



**In the Matter of:**

**GEORGE W. POWELL, III,**

**ARB CASE NO. 09-071**

**COMPLAINANT,**

**ALJ CASE NO. 2007-SDW-001**

**v.**

**DATE: January 5, 2011**

**CITY OF ARDMORE, OKLAHOMA,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio**

*For the Respondent:*

**Matthew Love, Esq., *The Law Offices of Margaret McMorrow-Love*, Oklahoma City, Oklahoma**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

The Complainant, George W. Powell, III, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 2003); the Water Pollution Control Act (WPCA), 42 U.S.C.A. § 1367 (West 2001); and the Toxic Substances Control Act of 1986 (TSCA), 15 U.S.C.A. § 2622 (West 1998); and their implementing regulations 29 C.F.R. Part 24

(2010) (collectively the “Environmental Whistleblower Statutes”). He alleged that the City of Ardmore (the City), violated the Environmental Whistleblower Statutes when it retaliated and discriminated against him because he raised concerns about the discharge and disposal of sewage and other hazardous waste at his workplace. Complaint at 1 (Aug. 18, 2006). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Powell’s complaint because he found that Powell did not meet his burden of showing that his protected activity caused or contributed to the termination of his employment. *Powell v. City of Ardmore*, 2007-SDW-001 (Nov. 25, 2008). We affirm the ALJ’s factual findings and conclusions of law as supported by substantial evidence and consistent with the law.

## BACKGROUND

The findings of fact are set forth in the ALJ’s Decision and Order (D. & O) at 2 to 6. They are set forth below in pertinent part.

In November 2004, the City hired George Powell to work as an Equipment Operator in the Street Department.<sup>1</sup> He was transferred to the Wastewater Treatment Plant and promoted to the position of Heavy Equipment Operator effective July 2005. D. & O. at 3. During his employment at the Wastewater Treatment Plant, Powell alleged that there were various safety problems at the worksite. *Id.* at 4. For example, in the fall of 2005, mercury spilled from a gear box that Powell helped to clean up. *Id.* at 7. Powell asked his supervisor, Carol Anderson, if the mercury was being handled properly during the cleanup. *Id.* at 8; Transcript (Tr.) at 294. Another safety issue arose in approximately September 2005, when Powell reported to Anderson that he could not safely drive a truck because it was not tarped. His supervisor allegedly told him to drive it anyway. D. & O. at 8-9; Tr. at 284-86, 400. The truck was never tarped during Powell’s employment at the plant. *Id.* at 9. A third incident occurred when Powell expressed concern to Anderson about an open overflow valve at the airpark on the day after he became aware of it in the spring of 2006. D. & O. at 10; Tr. at 310. After the City began a project to empty digesters A and B, in approximately April 2006, Powell asked Anderson why the City was hauling truckloads of sludge to spread on the north hill of the plant. D. & O. at 11; Tr. at 297-98, 314, 318-19. Anderson explained to Powell that the City had a permit to temporarily store sludge at that location. D. & O. at 11. Finally, Powell and some coworkers reported a crack in a digester at the plant to Anderson also in the spring of 2006, during the time they were emptying the digesters. D. & O. at 11; Tr. at 297-98, and 439.

Between April 20 and July 6, 2006, Powell received three written reprimands for three different incidents. On April 20, 2006, he received a written reprimand for speeding through a yellow light while he was driving a City vehicle. D. & O. at 3. This incident was reported to the City by a bystander witness who was upset about the incident. *Id.* at 3; Tr. at 404. On June 22, 2006, after two different City workers smelled alcohol on Powell’s breath, Powell self-reported

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<sup>1</sup> To be more exact, Powell was actually re-hired in November 2004 after he was terminated for the admitted use of illegal drugs. Powell executed a Return to Work Agreement as a condition to being rehired. *See* D. & O. at 3.

that he had been drinking the night before and probably should not drive any City vehicles. D. & O. at 3. He received a written reprimand for reporting to work under the influence of alcohol. *Id.*; Respondent's Exhibit (RX) 9. On July 5, 2006, Powell reported late to work as recorded by his time sheet that included the notation "storm knocked out elec." *Id.* at 4; RX 25. The next day, he received a written reprimand for being late. D. & O. at 4.

On July 10, 2006, Powell met with LeAnn Collins, the Human Resources Director for the City, because he thought that Anderson was giving him "bogus" write-ups as retaliation for reporting safety issues. *Id.* at 4. Powell told Collins about the sludge on the north hill and mercury issues during this meeting. *Id.* at 2, 4. He also told Collins during this meeting that motors with mercury in them were being buried at the plant and that something green was coming from a pipe at the airpark. *Id.* at 9, 10. Collins described Powell as very agitated during the meeting and documented that he slammed his fist. *Id.* at 4. She described becoming somewhat frightened by Powell. *Id.* Powell told Collins that he had been fired from a prior job for allegedly threatening to kill a supervisor and the supervisor's wife and children. *Id.* Powell also told Collins about an incident in his past when he had beaten another man. *Id.*

After the meeting, Collins contacted Dan Parrott, her supervisor, and told him that she was concerned about Powell's safety allegations, Powell's allegations that he was being wrongly written up, and Powell's mental state that frightened her. *Id.* Parrott instructed Collins to investigate these issues. *Id.*

The next morning, on July 11, 2006, Powell began taking pictures at the Wastewater Treatment Plant after he arrived before his shift. *Id.* at 5. After Collins was informed of this, she assumed that Powell intended to see her after taking pictures, which frightened her because of his agitated state. Consequently, she called Parrott and told him that, if Powell's mental state was the same as on the previous day, she thought it would be safer for everyone if Powell were placed on paid administrative leave. *Id.* Parrott agreed with Collins. *Id.* When Powell came to her office later that day, Collins told Powell that they were placing him on paid administrative leave to give him time to calm down and to give the City time to investigate his allegations. *Id.* Powell then told Collins that there was a crack in the digester. *Id.* at 11.

Powell complained to Collins on July 14, 2006, that a truck was driving without a tarp, a fact that was confirmed by the City's safety manager. *Id.* at 9.

From July 10, 2006, to July 17, 2006, Collins investigated the three issues Powell had brought up to her, namely: 1) safety issues, 2) Powell's write ups, and 3) Powell's mental state. *Id.* at 5. Collins was able to verify that some of Powell's safety complaints had merit while others were meritless or had been handled appropriately. *Id.* Collins investigated Powell's write ups and determined that they were not "bogus," and that they were validly based on misconduct by Powell. *Id.* at 6; Tr. at 631. Finally, during the course of her investigation, Rick Morse, one of Powell's coworkers, told her that he was concerned for Anderson's safety because Powell had told him that he had threatened to solve his problems by throwing Anderson into the digester. D. & O. at 6.

After her investigation, Collins recommended to Parrott that they discharge Powell because she felt that he was a danger to Anderson, given his threat and violent past. *Id.* She believed that his mental state was very agitated. *Id.* Parrott concurred. On July 25, 2006, Collins gave Powell a termination letter. *Id.* She told Powell that (1) there was no basis to consider the write ups he had received bogus, (2) she investigated the environmental complaints, and that (3) the larger concern for the City was the threat Powell had made against Anderson. *Id.* Powell appealed his termination, but Parrott ultimately affirmed his decision to discharge Powell. *Id.* at 6-7.

On August 21, 2006, Powell filed this action with the DOL, alleging that the City violated the Environmental Whistleblower Statutes when it placed him on administrative leave and subsequently terminated his employment.

After an investigation, OSHA determined that the City took adverse action against Powell for legitimate non-discriminatory reasons and not for any alleged activities protected by the Act. OSHA Findings at 2 (Jan. 11, 2007). OSHA dismissed Powell's claim. Powell objected to OSHA's Findings and requested a hearing before an ALJ. *See* 29 C.F.R. § 24.106(a).

On November 25, 2008, the ALJ found that Powell failed to meet his burden of showing that his protected activity caused or contributed to the termination of his employment. D. & O. at 19. Accordingly, he dismissed the complaint.

Powell timely appealed the D. & O. to the Board. *See* 29 C.F.R. § 24.110(a). He argues that the ALJ erred in how he interpreted the testimony and evidence presented at the hearing, taking issue with many of the ALJ's findings of fact. The City asserts that the ALJ's findings of fact are supported by substantial evidence. We affirm the ALJ's decision.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated her authority to issue final agency decisions in cases arising under the the Environmental Whistleblower Statutes to the Administrative Review Board (Board or ARB). Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering an appellate decision under the Environmental Whistleblower Statutes. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.110. The ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 24.110(b). Substantial evidence is the kind of "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Board reviews the ALJ's conclusions of law de novo. 5 U.S.C.A. § 557(b).

## DISCUSSION

The Environmental Whistleblower Statutes prohibit employers from discriminating against employees who have participated in activities that further the purposes of those acts or relate to their administration and enforcement. *See, e.g., Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-004, slip op. at 4 (ARB July 30, 2004). To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence that the respondent took adverse action against him because he engaged in protected activity. *Fabricius v. Town of Braintree/Park Department*, ARB No. 97-144, ALJ No. 1997-CAA-014, slip op. at 3-4 (Feb. 9, 1999); *Carroll v. Bechtel Power Corp.*, 1991-ERA-036, slip op. at 12 (Sec'y Feb. 15, 1995).

To be protected under the Environmental Whistleblower Statutes, an employee's protected activity must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 1992-SWD-001, slip op. at 5 (Sec'y Jan. 25, 1994). Complaints purely about the existence of occupational hazards are not protected. *See, e.g., McKoy v. North Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-002, slip op. at 6 (ARB Apr. 30, 2007); *Tucker v. Morrison & Knudson*, No. 1994-CER-001, slip op. at 5. (ARB Feb. 28, 1997).

### 1. Protected Activity

Initially, the ALJ considered whether Powell's various concerns, complaints, and questions constituted protected activity. The ALJ found that some of Powell's alleged activity was protected activity and some was not. We summarily describe the alleged protected activity, the corresponding ALJ's findings, and conclude that the ALJ's findings are supported by substantial evidence.

The ALJ found that when Powell questioned Anderson about the proper handling of mercury he engaged in protected activity. D. & O. at 8. He also found that when Powell told Collins about the mercury spill, he engaged in protected activity. *Id.* Testimony and documentation of the spill support the ALJ's finding that Powell engaged in protected activity when he expressed concern about cleanup of the spill to Anderson and when he told Collins about the spill.

The ALJ found that Powell's complaint that the truck he was driving did not have a tarp was protected activity, noting that "[t]he unpermitted disposal of the sewage sludge would constitute a violation of the Solid Waste Disposal Act." *Id.* at 9. Testimony in the record as well as documentation support the ALJ's finding that Powell engaged in protected activity when he complained that his truck was not tarped.

The ALJ found that Powell engaged in protected activity when he told Collins that the City was burying motors with mercury in them on city property. *Id.* The record, including documentation in the form of Collins' notes, supports this finding.

The ALJ found that Powell's concerns over waste discharge at the City's air park was not protected because Powell's concerns were not considered reasonably perceived threats to the environment. *Id.* at 11. The record, including testimony that there was no allegation of discharge at the pipe, supports the ALJ's finding.

The ALJ found that, when Powell complained about sludge deposited on the north hill, he did not engage in protected activity because his complaint was not reasonable. *Id.* The record supports that the City has permission to deposit sludge on the north hill.

The ALJ found that Powell's complaint about a crack in the digester was protected activity. Testimony and documentation in the record support that such a crack existed. *Id.*

Finally, the ALJ found that Powell's concern about grit disposal at the Wastewater Treatment Plant was not protected because Powell did not offer any evidence that he raised this concern to anyone. *Id.* at 12. There was no evidence contradicting this finding.

Thus, all of the ALJ's findings regarding alleged protected activity are supported by substantial evidence in the record. Moreover, the ALJ's findings of protected activity involved environmental safety concerns. The ALJ provided legally valid reasons for the activity he found did not constitute protected activity. Consequently, we affirm the ALJ's findings pertaining to the allegations of protected activity

## **2. Whether Powell Was Subjected to Adverse Employment Action**

Powell claimed that the City retaliated by placing him on paid administrative leave from July 11 through 25, 2006, and then by terminating his employment. The ALJ did not expressly address whether the paid administrative leave was an adverse action. Because we ultimately affirm the ALJ's dismissal of Powell's claim of retaliatory termination of employment, the two-week paid administrative leave is moot.

Turning to the termination of employment, the ALJ found that Powell suffered an adverse employment action when his employment was terminated on July 25, 2006. The termination of employment is patently an adverse action; therefore, we affirm the ALJ's finding on this issue.

## **3. Causation**

The ALJ concluded that Powell did not prove by a preponderance of the evidence that his protected activity played any role in his placement on paid administrative leave or his discharge. The ALJ found that Powell "was placed on administrative leave because Parrott and Collins were concerned and worried about his state of mind, and because Collins wanted time to investigate [Powell's] expressed belief that he was being written up because he was voicing environmental concerns." *Id.* at 13. Again, because we affirm the dismissal of Powell's retaliatory termination claim, there is no need to address the allegations pertaining to the administrative leave. There is

no remedy available, given that Powell was paid during his two-week administrative leave and then fired. Powell has not identified any specific relief connected to the administrative leave.

The ALJ found that Collins recommended the discharge “based on her fear that [Powell] was going to do harm to Carol Anderson in light of her discussions with Morse and [Powell’s] comments to her indicating that he had a violent past and had threatened to kill a supervisor at a prior job.” *Id.* at 18. Parrott made the final decision to discharge Powell based on Collins’ recommendation and the information that she provided to him. *Id.* at 17. Thus, Parrott’s decision was also based on Powell’s threats and behavior in relation to Collins.

The ALJ’s finding that Powell did not prove that his protected activity played any role in his subsequent termination due to his threat concerning Anderson and other behavior is supported by substantial evidence, including patently threatening statements that greatly concerned the City and three prior incidents of misconduct. Consequently, we affirm the ALJ’s conclusion that that Powell is not entitled to reinstatement, lost pay, or other economic damages.

#### **CONCLUSION**

Substantial evidence of record supports the ALJ’s findings that Powell engaged in protected activity, the City had knowledge of Powell’s protected activity, and that Powell failed to prove that his protected activity played any role in the termination of his employment. The ALJ’s dismissal of Powell’s claims are in accordance with the law. Accordingly, the ALJ’s D. & O. is **AFFIRMED**.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**