U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
CINCINNATI, OHIO DISTRICT OFFICE

DONALD VAN WINKLE	)	
	)	2006-ERA-24
	)	
Complainant	)	Complainant's PreHearing
	)	Submission
	)	
v.	)	November 16, 2007
	)	
BLUE GRASS CHEMICAL ACTIVITY/	)	
BLUE GRASS ARMY DEPOT	)	)
Respondent		

COMPLAINANT DONALD VAN WINKLE'S PREHEARING SUBMISSION

Complainant Donald Van Winkle, by the undersigned counsel, hereby respectfully submits his prehearing submission pursuant to the order of the presiding Administrative Law Judge dated August 10, 2007. Because the issue of the reviewability of Van Winkle's disqualification from the Chemical Personnel Reliability Program has not yet been resolved, this statement is written with the assumption that evidence on that issue will be admissible.

I. ISSUES INVOLVED IN THE PROCEEDING

There is no dispute that Complainant was, during the relevant time period, an employee of Blue Grass Chemical Activity (BGCA), a subordinate command of the U.S. Army Chemical Materials Agency (CMA). Likewise, there is no dispute that the Respondent is subject to the employee protections provisions of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971,[1] and the Clean Air Act (CAA), 42 U.S.C. § 7622, under which Van Winkle proceeds.

[1] Also known as the Resource, Conservation and Recovery Act (RCRA).

The issues to be determined anticipated by the Complainant are as follows:

A. Whether Complainant engaged in protected activity.

Complainant alleges that he engaged in the following protected activities:

1. Disclosures concerning Respondent's monitoring of the nerve agent VX to BGCA management, outside organizations, members of Congress and the press.

Mr. Van Winkle was concerned that the improper configuration of monitoring equipment was causing the monitoring devices to be unable to detect VX that may have been present in the igloos where chemical weapons are stored. He sought the adoption of the correct configuration of the monitoring equipment, involving the proper placement of the "V to G conversion pad," and also made complaints and sought relief concerning possible exposure to chemical agents by workers or visitors who, like him, had entered the igloos on the basis of purportedly negative readings during the period when the equipment was not configured properly.

2. Disclosures concerning the change out of the V to G pads, which, he contended, was not done frequently enough, possibly resulting in erroneous readings when monitoring VX.

3. Since early in his employment at BGCA, Van Winkle had a history of raising issues with his chain of command concerning the inadequacy or incorrectness of Standard Operating Procedures("SOP's").

4. Concerns about the maintenance and certification of BGCA's air monitoring equipment, contending that it was not always properly maintained and had not been certified as ready for operation.

5. Van Winkle's request to the Department of Defense's Deputy Inspector General for Inspections and Policy seeking a prompt inspection and review of BGCA's monitoring activities.

Van Winkle provided a sworn affidavit to the DOD IG in support of his concerns.

6. Van Winkle's affidavit posted on the website of Public Employees for Environmental Responsibility (PEER) and covered by media outlets.

Van Winkle detailed his concerns about the V to G conversion pad placement and change-out issues, maintenance and the certification of equipment.

7. Van Winkle filed a safety report concerning the monitoring at the BGCA suit laundry.

Van Winkle was concerned that the parameters on their minicam monitors were not set at a level that would detect levels of chemical warfare agents that might present health risks from long-term chronic exposure. After receiving a response from a Safety Specialist, he elevated this concern to CMA. He reported back to his management that chemists at CMA confirmed his concern.

8. Van Winkle's complaint with OSHA.

This is the complaint which led to this appeal, in which Van Winkle expressed his additional concern about insufficient staffing of trained personnel at BGCA to safely address routine or emergency operations in the igloos containing chemical warfare agents. Van Winkle stated that in the event of an emergency in one or more of the igloos, the current staff of trained workers could not safely address such an event, and that there was not any on-site or nearby fire or hazardous material staff that could be called upon for immediate support. He also addressed a concern to OSHA that employees were not tested frequently enough for exposure to low concentrations of VX.

9. Release to PEER of a copy of the CMA non-disclosure order that Van Winkle and other employees were required to sign.

10. Van Winkle's complaint of carbon monoxide exposure in the Real Time Analytical Platforms (RTAP) (mobile labs) in which he and his co-workers performed monitoring duties.

11. Van Winkle's expressed concerns that BGCA personnel, in particular the Supervisory Chemist, were unqualified for their positions, resulting in monitoring failures such as those involved in the V to G conversion pad issue, and inadequate SOPs for monitoring functions.

Legal Standards for Protected Activity

OSHA found that Complainant had engaged in protected activity, although it rejected his claims for lack of a retaliatory motive.

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. *E.g.*, *Bechtel Constr. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995). Concerns which "touch on" the subjects regulated by the Acts are protected. *Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec'y Feb. 1, 1995). Protection extends to activity which furthers the purposes of the environmental statutes of relates to their administration and enforcement. *Devers v. Kaiser Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3 (ARB March 31, 2005), DOL Rptr. at 11.

Internal complaints to managers are protected under the applicable employee protection provisions. *E.g.*, Jones *v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991); *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85- WPC-2, (Sec'y Mar. 13, 1992), slip op. at 12-13, *aff'd*, 992 F.2d 474 (3d Cir. 1993) (complaint to superiors about validity of sampling system protected under Water Pollution Control Act).

The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *Marcus v. U.S. Environmental Protection Agency*, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 25, *citing Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5, ARB June 14, 1996).

Protected activities include employee complaints which "are grounded in conditions constituting reasonably perceived violations of environmental acts." *Jones v. EG&G Defense Materials., Inc.*,95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 8, *citing Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2 (Sec. Aug. 17, 1993), slip op. at 26; *Johnson v. Old Dominion Security*, Case No. 86-CAA-3 (Sec. May 29, 1991), slip op. at 15.

Raising complaints about worker health and safety "constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), slip op. at 10.

Proof of an actual violation is not required. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation); *Minard v. Nerco Delamar Co.*, 1992- SWD-1 (Sec'y Jan. 25, 1994) (concluding that whistleblower protection applies to where a complainant is mistaken, so long as complainant's belief is reasonable); *Scerbo v. Consolidated Edison Co. of N.Y., Inc.*, 1989-CAA-2 (Sec'y Nov. 13, 1992) (protection is not dependent upon actually proving a violation).

Here, there can be no doubt but that Van Winkle's complaints about inadequate monitoring of chemical weapons, resulting in possible undetected leaks of chemical warfare agents regulated under the Clean Air Act and the Solid Waste Disposal Act into the internal environment of the igloos and other buildings at BGCA, as well as the external environment, furthered the purposes of those Acts. Moreover, ample evidence, including testimony of BGCA employees and former employees and management admissions and corrective actions, will be

presented to demonstrate that Mr. Van Winkle's concerns were not only based on a reasonable belief, but in fact accurate.

B. Whether Management Was Aware of Van Winkle's Protected Activities

Van Winkle's various protected disclosures and activities are reflected in various documents and in deposition testimony. Van Winkle's management was aware of all of these disclosures and activities, either because Van Winkle reported them directly to management, or because they were in press reports they admitted seeing, or they otherwise admitted they were management learned of them through press reports, investigations, or other means, as admitted in various discovery and other documents and deposition testimony.

C. Whether Van Winkle Was Subject to Adverse Actions and a Hostile Work Environment, Resulting in a Constructive Discharge

The evidence will show that up until his protected activities, Van Winkle had received excellent appraisals with numerous positive comments, and no adverse actions had been taken against him. After his protected activities, he was subject to certain discrete adverse actions, such as his temporary and permanent disqualification from the Chemical Personnel Reliability Program (CPRP), which resulted in his inability to work in the Chemical Limited Area (CLA), and loss of overtime and hazard pay. The evidence will show that there were few positions at BGCA which did not require access to the CLA, and the employees who were disqualified from the CPRP often were not able to remain at BGCA for long.

Van Winkle was also subject to a hostile work environment which included hostile comments both to Mr. Van Winkle and to others behind his back, including warning new

employees to stay away from Mr. Van Winkle and criticisms of his work performance and abilities, as well as criticisms of his protected disclosures; angry and hostile behavior; assignment of inferior equipment, including an RTAP vehicle; pressure to take medical disability; efforts to find pretexts to dismiss him; and denial of training opportunities.

These actions and hostile work environment combined to send a clear message to Mr. Van Winkle that management wanted him to leave BGCA, and would do what it could to make his life miserable if he stayed and to find a pretext it could to dismiss him.

D. Whether the Adverse Actions and Hostile Work Environment Were Retaliation for Van Winkle's Protected Activities

As noted above, Van Winkle received excellent performance evaluations with many positive comments prior to his protected activities. After his protected activities, he was subject to a hostile work environment, and eventually found to be a threat to the stockpile in the CLA and therefore disqualified from the CPRP. In some cases, there is direct evidence of discrimination because BGCA management explicitly relied upon protected activities to justify the actions taken against Van Winkle. For example, management justified the disqualification from the CPRP in part based on Van Winkle's efforts (misrepresented as coercion) to have other employees support his protected disclosures, and in part on Van Winkle's affidavit posted on PEER's web site – which was unquestionably a protected disclosure.

In addition, there is ample indirect evidence of retaliation. Van Winkle will present evidence and testimony at the hearing showing that management had a retaliatory animus towards him and that Respondent's purported and shifting justifications for his disqualification from the CPRP were pre-textual. Such evidence and testimony will rebut claims that Van

Winkle coerced fellow employees, that he did not perform his job duties competently and conscientiously, and that there was any evidence that he could not be entrusted with access to the CLA.

In addition, Van Winkle will present testimony of witnesses who observed his hostile treatment and efforts to impeded the performance of his duties, who were told to stay away from him, who heard derogatory remarks about him by management, who heard expressions of anger that Van Winkle had spurred several investigations to which BGCA management was required to respond, and who heard remarks concerning management's intention to hamper Van Winkle's career and obtain his dismissal.

Legal Standards for Establishing Retaliation

The Complainant, applying the traditional "burden-shifting" approach established in *McDonnell Douglas v. Green*, 411 U.S. 492 (1973), may establish a *prima facie* case of retaliation indirectly by showing that the plaintiff was an employee of the party charged with discrimination; the plaintiff was engaged in a protected activity under the Acts; the employer took an adverse action against the plaintiff; and the evidence creates a reasonable inference that the adverse action was taken because of the plaintiff's participation in the statutorily protected activity. *Also see, Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995).

Once the employee establishes a *prima facie* case of discrimination through such indirect means, the burden shifts to the employer to "produce evidence that the plaintiff was removed for a legitimate, nondiscriminatory reason. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The employee then has "the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but

were a pretext for discrimination." *Id.* at 253; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993). The plaintiff need not proffer direct evidence that unlawful discrimination was the real motivation. It is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

If an employee proves unlawful discriminatory or retaliation played a part in the employer's decision, but the employer contends that its adverse action against the employee was motivated instead by a legitimate, non-discriminatory reason, dual-motive analysis applies. In such a case, the employer must prove by a preponderance of the evidence, not merely assert or articulate, that it would have reached the same decision even if the employee had not engaged in protected conduct. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

As noted above, Complainant will present both direct and indirect evidence that he suffered adverse actions and a hostile work environment because of retaliation for his protected activities. Several principles of the law of retaliation also support Van Winkle's case, as follows.

It is not permissible and contrary to the purposes of the federal environmental statutes to find fault with an employee for failing to observe established channels when making protected complaints. *Odom v. Anchor Lithkemko*, 96-WPC-1 (ARB Oct. 10, 1997); *West v. Systems Applications Int'l*, 94-CAA-15 (Sec'y 4/19/95); *Berkman v. U.S. Coast Guard Academy*, Case Nos.: 97-CAA-2 and 97-CAA-9 (ARB Dec. January 2, 1998).

"Where the employer's asserted justification is shifting and unreliable, its case is weakened, and ... the true reason ... [protected activity] is correspondingly strengthened." *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981).

Use of irregular procedure by the employer, as will be shown in connection with Van Winkle's disqualification from the PRP, is also relevant evidence of retaliatory motive. "An employer's failure to follow its normal procedures can, in an appropriate case, suggest deliberate retaliation. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983)." *Johnson v. Old Dominion Security*, 86-CAA-3, 4 and 5 (Sec'y May 29, 1991); *also see Land v. Consolidated Freightways*, 91-STA-28 (Secretary, Order of Remand, May 6, 1992).

Further, an inadequate investigation by the company of the allegations against the employee and of incidents for which the employee is allegedly responsible prior to taking action against the employee, circumstances also present here, is evidence of retaliatory motive. *Cotter v. Consolid. Edison Co. of N.Y.*, 81-ERA-6, slip op. of ALJ at 17 (July 7, 1981), adopted by SOL (Nov. 5, 1981), *aff'd Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61 (2d Cir. 1982).

The ARB has noted there will seldom be "eyewitness" testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Services*, 95-ERA-40 (ARB June 21, 1996), slip op. at 11.

E. Whether Van Winkle Is Entitled to Reinstatement with Back pay or Front Pay, Compensatory Damages, and Attorneys' Fees and Costs

The statutes under which Van Winkle proceeds, the CAA and the SWDA (or RCRA) provide for all of these forms of relief for prevailing parties. Complainant contends that he should be awarded all of these forms of relief. He requests an opportunity to brief his entitlement to relief, as well as other issues, in a post-hearing brief.

II. WITNESSES

Complainant potentially may call the following fact witnesses:

1. Denver Begley
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

2. Archie Babb
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

3. Debbie Boston
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

4. Jimmy Bowling
c/o Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

5. Wiley Flynn
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

6. Dewey Harrison
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

7. Carol Hunter
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

8. Ken Kenly
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

9. Bonnie McCoy (as a hostile witness)
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

10. Don Rogers
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

11. Gary Stanfield
c/o Blue Grass Chemical Activity, Blue Grass Army Depot
2091 Kingston Highway
Richmond, KY 40475

12. Claude Poston
106 East Coopers Court
Hubert North Carolina 28539

13. James Jackson
PO Box 132
Highland Falls New York 10928

14. Kim Schafermeyer
234 McDowell Road
Lexington, KY 40502

III. Documents

Complainant was unable to determine which documents could be stipulated due to an inability to reach Respondent's counsel to confer on this matter. Complainant's counsel will attempt to reach an agreement with Respondent's counsel on stipulated documents and supply bound and indexed copies all non-stipulated documents from his list by Monday morning, November 19, 2007.

Respectfully submitted,

_____

Paula Dinerstein
Adam Draper
Pubic Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036
Tel. 202.265.7337
Fax 202.265.4192
E-mail: pdinerstein@peer.org
adraper@peer.org

CERTIFICATE OF SERVICE

I certify that Complainant's **PREHEARING SUBMISSION** was served on this 15th day of November, 2007 on the parties listed below BY OVERNIGHT MAIL.

Kevin Bennett
Blue Grass Army Depot
Office of Counsel, Building 219
2091 Kingston Highway
Richmond, KY 40475

Judge Thomas Phalen
U.S. Department of Labor
Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

Paula Dinerstein