of the white-out. The date on another document, entitled "Career Clusters Interest," has been changed to "11-14-2018." There is another document entitled "Science PRE-TEST," with the dates "2017-2018" blacked out with marker. Contrary to Brown's sworn testimony, CX 7 is not identical to the binder that Brown allegedly left for Cook's review. And, there was at least one document added to the binder after May 2016. Brown's testimony on these points was inaccurate and untruthful. Further, Brown's testimony about when and how her binder was returned to her is particularly vague: "Well, it was returned. We all get them back. Every year you get your binder back." (Tr. 119). Consequently, I do not credit any of her testimony about leaving her binder on the windowsill in Cook's office.[80]

Brown received a poor performance evaluation for the reasons stated by Cook, she did not provide Cook with her binder, had no observations, and had no MAP scores for her students. Brown's protected activity was not a motivating factor in her receipt of a poor performance evaluation.[81]

2. The September 19, 2016 Staff Meeting Regarding the Water

I have found that Cook's instruction to her staff, including Brown, not to make complaints to outside agencies was an adverse action against Brown under the SDWA. This instruction came a mere 19 days after Cook expressed her feelings of hostility towards Brown for filing an OSHA complaint. (*See* JT 15 at 2 (Cook's August 31, 2019 email to Campbell-Williams)). Moreover, the instruction was given at a staff meeting regarding drinking water issues at the school. And, I have found that Cook's explanation of why she said what she said was unclear at best. I find that Brown's protected activity of filing a report with OSHA was a motivating factor in the adverse action of Cook instructing her staff, including Brown, not to make complaints to outside agencies.

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[80] In Brown's brief, her counsel refers to part of a finding I made during the hearing. (*See* Compl. Brf. at 22). The full finding was: "I found that the testimony is enough to establish authenticity that it is the binder that was put on Ms. Cook's window sill at the time that the binder was supposed to be presented to her, and that it's the original and it's in the same condition that it was in at the time of presentation. Claimant's Exhibit is admitted in evidence." Although this finding could have been worded more clearly, it was a finding only that Brown had established the evidentiary foundation for admission of the binder in evidence, my description of that requisite foundation, and my description of the binder. I had not reviewed the contents of the binder at that point in detail. I was not making a finding regarding Brown's credibility or the truth or accuracy of her testimony.

[81] Brown alleges in her OSHA complaint that DPS retaliated against her by failing to promote her. However, there is no evidence that DPS failed to promote Brown. Rather, there is evidence that Brown was not able to apply for a promotion to Master Teacher solely because of her poor performance evaluation. But, because I have found that Brown's protected activity was not a motivating factor in her receipt of the poor performance evaluation, it follows that her protected activity cannot be a motivating factor in her lack of opportunity to promote. And, even assuming the lack of an opportunity to promote flowing solely from the poor performance evaluation is an adverse action, that still does not affect my hostile work environment analysis because it is not a discrete act. Rather it is a consequence that flowed from Brown's receipt of the poor performance evaluation. DPS did not violate the SDWA by failing to promote Brown.

3. The Meeting in Branson's Office and Reprimand of August 31, 2016

Although I have not found that Cook's August 31, 2016 written reprimand of Brown was an adverse action, I will still address the impetus for the reprimand to determine whether it is harassment that should be considered under Brown's hostile work environment theory. This reprimand was given on the same day that Cook expressed her hostility towards Brown in her email to Campbell-Williams. This temporal connection supports the inference that Cook was motivated by Brown's complaint to the OSHA in reprimanding Brown. However, various other facts call for a different inference and conclusion.

I find that the meeting in Branson's office was loud enough to cause Cook to come in and ask everyone to be quieter or inform them the meeting was too loud. I infer from this level of noise and the subject matter of the meeting, the actual or perceived challenge to a union election, that the meeting was also heated. All the witnesses' descriptions of Brown's statement to Cook were consistent or similar, including Brown's: "I thought you were gone; good bye;" "I thought you said you were leaving . . . get out;" or "I told you that you could leave." None of the non-party witnesses defended the statement. One witness described the statement as dismissive. Even Brown's greatest supporter, Booker, acknowledged that the statement was not appropriate. Cook's reprimand of Brown for insubordination during the meeting on August 31, 2016, was justified by Brown's inappropriate statement and the circumstances surrounding the meeting – loud and heated.[82] The meeting had nothing to do with Brown's protected activity. Cook testified that she did not reprimand Brown on August 31, 2016, because of Brown's complaints about the water. (Tr. 327-328). Although Cook had a certain amount of hostility and animus towards Brown by August 31, 206, for Brown's protected activities, I credit Cook's testimony because it is entirely reasonable in light of the foregoing facts. I find that Brown's protected activity was not a motivating factor in Cook's August 31, 2016 reprimand of Brown and that the reprimand was not harassment, but reasonable discipline for a non-retaliatory reason.[83]

F. Affirmative Defense

As stated above, a respondent may still prevail on a whistleblower claim under the SDWA, if it establishes by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. The only adverse action I have found to be motivated by Brown's protected activity, was Cook's September 19, 2016 instruction to staff not to report issues regarding the school's drinking water to outside agencies. DPS's position is

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[82] I have made my determination that Brown's statement to Cook was inappropriate independent of the witnesses' opinions regarding the statement. Nonetheless, their opinions do support my finding.

[83] Cook's August 31, 2016 warning letter to Brown states that the meeting with Branson occurred on August 31, 2016. (JT 16). However, Brown, Cook, Branson, Beattie, and Dowlen all refer to the meeting occurring on August 30 or August 31. (*See* Tr. 78, 80-81, 253, 334; Branson T. at 137-141, 154; Beattie T. at 83; Dowlen T. at 152). Whether the meeting occurred on August 30 or 31 is not terribly important. What I have considered is whether the meeting occurred before or after Cook's email to Cambpell-Williams at 11:23 a.m. on August 31, in which Cook describes an increasingly worse work environment given Brown's "Retaliatory/OSHA suit." (JT 15 at 2). The evidence is unclear regarding whether the meeting occurred before or after Cook sent this email. However, it is logical to assume that the meeting was an impetus for Cook sending the email. Regardless, I need not make a finding on this particular issue because the email was merely an expression of Cook's animus regarding Brown's protected activity. The animus regarding Brown's protected activity existed before the email was sent.

that Cook did not make this statement. It makes no argument that Cook would have made the statement absent Brown's protected activity and I can think of no credible or logical reason why Cook would have made this statement absent Brown's protected activity, especially since 19 days earlier Cook had expressed such strong and hostile feelings towards Brown's OSHA complaint. DPS has failed to establish its affirmative defense by a preponderance of the evidence. Thus, DPS violated the employee protection provision of the SDWA.

G. Damages

The damages available under the employee protection provision of the SDWA are set forth in 29 C.F.R. § 24.105(a)(1):

> If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with an order providing relief to the complainant. The order shall include, where appropriate, a requirement that the respondent abate the violation; reinstate the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; pay compensatory damages; and, under the Toxic Substances Control Act and the Safe Drinking Water Act, pay exemplary damages, where appropriate. At the complainant's request the order shall also assess against the respondent the complainant's costs and expenses (including attorney's fees) reasonably incurred in connection with the filing of the complaint.[84]

1. Compensatory Damages

Brown testified that:

> Brown did not remain at Ronald Brown Academy. She requested Family Medical Leave Act (FMLA) leave on September 16, 2016, because of stress and anxiety, which manifested with rashes, not feeling well, and stomach problems. She was off from work for the rest of the 2016-2017 school year. She received health benefits, but not pay, bonus pay, or pension credit while off work. Brown attributes her stress and anxiety to being transferred to Ronald Brown Academy, which also had a high level of contaminants in its water; she felt like she was being targeted and that DPS was trying to cause her bodily harm. (Tr. 107-112, 156; *see* JT 27; JT 29).
>
> Brown had other medical issues during the 2016-2017 school year: twitching, a nerve block, and some fluid drained from her stomach. (Tr. 188-189).

JT 27 includes FLMA leave of absence requests and certifications of healthcare provider. One request dated September 6, 2016, seeks leave from that date "unknown July 2017." (JT 27 at 1). Another request dated November 18, 2016, seeks leave from November 15, 2016 to December 26, 2016. (JT 27 at 6). The September 6, 2016 request is stamped "RECEIVED SEP

[84] DPS has not raised immunity as a defense to any award of punitive damages, so I have not addressed the issue of immunity. (*See* Resp. Brf. at 25).

22 2016. (JT 27 at 1). The certifications completed by Brown's primary care physician, Arnel Clarin, M.D., on October 3, 2016, and/or November 16, 2016, indicate that Brown suffered from an adjustment disorder with mixed anxiety and depressed mood and/or anxiety and major depressive disorder; she needed treatment and was prescribed medication; and she could not perform job functions due to her condition until cleared by a psychiatrist. (JT 27 at 2-5, 7-9). The October 3 certificate estimates the beginning and end dates of Brown's incapacity as October 3, 2014 to November 4, 2016. (JT 27 at 4). The November 16 certificate estimates the beginning and end dates of Brown's incapacity as extending from November 5, 2016 to December 26. (JT 27 at 8).[85]

JT 30 includes an additional FMLA leave request signed by Brown on May 4, 2017, seeking leave from April 15 2017, to June 24, 2017. (JT 30 at 1). The certification by Brown's physician, Dr. Abbas, on April 4, 2017, indicates that Brown is unable to perform all her job functions due to uncontrollable pain related to or induced by stress. She has trigeminal neuropathy from a 2014 motor vehicle accident, facial muscle spasms, and numbness, agoraphobia, and was pending surgery for nerve blocking. (JT 30 at 2-4).

Brown testified that she has been stressed for a long time. (Tr. 173). A medical progress note of April 1, 2106, notes that Brown is feeling stressed about the changes in her life. (JT 25 at 2).

With respect to Brown's decision to stop teaching summer school in 2016, she testified that she stopped teaching that summer, and lost income as a result, because of the stress and fear for her safety. When asked why she stopped teaching summer school, Brown responded: "It was really just stress. It really wasn't worth the threat of being fired for something I didn't do, and it was constant stress every week. I just couldn't take it anymore." (Tr. 73). Brown clarified that it was because of constant harassment and the retaliation. (Tr. 163). She informed Branson and Human Resources of her decision. (Tr. 73-74).

Although DPS denies that Brown is entitled to any lost earnings, the parties have stipulated that Brown's lost earnings relative to what she would have made had she worked the entire 2016-2017 school year totals $56,274.90. (ALJX 2).

There is no medical opinion in evidence that the stress and anxiety for which Brown took FMLA leave was caused by DPS's alleged adverse actions. There is no medical opinion in evidence that the stress and anxiety for which Brown took FMLA leave was caused by Cook's September 19, 2016 instruction not to report issues with the drinking water to outside agencies. Further, the start date of Brown's FMLA leave, September 16, which predates Cook's September 19 instruction, and Brown's testimony attributing her stress and anxiety to being transferred further negate DPS's violation of the SDWA as the cause of Brown's lost earnings. Brown has failed to prove that she is entitled to lost earnings as a result of DPS's violation of the SDWA.

Brown also seeks to have her poor performance evaluation removed from her record. However, I have not found that DPS violated the SDWA by giving her the poor performance evaluation. Thus, she is not entitled to this requested relief.

[85] The year of the end date for this estimate is illegible.

Brown is entitled to emotional distress damages. She testified that she suffered stress and anxiety as a result of DPS's actions, which eventually led to her taking FMLA leave. The difficulty is determining how much stress and anxiety Brown suffered from DPS's violation of the SDWA, i.e., Cook's September 19 instruction not to go to outside agencies with complaints regarding the drinking water versus the stress and anxiety that Brown attributes to other actions by DPS. Cook's instruction and DPS's transfer of Brown were some of the last acts by DPS that purportedly vexed Brown. However, based on Brown's testimony, I believe she was more upset by her transfer. A reasonable amount of damages that will adequately compensate Brown for the emotional distress she suffered from DPS's violation of the employee protection provision of the SDWA is $3,000.00.

2. Exemplary Damages

Under *Youngermann v. United Parcel Service, Inc.*,[86] I am required to first determine whether an award of punitive damages is appropriate. If that question is answered in the affirmative, I will then need to perform a second analysis to determine the amount of punitive damages to be awarded.

At the first step of the punitive damages assessment, I primarily focus on Cook's state of mind because she is the individual who violated the employee protection provision of the SDWA. Phrases such as "reckless indifference" to, or "callous disregard" of, the federally-protected rights of Brown describe in general terms the type of evidence that will indicate that an award of punitive damages is appropriate. I will also look for evidence of intentional violation of federal law(s).

During the staff meeting at J.R. King on September 19, 2016, Cook told her staff not to go to outside agencies regarding the school's drinking water. This occurred after Brown had repeatedly reported a lack of adequate drinking water at the school to Cook and filed an OSHA complaint for retaliation for making such reports. Cook was aware of the OSHA complaint and had expressed strong and hostile feelings towards Brown based on such complaint only 19 days before making her statement at the staff meeting. The close timing of these events, the hostility expressed by Cook towards Brown's whistleblower complaint, the serious safety and public health issues involved in Brown's complaints, i.e. a lack of adequate drinking water for public elementary and middle school students, the lack of evidence of any remedial or preventative action by DPS in the face of Cook's expressed hostility, and the facts that Cook expressed her hostility to her superiors and someone from DPS's administration was present at the September 19 staff meeting when Cook gave her entirely inappropriate instruction all evidence Cook's intentional violation of the law and DPS's reckless indifference and callous disregard for the same.

Based upon the entire record before me, I find that DPS intentionally violated the employee-protection provisions of the SDWA with respect to Brown; was recklessly indifferent to the right of Brown to engage in protected activity under the SDWA; and callously disregarded that right. I find that Brown is entitled to an award of punitive damages.

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[86] ARB No. 11-056, ALJ No. 2010-STA-047, 2013 WL 1182311 (ARB Feb. 27, 2013).

Punitive damages are awarded to accomplish the twin aims of punishment and deterrence.[87] I have considered both of these aims as well as the proportionality of my award of punitive damages to my award of compensatory damages (emotional distress damages), and the seriousness of DPS's violation of law.

DPS's violation of the SDWA is extremely serious. It was a clear and patent attempt to discourage a whistleblower and multiple potential whistleblowers. DPS has shown no remorse for its action or given any indication that it will not repeat its conduct in the future.

By contrast, I have found that a reasonable amount of emotional distress damages to compensate Brown for the her stress and anxiety resulting from DPS's violation of the SDWA is $3,000.00. I find that a fair and just amount of punitive damages is three times Brown's compensatory damages. Brown is entitled to $9,000.00 in punitive damages plus attorneys' fees and costs.

H. Judge Stern's Decision and Recommended Order – Preclusive Effect

I made all the foregoing findings and conclusions independent from Judge Stern's D&RO. I did not consider Judge Stern's D&RO or her findings as evidence in this proceeding. Instead, I reviewed Judge Stern's D&RO, consistent with my May 30, 2019 Order, solely to determine whether to give preclusive effect to any of Judge Stern's findings under the doctrine of collateral estoppel.[88] Most of Judge Stern's findings were similar enough to mine that they do not merit further analysis or discussion. This Section deals with Judge Stern's findings that may have a preclusive effect in this proceeding, which could conceivably change any of my ultimate conclusions.

"'Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'[[89]] Collateral estoppel ''bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.'[[90]] A prior court resolution has preclusive effect when the following four elements are satisfied: (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4)

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[87] *Youngermann*, 2013 WL 1182311, at *7.

[88] I recognize that this may have been a rather backwards approach to determining the specific applicability of collateral estoppel in this case. The approach certainly did not serve the purpose of judicial efficiency or economy. But, because of the differing claims, separate legal standards, different evidence, and large volume of evidence involved in the State Action and this proceeding, this approach was workable and not impractical.

[89] *Abbs*, 2010 WL 3031374, *5 (citing *Montana,* 440 U.S. at 153, citing, inter alia, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)).

[90] *Id. (*citing *SEC v. Quinlan*, 2010 WL 1565473, slip op. at 4 (6th Cir. Apr. 21, 2010) quoting *Taylor v. Sturgell,* 553 U.S. 880 (2008)).

the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding."[91]

In the State Action, Brown alleged that DPS violated Section 10(1)(a) and (c) of PERA by: (1) giving Brown a poor performance evaluation on May 27, 2016, and then failing to allow her to appeal the evaluation; (2) reassigning Brown to teach 4th grade; and (3) involuntarily transferring Brown from J.R. King in September 2016. (D&RO 2-3).

Judge Stern explained in her D&RO that the elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are: (1) an adverse employment action; (2) union or other protected activity; (3) employer knowledge of such activity; (4) anti-union animus or hostility toward the employee's exercise of protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. (D&RO 28 (citations omitted)). "If a charging party establishes a prima facie case of unlawful discrimination, the burden shifts to the respondent to provide credible evidence that the same action would have been taken even in the absence of the protected conduct." (*Id.*) To be protected by Section 9 [of PERA], employees' activities must be both 'concerted,' and 'for mutual aid and protection.'" (*Id.* at 30).

Judge Stern found that Brown's poor performance evaluation was an adverse employment action and that intentionally thwarting a teacher's attempt to appeal his or her evaluation would also constitute an adverse employment action. She found that Brown's reassignment to 4th grade and transfer to Ronald Brown Academy were not adverse actions. (*Id.* at 30). These findings are similar to mine, except I did not make a finding regarding whether DPS's actions towards Brown's attempt to appeal her evaluation constituted an adverse action. I found instead that Brown failed to establish that someone in DPS's Human Resources who was responsible for acting on her appeal request received such request or intentionally ignored it; Brown failed to establish that DPS's failure to consider her attempted appeal was intentional harassment.

Judge Stern found that Brown engaged in concerted protected activity when she: raised the lack of drinking water with Cook on May 23, 2016; raised the same issue with Cook and Hobbs in early June 2016; filed a complaint regarding a lack of drinking water at the school with the MIOSHA in May or June 2016; discussed the drinking fountains being turned back on with the Detroit Health Department or the MDEQ; and emailed Cook regarding water issues on September 20, 2016. However, she did not find Brown's filing of an OSHA complaint to be concerted protected activity because the complaint was made solely on Brown's own behalf, and thus, is not the type of activity PERA was intended to protect. Judge Stern further found that DPS had knowledge of these concerted protected activities. And, "even if Brown's May or June the MIOSHA complaint did not identify her as the complainant, Respondent would have assumed that Brown filed this complaint based on her previous complaints, and the fact that the water situation at J.R. King was the subject of the complaint. (*Id.* at 30-32). Judge Stern found that Cook had animus towards Brown's protected activities, including Brown's complaints about

[91] *Id*. (citing *Montana,* 440 U.S. at 153-154; *Parklane* Hosiery, 439 U.S. at 328, 332; *Quinlan,* 2010 WL 1565473, slip op. at 4, citing *Smith v. SEC,* 129 F.3d 356, 362 (6th Cir. 1997) (*en banc*) (quoting *Detroit Police Officers Ass'n v. Young,* 824 F.2d 512, 515 (6th Cir. 1987))).

a lack of drinking water. (*Id*. at 32-33). She elaborated on this finding by stating, "I have also found that Cook's hostility toward Brown was based, at least in part, on Brown's concerted protected activities." (*Id*. at 33).

Judge Stern phrased her motivating factor inquiry as follows: "I now must analyze whether Brown met her burden of establishing that Cook's animus towards Brown's protected activity was at least one of the reasons Brown received a 'minimally effective' rating [on her performance evaluation]." (*Id*. at 33). She found "that since Brown did not show Cook her binder, Cook would have given Brown the same, or a lower rating, had Brown not engaged in protected concerted activity in the months before the evaluation." (*Id*. at 34). And, "that the record does not support a finding that Respondent intentionally thwarted Brown's attempts to appeal hear 2015-2016 evaluation." (*Id*.) It is unclear whether Judge Stern found that the animus for Brown's protected activity was a motivating cause of her poor performance evaluation or skipped that step and merely found that DPS had established its defense that it would have taken the same action even in the absence of the protected activity. Also, it appears that the motivating factor test utilized by Judge Stern ("at least one of the reasons") is a more liberal test than the motivating factor test (i.e. a substantial cause) that I am required to use in this case. Thus, I do not find that Judge Stern's conclusion regarding the cause of Brown's poor performance evaluation precludes any of my findings or changes my ultimate conclusions.

In the State Action, Brown also alleged that Cook and Branson unlawfully interfered with her and other employees' exercise of their Section 9, PERA rights by, among other means: (1) seeking to transfer Brown to another school in late May 2016; (2) sending Brown an email on June 7, 2016, stating that she was fired; (3) sending Shazor to Brown's classroom to question her about a flyer; (4) issuing the written warning (reprimand) to Brown on August 31, 2016; (5) instructing staff, including Brown not to raise any concerns they had about the school's water with anyone outside the school during the September 19, 2016 staff meeting; and (6) failing to take action against another teacher who remarked that "snitches get stiches." (*Id*. at 2-3).[92] According to the D&RO, the existence of an adverse employment action and anti-union animus are not necessary to establish an independent violation of Section 10(1)(a). "The test for determining whether Section 10(1)(a) has been violated is whether a reasonable employee would interpret a statement, or other conduct as an express or implied threat."

Judge Stern found that of all these allegations, the only violations of Section 10(1)(a) that occurred were: Cook's effort to transfer Brown in late May 2016; Cook's written reprimand of Brown on August 31, 2016; and Cook's instruction at the September 19, 2016 staff meeting not to raise water issues with anyone outside the school. (*Id*. at 36-38). None of these conclusions by Judge Stern have a preclusive effect in this case because the violations found include very different elements than those for a claim under the employee protection provision of the SDWA. However, certain factual findings made in reaching these conclusions by Judge Stern and those regarding any violation of Section 10(1)(c) of PERA merit further discussion.

Judge Stern's conclusion that Cook's effort to transfer Brown in late May 2016, was based on her finding that Brown had not requested such transfer on or before May 26, 2016.

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[92] Lastly, Brown alleged that DPS unlawfully interfered with the administration of the DFT in violation of Section 10(1)(b) of PERA. (D&RO 2-3).

Judge Stern expressly credited Brown's testimony over that of Cook and Dowlen, all of whom she observed testify, to find that Brown had not approached Cook and requested a transfer in front of Dowlen. Such findings were necessary for Judge Stern to determine whether a violation of Section 10(1)(a) of PERA occurred. Such factual findings should be given preclusive effect under the doctrine of collateral estoppel, which I have done in my analysis above.

Although Judge Stern concluded that Cook's August 31, 2016 reprimand of Brown violated Section 10(1)(a) of PERA, she found, similar to me, that Brown's statement to Cook was disrespectful. (*See id*. at 36). Further, Judge Stern's conclusion was based on findings that the discussion in Branson's office was analogous to a grievance discussion, and that the participation of Brown and Booker in this discussion constituted union activity protected under the Act, and thus, Brown could not lawfully be disciplined for her remarks to Cook. (*See id*. at 37-38). By contrast, I found that Brown's protected activity under the SDWA was not a motivating factor in Cook's August 31, 2016 reprimand of Brown, which was determinative of whether the reprimand violated the SDWA. Judge Stern's finding is entirely dissimilar from mine, and thus, has no preclusive effect here.

Unlike me, Judge Stern found that DPS had knowledge of Brown's complaint regarding a lack of drinking water to the MIOSHA in May or June 2016, and her discussion about the drinking fountains being turned back on with the Detroit Health Department or the MDEQ. Giving these finding preclusive effect here does not change my analysis or ultimate conclusions regarding whether or how DPS violated the SDWA. Cook and Campbell-Williams were aware of Brown's OSHA complaint in June and July respectively. Had Cook been aware of the other complaints, it would be hard to imagine that she would have been significantly more upset than she was when she emailed Campbell-Williams about the OSHA complaint on August 31, 2016. More importantly, Judge Stern does not make factual findings about when DPS knew that Brown had filed the MIOSHA complaint or contacted the Detroit Public Health Department or the MDEQ that would change any of my motivating factor causation analysis.

In her D&RO, Judge Stern discusses evidence relating to the written reprimand that I have found Brown failed to establish she received. The reprimand allegedly arose out of the April 27, 2016 meeting. Some or all of that evidence is not of record in this proceeding. To the extent Judge Stern made a finding about whether Brown was given a written reprimand arising out of the April 27, 2016 meeting, a review of the D&RO does not show that any such finding was necessary to the outcome of the case before her. Thus, any such finding has no preclusive effect in this proceeding.

Lastly, with respect to Judge Stern's finding that Cook had animus towards Brown's protected activities, including Brown's complaints about a lack of drinking water, Judge Stern does not state when this animus first arose. I agree that by August 31, 2016, and maybe as early as sometime in June 2016, Cook had animus and hostility towards Brown for her protected activities, but I have accounted for this in my analyses. Giving preclusive effect to Judge Stern's finding that Cook had animus towards Brown's protected activities starting at some unidentified time does not change my ultimate conclusions.

IV. ORDER

Based on the foregoing, it is ORDERED that:

1. Respondent DPS shall pay Complainant Brown emotional distress damages in the amount of $3,000.00.

2. Respondent DPS shall pay Complainant Brown punitive damages in the amount of $9,000.00.

3. Complainant Brown is to recover fully her litigation costs, expert witness fees (if any) and reasonable attorneys' fees; and

4. Within 21 days of the date of this Decision and Order, Complainant's counsel is directed to supply Respondent's counsel with: (1) the total number of hours spent by Complainant's counsel on the prosecution of this matter before the OSHA and before the Office of Administrative Law Judges; (2) the hourly rate sought by Complainant's counsel for the legal services performed; (3) the total amount of expert witness fees (if any); and (4) the total amount of litigation costs incurred by Complainant. Within 14 days after Complainant's counsel supplies Respondent's counsel with this information, Complainant's counsel and Respondent's counsel are to meet and confer (either in person or by telephone) to attempt to reach agreement as to the amount of attorneys' fees and expenses to be paid to Complainant and, if no agreement can be reached, to narrow the issues in dispute. If no agreement is reached, Complainant's motion for attorneys' fees and costs must be filed with the undersigned within 60 days from the date of this Decision and Order. Any opposition to such motion must be filed[93] with the undersigned within 14 days from the service of such motion. No reply will be permitted, except by leave of this tribunal.

Jason A. Golden
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)

[93] 29 C.F.R. § 18.30(b)(2) provides: "*Filing: when made—in general.* A paper is filed when received by the docket clerk or the judge during a hearing."

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.