

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

DONALD VAN WINKLE,)	
)	
Complainant)	
)	
v.)	2006-ERA-24
)	
BLUE GRASS CHEMICAL ACTIVITY/ BLUE GRASS ARMY DEPOT,)	Date: Sept. 26, 2011
)	
Respondent)	

COMPLAINANT’S OPENING BRIEF ON REMAND

INTRODUCTION

This case concerns a complaint by Donald Van Winkle under the employee protection provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6971 (also known as the Solid Waste Disposal Act (SWDA)), and the Clean Air Act, 42 U.S.C. § 7622.¹ The complaint was heard by Administrative Law Judge Phalen in November and December 2007, and a recommended decision was issued on December 5, 2008. Van Winkle appealed to the Administrative Review Board (ARB or Board), which found that Judge Phalen had erred in concluding that Van Winkle’s claim of a retaliatory disqualification from Respondent’s Chemical Personnel Reliability Program (CPRP) was unreviewable. The Board also found that because of his finding that Van Winkle’s complaint was unreviewable, Judge Phalen failed to adequately consider Van Winkle’s claims of other protected activity, retaliatory actions, a hostile work environment and constructive discharge. The case was remanded for full consideration

¹ The complaint was mistakenly captioned under the Energy Reorganization Act (ERA).

of Van Winkle's complaint. Due to Judge Phalen's retirement, it was subsequently reassigned to Administrative Law Judge Alice M. Craft.

Van Winkle will demonstrate here that his once promising career with Blue Grass Chemical Activity (BGCA) was completely derailed and ultimately ended because he made protected disclosures of health and safety problems. Van Winkle's disclosures raised concerns about the Army's capability and willingness to protect both workers at BGCA and the public in surrounding communities through its chemical warfare agent monitoring program. Van Winkle's disclosures to higher authorities in the Army and to outside agencies resulted in multiple investigations of BGCA, including an investigation by the Kentucky Department of the Environment (KDEP), a Department of Defense Inspector General (IG) investigation and a criminal grand jury investigation. The validity of his primary disclosure was confirmed by KDEP and the IG. Rather than laud the efforts of a diligent, safety-conscious employee trying to ensure worker and community safety, BGCA responded by transferring Van Winkle away from his position, creating a hostile work environment, and removing Van Winkle from the CPRP, essentially dooming his career at BGCA and ultimately resulting in a constructive discharge.

STATEMENT OF FACTS

1. Van Winkle's Employment History and Duties

Complainant Donald Van Winkle (Van Winkle) began his employment at Blue Grass Army Depot (BGAD) in 1999. BGAD is a U.S. Army munitions storage facility in Richmond, Kentucky. Van Winkle served as a security guard and then received a promotion to become a special response team member. In 2002, he received another promotion to a Chemical Material Handler/Weapons and Munitions Inspector at Blue

Grass Chemical Activity (BGCA), a tenant organization at BGAD. In 2003, he was again promoted, this time to the position of Air Monitoring Systems Operator/Mechanic.² This position required that Van Winkle maintain a “secret” security clearance and as well meet the requirements of the Chemical Surety program, also known as the Chemical Personnel Reliability Program (CPRP).³ In all of these positions, Van Winkle was a civilian employee of the U.S. Army.

BGCA reports to the U.S. Army Chemical Materials Agency (CMA), which is responsible for the storage, monitoring and destruction of the U.S. chemical weapons stockpile. The United States is obligated by international treaty to destroy its chemical weapons, and must ensure their safe storage in the interim. The BGCA stockpile of chemical weapons comprises 523 tons of two nerve agents, GB (sarin) and VX, and mustard agent. Chemical weapons containing these agents are stored in approximately 45 earth-covered bunkers called igloos. Most of the chemical agents are contained in fully assembled warheads, rockets and projectiles.⁴

As an Air Systems Operator/Mechanic, Van Winkle operated an instrument called a mini-cam, which is a gas chromatograph that analyzes the air inside the igloos to detect the presence of chemical agent from leaking munitions.⁵ Prior to employees entering the

² See Recommended Decision and Order (RDO) at 4; Tr. 31- 32 (Van Winkle) (“Tr.” refers to the transcript of the hearing before Administrative Law Judge Phalen. The page number is followed by a parenthetical identifying the witness); JX 1; JX 60. (“JX” refers to the Joint Exhibits submitted in the hearing before Judge Phalen. “CX” refers to Complainant’s Exhibits.)

³ JX 60; JX 1, p.3.; RDO at 5.

⁴ See, RDO at 4, n.5; <http://www.cma.army.mil/bluegrass.aspx>.

⁵ Tr. 33 (Van Winkle); Tr. 711-12 (Bilyeu); JX 1.

igloos for inspections, maintenance and other operations, and while they are in the igloos, air monitors like Van Winkle continuously monitor the air so that they can warn the employees to take appropriate precautions if agent is detected. During the relevant time period, employees would enter igloos with filter masks only at their waists if no agent had been detected.⁶ Thus, accurate mini-cam readings were essential to protect BGCA employees entering igloos, as well as to detect chemical agent leaks into the outside environment when the igloo doors were open.⁷ Air monitors work in vehicles called Real Time Analytical Platforms (RTAPs), which contain the monitoring equipment. Teflon sampling tubes are extended from the mini-cams in the RTAPs to air intakes at various locations inside the igloos.⁸

2. Van Winkle's Complaints and Disclosures

Beginning soon after he became an air monitor, Van Winkle began to question his management about the fact that he was directed to perform monitoring practices in ways which were sometimes inconsistent with written Standard Operating Procedures (SOPs). He never received a satisfactory response to his concerns.⁹ In February 2005, BGCA sent

⁶ Tr. 42-44, 49, 53 (Van Winkle); JX 100, p.5, first box. When the mini-cam registered as free of agent, another step was taken before employees were sent into igloos unmasked. Two inspectors with full protection gear were sent inside the igloos to inspect for visible leaks. Tr. 42 (Van Winkle); Tr. 699 (Bilyeu). However, this process was of limited utility because the igloos were dark and the inspectors spent only a few minutes inspecting with flashlights in an area approximately 100 feet by 50 feet with 15 foot ceilings, which was sometimes filled to capacity with munitions in pallets piled several deep. Tr. 42, 49-52 (Van Winkle); Tr. 588-89 (Shuplinkov).

⁷ Tr. 50 (Van Winkle).

⁸ Tr. 36 (Van Winkle).

⁹ RDO at 16; Tr. 152-55 (Van Winkle).

Van Winkle and seven co-workers to a mini-cam maintenance training course offered by the manufacturer of the equipment.¹⁰ At the course, the instructor revealed that the way they had been placing the “V to G conversion pad” at BGCA rendered their monitoring for VX agent ineffective. This was because the VX molecule is too large and sticky to travel down the Teflon tube to be detected by the mini-cam. It must first be converted to a smaller molecule by the V to G conversion pad. The pad must be placed inside the igloo at the source of air intake to the Teflon tube, or VX agent will never travel down the tube to be detected.¹¹ Van Winkle knew that the V to G pads had been placed outside the igloos at least since he came to BGCA in 2002.¹² The incorrect placement meant that for years, workers inside the igloos or others in the vicinity when igloo doors were open potentially had been exposed to undetected leaking VX agent without appropriate protective gear.¹³ VX is highly toxic in liquid, aerosol and vapor forms. It is a rapid-acting, lethal nerve agent.¹⁴ Non-lethal doses can negatively impact human health.¹⁵

When he returned from the course, Van Winkle raised this issue and the possibility that workers had been exposed to chemical agent while the pads were

¹⁰ Tr. 34-5 (Van Winkle); JX 63.

¹¹ Tr. 35- 39 (Van Winkle); Tr. 78 (Jackson); Tr. 825-26 (McCoy); Complainant’s Exhibit (CX) 6A, p. 33-35; RDO at 5.

¹² Tr. 41 (Van Winkle).

¹³ Tr. 41-44, 51-53 (Van Winkle); CX 6A at 34-35.

¹⁴ *See*, CMA Fact Sheet on Nerve Agent VX, available at <http://www.cma.army.mil/fndocumentviewer.aspx?docid=003676686>.

¹⁵ JX 2, p. 2 & n.2; Tr. 44-46 (Van Winkle).

incorrectly placed.¹⁶ BGCA management eventually addressed the issue going forward, first by requiring full protection for all workers entering VX igloos,¹⁷ and then, over several months, moving the V to G pads to the proper place.¹⁸ However, they never addressed the possible exposure of employees or the public during the years that the pads were wrongly placed.¹⁹ In fact, even at the hearing in this case, management refused to admit that the placement of the pads outside the igloos could have resulted in employee or public exposure to VX agent.²⁰

In addition to the issue concerning the placement of the V to G pads, Van Winkle made complaints or disclosures about the life span of the V to G pads,²¹ failure to properly monitor potentially contaminated equipment in the suit laundry,²² incompetence of the chemistry lab management,²³ improper maintenance and certification of

¹⁶ Tr. 54-62 (Van Winkle); Tr. 343 (Bowling); Tr. 309 (Hunter); *see* RDO at 5-6, 25.

¹⁷ Tr. 62, 64-65 (Van Winkle); Tr. 522 (Shuplinkov).

¹⁸ The movement of the pads was completed in October, 2005, eight months after the issue was first raised in February of that year. JX 28; Tr. 71-72, 121-22 (Van Winkle).

¹⁹ Tr. 62, 151 (Van Winkle); Tr. 718-19, 722 (Bilyeu); Tr. 837-38 (McCoy); Tr. 351 (Stanfield); Tr. 633-34 (Rooney).

²⁰ Tr. 67, 151 (Van Winkle). Management took the awkward position that while the placement inside the igloo at the air intake was “optimal,” the old configuration posed no risks to workers or the public. Tr. 524, 561, 564-66, 569-70, 577-78, 599 (Shuplinkov); CX 10, p. 4; Tr. 826, 831-35 (McCoy). These claims were made despite the findings by KDEP and the DOD IG to the contrary, discussed below.

²¹ JX 9, ¶¶ 19; Tr. 163-64 (Van Winkle).

²² JX 71; Tr. 156-60 (Van Winkle); RDO at 16, n.13.

²³ RDO 16-17; Tr. 182-84, 186 (Van Winkle).

monitoring equipment,²⁴ and insufficient staffing of trained personnel at BGCA to address routine or emergency operations.²⁵ Van Winkle also filed an internal complaint about the safety of the drinking water in some of the BGCA buildings,²⁶ and objected to what he saw as a gag order on protected activities by an Army non-disclosure order.²⁷

In addition to internal complaints, Van Winkle made a complaint to KDEP about the V to G pad issue, which was investigated by that agency in June 2005.²⁸ In August 2005, Van Winkle filed a request with the Pentagon Inspector General's office for an investigation of monitoring and reporting with regard to VX igloos, maintenance of air monitoring equipment, and an after-action review to determine the responsible officials who made decisions that compromised the efficacy of the conversion pads to detect VX leaks. In support, he attached a sworn affidavit. The request for investigation and affidavit were copied to officials at the U.S. Army Inspector General, the Kentucky Environmental and Public Protection Cabinet and the U.S. Environmental Protection Agency (EPA), Region IV.²⁹ The letter and affidavit resulted in an investigation of BGCA by the Army Inspector General.³⁰ The affidavit was also posted on the web site of Van Winkle's counsel, Public Employees for Environmental Responsibility (PEER), and

²⁴ JX 9, ¶ 20; Tr. 164-66 (Van Winkle); RDO at 16, n.13.

²⁵ JX 93, p. 2-3; Tr. 180 (Van Winkle); RDO at 16, n.13.

²⁶ RDO at 11, n. 9; 16, n. 13; CX 11 (Jan. 25, 2006)

²⁷ RDO at 16, n. 13; JX 75, JX 90; JX 92; JX 95.

²⁸ Tr. 127, 139-40 (Van Winkle); Tr. 589 (Shuplinkov); JX 96; CX 6A, p. 33.

²⁹ JX 91.

³⁰ Tr. 166 (Van Winkle); Tr. 589, 616-17 (Shuplinkov).

released to the press.³¹ Van Winkle also spoke with investigators from the Army Criminal Investigative Division and the EPA.³² The investigations of Van Winkle's complaints eventually led to a federal criminal grand jury investigation of BGCA.³³

In December 2005, the IG substantiated Van Winkle's claim that the V to G pads were improperly removed from the igloos in violation of Army procedures, compromising their effectiveness to detect VX leaks.³⁴ KDEP ultimately concluded in an October 21, 2007 report that during the time that the V to G pads were incorrectly placed, VX could not have been detected, and that it was impossible to know whether non-detect test results during that period were due to no leaking munitions or to inadequate monitoring.³⁵

³¹ Tr. 169 (Van Winkle); CX 9; CX 10; CX 14.

³² Tr. 139 (Van Winkle).

³³ JX 97; JX 51.

³⁴ Van Winkle had been unable to obtain a copy of the IG Report at the time of the hearing in this case, and thus it was not included as a hearing exhibit. However, presumably officials at BGCA were made aware of the results of the investigation in December 2005. Van Winkle's counsel subsequently obtained a partially redacted copy under the Freedom of Information Act.

The DOD IG substantiated the allegation that a BGCA official improperly ordered the removal of the V to G conversion pads from inside the igloos in violation of applicable Army chemical agent monitoring requirements. U.S. Army IG Completion Report, Hotline Case 97059/DIH 05-8278 (Dec. 8, 2005) at 23, 30 (hereinafter "2005 IG Report"). The IG found that the sampling configuration for VX was incorrect for the period September 2003 to August 2005. *Id.* at 31. The IG further found that "It is unlikely that the MINICAMS would have been effective in detecting anything but gross levels of VX leakage while the V to G conversion pads were not installed at the distal end of the sampling point." *Id.* at 30.

³⁵ CX 6 at 34-35.

3. *Retaliation*

After he raised the V to G pad issue, retaliation against Van Winkle began. He was passed over for promotions, turned down for training, and had overtime duties taken away. Then he was warned by his supervisor that management considered him a troublemaker and wanted to get rid of him.³⁶ In the summer of 2005, Van Winkle was removed from his air monitoring duties and assigned to a building outside of the Chemical Limited Area (CLA), where he performed maintenance on the mini-cams.³⁷ He sought legal help, and was referred to PEER.³⁸ PEER counsel asked him to substantiate some part of his claims in order to take his case.³⁹

In response to PEER's request for substantiation, in July 2005, Van Winkle wrote a statement concerning the meetings held on the V to G pad issue and the admission of Bonnie McCoy, the Supervisory Chemist, that it was her decision to move the pads to the ineffective position outside the igloos, and that she had not gotten results showing that the procedure worked when she tested it out.⁴⁰ Van Winkle asked some of his co-workers who had been at the mini-cam training to sign the statement, but they declined. Jimmy Bowling, the President of the BGAD union, did sign. Van Winkle submitted

³⁶ Tr. 128-29 (Van Winkle).

³⁷ Tr. 213 (Van Winkle).

³⁸ Tr. 131-34 (Van Winkle).

³⁹ Tr. 134-35 (Van Winkle).

⁴⁰ CX 13; Tr. 135 (Van Winkle).

Bowling's statement to PEER, which then took his case.⁴¹ Van Winkle never threatened any of his co-workers with subpoenas or pressured them to join a lawsuit.⁴²

Nevertheless, on August 3, 2005, Van Winkle was given a letter temporarily disqualifying him from the CPRP, based upon "allegations of suspect queries to crew members" which allegedly caused "unease and uncertainty to crew members with threats of future subpoena action," and based upon "your contemptuous and arrogant behavior and attitude toward your Certifying Official."⁴³ The temporary disqualification meant that Van Winkle could not work in the CLA, and therefore would not be able to return to his air monitoring duties. The letter was signed by Thomas A Bilyeu, Van Winkle's Certifying Official and then the Director of Chemical Operations at BGCA.

Bilyeu then consulted with the then-commander at BGCA, Lt. Col. Shuplinkov, who told him to conduct an informal inquiry into the matter.⁴⁴ Bilyeu formed a committee of himself, two members of BGCA management and Denver Begley, the union steward, which interviewed all 17 employees of the Chemical Operations Directorate. They asked each employee the same four questions, directed at whether the employee was aware of any employee soliciting other employees to participate in a phone call or sign any documents related to BGCA, or had been solicited to do so themselves, and whether they had provided information to any entities outside of BGCA.⁴⁵ Fourteen

⁴¹Tr. 136-38 (Van Winkle); CX 13; RDO at 6.

⁴² RDO at 29, n.22; Tr. 139 (Van Winkle).

⁴³ JX 8.

⁴⁴ Tr. 694 (Bilyeu); Tr. 530 (Shuplinkov).

⁴⁵ Tr. 694-95 (Bilyeu); Tr. 790 (Sydor); JX 7, p. 1, 7.

employees disclaimed any such knowledge or activity.⁴⁶ Two stated that Van Winkle had talked about filing a lawsuit and that they or other employees might get subpoenaed. A third stated that Van Winkle had asked him to talk with someone on the phone or write a letter. None of the statements evidenced anything approaching coercion.⁴⁷ Van Winkle was also called in to answer the four questions, but on the advice of Begley, declined to answer.⁴⁸

Bilyeu reported the results of his inquiry back to Lt. Col. Shuplinkov, who decided to appoint a commander's informal inquiry under AR 15-6.⁴⁹ The AR 15-6 investigation, conducted by Richard Hancock, the Director of Risk Management, was based on allegations that Van Winkle had "solicited participation in an unspecified legal action against BGCA from his co-workers."⁵⁰ Hancock considered the responses collected by Bilyeu and in addition interviewed 10 employees at BGCA as well as Van Winkle.⁵¹

While Hancock's investigation was still in progress, Van Winkle composed and released his affidavit which alleged that the air monitoring program at BGCA was deficient and that worker and public health may have been jeopardized. In addition to

⁴⁶ JX 7, p. 11-24.

⁴⁷ JX 7, p. 8, 9 and 10.

⁴⁸ Tr. 495 (Begley).

⁴⁹ JX 7 at 5; JX 58.

⁵⁰ JX 7, p. 1, ¶ 2.

⁵¹ JX 7 at 1.

being posted on the PEER website, the affidavit was the subject of several media stories.⁵² It was also sent to the Army Inspector General and state and federal environmental officials.⁵³ Shortly afterwards, on August 26, 2005, Hancock recommended Van Winkle's permanent disqualification from the CPRP. He found that Van Winkle did in fact "make the attempt" to garner support for legal action against BGCA or the Army.⁵⁴ Hancock also found that Van Winkle had recurring difficulties in keeping his equipment running, that BGCA's actions in response to his disclosures about the V to G pads were appropriate, and that Van Winkle was characterized as a "negative presence" by the majority of those interviewed. Finally he found that: "Perhaps the most damaging evidence is Mr. Van Winkle's own affidavit." Hancock claimed that the affidavit contained errors and was "inflammatory" and "needlessly" raised public concern.⁵⁵

Van Winkle did not see Hancock's report or the accompanying witness statements until it was provided in discovery in this case. Neither he nor his representative was present when his co-workers and managers were interviewed, or allowed to see their statements or rebut what they contained.⁵⁶ Van Winkle was not given the opportunity to present any witnesses on his own behalf.⁵⁷

⁵² JX 7, p. 42-47; CX 10; CX 14.

⁵³ JX 91, p. 1-2.

⁵⁴ JX 7, p. 3

⁵⁵ JX 7 at 3-4.

⁵⁶ Tr. 216-217 (Van Winkle); Tr. 439 (Begley).

⁵⁷ Tr. 221 (Van Winkle).

On January 30, 2006, Van Winkle was given a memo from Bilyeu recommending his permanent disqualification from the CPRP, based solely on the following findings:

There is lack of trust between you and myself (your certifying official) and the crew (your peers). You made threats to coerce the chemical crew members. You show signs of a disgruntled employee and display a lack of positive attitude; both are security concerns. Overall your attitude and observed actions displayed in the workplace towards management and peers are unacceptable and places the stockpile in jeopardy.⁵⁸

Van Winkle was allowed to provide a rebuttal to this document, orally in a meeting with James Rooney, the “reviewing official” on the disqualification,⁵⁹ and in writing.⁶⁰ In his written response, Van Winkle protested the lack of information and specific facts to support Bilyeu’s conclusions, which made it impossible to provide a complete rebuttal.⁶¹ He noted that the permanent disqualification memo violated AR 50-6, § 2-29, which requires that the notification “cite specific circumstances that support the certifying official’s decision to disqualify,” and specifically provides that statements such as “contemptuous attitude” are inadequate by themselves.⁶² Van Winkle also noted that Bilyeu had a conflict of interest because he was at the center of many of the concerns raised by Van Winkle about the monitoring program and of his claims of harassment and

⁵⁸ JX 15, ¶ 2.

⁵⁹ See AR 50-6, § 2-29c, JX 59, p. 19.

⁶⁰ JX 17; JX 18.

⁶¹ JX 17, p. 2; see RDO at 12.

⁶² JX 17, p. 2; JX 39, p.2.

retaliation.⁶³ At the rebuttal meeting, Van Winkle was orally given some additional information about his co-workers' statements, but was not allowed to see the AR-15 report or the statements against him. Begley, who represented Van Winkle throughout the process, testified that Van Winkle was not given an adequate opportunity to understand the evidence against him and respond to it.⁶⁴

Bilyeu's recommendation for permanent disqualification was approved on March 9, 2006 by Rooney on the basis of Bilyeu's findings concerning "lack of trust, attitude and observed actions . . .", without providing any further detail.⁶⁵ There were never any proceedings to remove Van Winkle's "secret" security clearance, which remained in force.⁶⁶

4. *Subsequent Events*

Van Winkle continued to work in the BGCA maintenance department until he broke his back in an accident at home on April 23, 2006.⁶⁷ He was out of work until July

⁶³ JX 17, p. 2. Bilyeu admitted at the hearing that after Van Winkle stated he did not trust him, "I felt that my objectivity may have been somewhat, you know, hampered." Tr. 703 (Bilyeu). The 2005 IG Report had found with respect to the Chemical Operations Manager (Bilyeu), that while there was no documented evidence that he approved the removal of the V to G conversion pads from within the igloos, and that this matter would have been delegated to the technical experts in the laboratory, he "did not adequately perform his supervisory duties." 2005 IG Report at 26.

⁶⁴ Tr. 437 (Begley).

⁶⁵ JX 16.

⁶⁶ AR 50-6, § 2-29k provides that where a CPRP disqualification is based on credible derogatory information that could affect the individual's security clearance, the security manager should be notified. JX-59, p. 20. This was not done here.

⁶⁷ Tr. 227 (Van Winkle).

2006, when he returned on light duty.⁶⁸ After Begley warned him that he would be dismissed if he did not take a permanent medical disability, he applied for disability.⁶⁹ While his disability paperwork was in process, Van Winkle decided to run for political office.⁷⁰ He believed he could do so because, based on the time he was told it would take to get his disability approved, he would no longer be a federal worker by the time of the election, and he would not do any campaigning while he was still employed.⁷¹ However, because his name had been listed as a candidate, he was contacted by the Office of Special Counsel about possible Hatch Act violations. He was given a choice to either resign from his position at BGCA or withdraw from the election.⁷² He chose to resign effective October 31, 2006.⁷³ He would not have resigned if he had believed there was any prospect of continuing his career at BGCA.⁷⁴

After he left employment at BGCA, Van Winkle abandoned the degree he had been pursuing in chemistry because there was no longer any purpose for it, and switched to a different college major. From the time he left BGCA in October 2006 to the time of the hearing in November 2007, he had been unemployed.⁷⁵ Since that time, he has

⁶⁸ Tr. 231 (Van Winkle).

⁶⁹ Tr. 232-35 (Van Winkle).

⁷⁰ Tr. 236-38 (Van Winkle).

⁷¹ Tr. 238-39 (Van Winkle); *see* RDO at 15.

⁷² Tr. 239-41 (Van Winkle); JX 84.

⁷³ JX 21; JX 101.

⁷⁴ Tr. 244 (Van Winkle).

⁷⁵ Tr. 244-45 (Van Winkle).

incurred substantial expense to continue his education in order to enter a new career, and has earned far less than he did at BGCA.

On April 15, 2009, while his appeal to the Board in this case was pending, Van Winkle filed a whistleblower reprisal complaint with the Department of Defense Inspector General Hotline. The IG's Civilian Reprisal Investigations unit conducted an investigation and issued a report on February 11, 2011. It found that Van Winkle engaged in protected activity with respect to the V to G pad issue, the suit laundry issue, his request of a DOD IG investigation, and when his affidavit concerning his disclosures was posted on PEER's website and reported in the local press.⁷⁶ While Van Winkle raised several claims of retaliatory action, the IG only examined one of them, concerning a lowered performance evaluation, which was found to be retaliatory.⁷⁷ The IG found evidence that BGCA officials had a motive to retaliate because they complained that Van Winkle's disclosures about the V to G conversion pads put a lot of pressure on management, created extra work, and caused all types of inspections to come in.⁷⁸ The IG concluded that agency officials failed to establish that the lowered performance evaluation would have occurred absent the protected disclosures, and substantiated Van Winkle's claim of reprisal.⁷⁹

⁷⁶ DOD IG Report No. CRI-HL 110281 (Feb. 11, 2011) at 11-13.

⁷⁷ The IG did not examine the other claims either because they were found not to be personnel actions under the Whistleblower Protection Act or because they had been raised in this DOL proceeding. The IG rejected Van Winkle's constructive discharge claim. *Id.* at 14.

⁷⁸ *Id.* at 21-22.

⁷⁹ *Id.* at 23-24.

PRIOR PROCEEDINGS

1. *OSHA Complaint*

On September 2, 2005, Van Winkle filed his complaint with OSHA. On June 2, 2006, OSHA found that Van Winkle had engaged in protected activity by raising the V to G pad issue and also by raising concerns about monitoring in the suit laundry. OSHA considered the merits of the claim of retaliation by means of the CPRP disqualification, and found that BGCA had legitimate, non-discriminatory reasons for the disqualification and that Van Winkle would have been disqualified regardless of his protected activity. OSHA thus dismissed Van Winkle's complaint.

2. *ALJ Recommended Decision and Order*

Van Winkle requested a hearing, which was held November 27-29 and December 4, 2007. Judge Phalen issued his recommended decision on December 5, 2008. He concluded that Van Winkle's testimony was truthful overall, and that he was "straightforward and truthful."⁸⁰

a. Protected Activity

Judge Phalen found that Van Winkle engaged in the following protected activities: his disclosures about the incorrect placement of the V to G pads and the possibility that it could have affected the safety and health of the employees at BGCA and members of the public, his efforts to get employees to back his case so that PEER would represent him, his OSHA complaint and his affidavit (supplied to OSHA, the

⁸⁰ RDO at 8, n.8.

Pentagon Inspector General and the press),⁸¹ and his complaint about drinking water quality in some of the BGCA buildings.⁸² He did not rule on whether Van Winkle's other asserted protected activities were in fact protected, but found that there was insufficient evidence to find retaliation based upon them.⁸³

b. Adverse Action

The ALJ found that Van Winkle's temporary and permanent disqualifications from the CPRP were "adverse actions" as defined in the whistleblower laws.⁸⁴ He did not address whether any of the other claimed retaliation amounted to "adverse action."

c. Retaliation

On the ultimate question of whether Van Winkle suffered retaliation for protected activities, Judge Phalen analyzed the evidence and made factual findings only with regard to the claim of constructive discharge, which he determined was unfounded.⁸⁵ As noted above, he only made conclusory findings of "insufficient evidence" of retaliation for most of Van Winkle's claims. He did not specifically address the claimed retaliatory

⁸¹ RDO at 10 (referring to disclosures about the V to G pad issue, maintenance and certification of the air monitoring equipment, and Van Winkle's OSHA complaint, Judge Phalen states: ("All of this was, of course, protected activity").

⁸² RDO at 11, n. 9.

⁸³ RDO at 17; *id.* at 16, n. 13. The other asserted protected activities were disclosures concerning the life-span of the V to G pads, the Standard Operating Procedures and the incompetence of the chemistry lab's management, inadequate monitoring at the suit laundry, improper maintenance and certification of equipment, inadequate emergency procedures, problematic drinking water, and the requirement to sign a non-disclosure order.

⁸⁴ RDO at 27-28.

⁸⁵ *Id.* at 13-14.

actions and hostile work environment, or the evidence of retaliatory animus towards Van Winkle, except with regard to the CPRP disqualification, which he found to be unreviewable except for compliance with the procedures in AR 50-6.⁸⁶ He found no procedural error.⁸⁷

3. *ARB Decision*

Van Winkle appealed to the ARB, which issued its decision on February 17, 2011.⁸⁸ The Board found that the merits of CPRP certification determinations are reviewable, but that whether or not Van Winkle's CPRP disqualification proceedings complied with Army regulations was beyond the DOL's and the Secretary's jurisdiction under the CAA and the SWDA.⁸⁹

The Board also found that because Judge Phalen concluded that he was not authorized to review the merits of Van Winkle's complaint, he did not review the merits of Van Winkle's claims of retaliation for protected activity, and specifically that he failed to adequately address Van Winkle's claims of protected activities in addition to the V to G pad issue, or Van Winkle's claims of a hostile work environment and constructive discharge.⁹⁰ The case was remanded "for the ALJ to fully consider the merits of Van

⁸⁶ RDO at 23-24.

⁸⁷ *Id.* at 24-25.

⁸⁸ *Van Winkle v. Blue Grass Chemical Activity/Blue Grass Army Depot*, ALJ Case No. 2006-ERA-024, ARB Case No. 09-035 (ARB 2011) (hereinafter "ARB Decision").

⁸⁹ ARB Decision at 11.

⁹⁰ *Id.* at 11-12.

Winkle's complaint under the CAA and the SWDA.⁹¹

ARGUMENT

I. VAN WINKLE ENGAGED IN ACTIVITY PROTECTED UNDER THE ENVIRONMENTAL WHISTLEBLOWER LAWS

The environmental statutes at issue here provide broad protection from retaliation for employees who engage in activities that further the purposes of those statutes. The employee protection provisions of the CAA (42 U.S.C. § 7622) and of SWDA/RCRA (42 U.S.C. § 6971) provide that employers may not discharge or otherwise discriminate against employees because the employee, *inter alia*, commenced or is about to commence a proceeding under the Act or took any other action to carry out the purposes of the Act.⁹² As OSHA found, VX and the other chemical agents stored at BGCA are regulated under those statutes.⁹³

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., Am. Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998); *Bechtel Constr. Co. 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 or

⁹¹ *Id.* at 13.

⁹² The Department of Labor regulations implementing these laws state that an employer violates the employee protection provisions tot "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against an employee because the employee has" among other things, assisted or participated in "any other action to carry out the purposes of such Federal statute." 29 C.F.R. §24.102(b), (b)(3).

⁹³ JX 20, p. 2.

relates to their administration and enforcement. *Devers v. Kaiser Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3 (ARB Mar. 31, 2005), DOL Rptr. at 11; *Marcus v. U.S. EPA*, 1996-CAA-3-7 (ALJ Dec. 15, 1998), DOL Rptr. at 29, (citing *Tyndall v. U.S. EPA*, 93-CAA-6, 95-CAA-5 (ARB June 14, 1996)).

Internal complaints to managers are protected under the employee protection provisions. *See, e.g., Bechtel*, 50 F.3d at 931-32; *Jones v. TVA*, 948 F.2d 258, 264 (6th Cir. 1991); *Guttman v. Passaic Valley Sewerage Comm'rs*, 85-WPC-2, (Sec'y Mar. 13, 1992), slip op. at 7-8, *aff'd sub nom Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993).

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 Chem. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), slip op. at 11; *see also, Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998), slip op. at 10 (citing *Scerbo v. Consol. Edison Co.*, 86-ERA-2 (Sec'y Nov. 13, 1992), slip op. at 4-5).

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. *Pogue v. U. S. Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991); *Hoffman v. Bossert*, 94-CAA-4 (Sec'y Sept. 19, 1995), slip op. at 6; *Odom v. Anchor Lithkemko*, ARB No. 96-189, ALJ No. 96-WPC-1, (ARB Oct. 10, 1997), slip op. at 7, n.9; *West v. Systems Applications Int'l*, 94-CAA-15 (Sec'y Apr. 19, 1995), slip op. at 4; *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2 and 9,

(ARB Feb. 29, 2000), slip op. at 20, n.17.

There can be no doubt that Van Winkle's complaints about inadequate monitoring of chemical weapons, resulting in possible undetected leaks of chemical warfare agents regulated under the CAA and SWDA, were health and safety complaints which furthered the purposes of those Acts and related to their administration and enforcement.⁹⁴ Clearly it would further the purposes of the CAA and the SWDA to insure that chemical warfare agents are properly monitored to prevent exposure of BGCA workers and the public and environmental contamination. Van Winkle's disclosures and complaints about the incorrect placement of the V to G pads -- including his internal complaints as well as his reports and requests for investigations to KDEP, the DOD IG, higher officials in the Army and the U.S. EPA -- all served this purpose. Likewise the purposes of the CAA and SWDA were served by Van Winkle's disclosures about concerns about the life-span of the V to G pads,⁹⁵ inadequate monitoring in the BGCA suit laundry for contamination of materials which had been inside an igloo,⁹⁶ the lack of qualifications and competence of BGCA personnel with responsibilities to safeguard the chemical weapons,⁹⁷ and

⁹⁴ The purpose of the Clean Air Act is to protect air quality to promote health and welfare. 42 U.S.C. § 7401(b)-(c). A purpose of the Solid Waste Disposal Act is to assure hazardous waste management practices that protect human health and the environment. 42 U.S.C. § 6902. It is undisputed that the chemical weapons agents at BGCA are regulated under those laws.

⁹⁵ Van Winkle's concern was that no one at BGCA knew how often the pads should be changed once they were placed inside the moist environment of the igloos, and the pads were possibly becoming ineffective before being changed out. Tr. 163-64 (Van Winkle); Tr. 578-79 (Shuplinkov); JX 9, p. 3, ¶ 19.

⁹⁶ JX 71; Tr. 156-61 (Van Winkle).

⁹⁷ Tr. 182-84, 186-87 (Van Winkle).

improper maintenance and certification of monitoring equipment.⁹⁸ All of these disclosures bore upon the adequacy and efficacy of BGCA's monitoring to protect employees, the public and the environment from chemical warfare agents.

Van Winkle's complaint to OSHA is likewise protected as a proceeding under the Acts, and his activities to prepare to bring a whistleblower complaint are likewise protected. *See, Erickson v. U.S. EPA*, ARB No. 03-002, ALJ No. 1999-CAA-2 (ARB May 31, 2006), DOL Rptr. at 17 (filing a whistleblower complaint is quintessential protected activity, and talking about such a complaint with the news media and a federal agency is also protected activity.)

II. LEGAL STANDARDS FOR ESTABLISHING RETALIATION

In whistleblower cases, a *prima facie* case of retaliation may be established indirectly by applying the traditional "burden-shifting" approach established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The elements of the *prima facie* case are that 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. *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Bechtel*, 50 F.3d at 933-34.

"Temporal proximity between a complainant's protected activity and an employer's adverse action has been held sufficient to meet the causation requirement of a complainant's *prima facie* case." *Jenkins v. U.S. EPA*, 92-CAA-6 (Sec'y May 18, 1994) slip op. at 10, (citing *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v.*

⁹⁸ Tr. 164-66 (Van Winkle).

Baldrige, 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985); *Burrus v. United Telephone Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982).

Temporal proximity, combined with other circumstantial evidence, can also be sufficient to support the ultimate finding on the merits of whistleblower retaliation.

Pierce v. U. S. Enrichment Corp., ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-1 (ARB Aug. 29, 2008) (holding temporal proximity combined with lack of credibility of employer's explanation for the adverse action meets employee's burden of proof);

Overall v. TVA, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001); *White v. Osage Tribal Council*, 95-SDW-1 (ARB Aug. 8, 1997), slip op. at 4 ("Proximity in time between protected activity and an adverse action is solid evidence of causation").

Once the employee establishes a *prima facie* case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its action. *Texas Dep't. of Cmty. 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 Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993); *Bechtel*, 50 F.3d at 934. The employee 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, 147 (2000).

If an employee proves unlawful discrimination 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 Am. Nuclear Res.*, 134 F.3d at 1295. “The employer bears the risk if the two motives prove inseparable.” *Id.*

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 Servs., Inc.* 95-ERA-40 (ARB June 21, 1996), slip op. at 6; *see also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3 (ARB June 24, 2011), DOL Rptr. at 13-14 (“Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence”).

III. THE CPRP DISQUALIFICATION WAS RETALIATORY

As Judge Phalen found, Van Winkle’s temporary and permanent disqualifications from the CPRP constituted cognizable adverse actions under the environmental whistleblower laws, because they resulted in increasing the chance of loss of future employment options.⁹⁹ In fact, as shown in Part VI below, the disqualification from the CPRP essentially meant that Van Winkle’s career at BGCA was over.

⁹⁹ RDO at 27. Judge Phalen noted that loss of CPRP certification meant that if non-CPRP work became unavailable, Van Winkle would be subject to a lay-off, when he could have continued employment if he still had his CPRP certification. *Id.* at 27-28, n. 21.

While Judge Phalen erroneously concluded that he did not have the authority to review Van Winkle’s CPRP disqualification, he clearly believed that the record supported a conclusion that the disqualification was retaliatory. He found that the Army’s procedures could subject individuals to CPRP disqualification based on protected activities such as those engaged in by Van Winkle in seeking publicity about employer actions he believed to be harmful to the health and safety of the public and co-workers.¹⁰⁰ He then found that there was an inherent potential for conflict of interest and abuse of authority when the certifying official recommending disqualification is involved in the situation concerning which the employee blew the whistle.¹⁰¹ He also found that Bilyeu in fact believed that CPRP disqualification was appropriate if a whistleblower took his concerns outside the agency, as Van Winkle had done.¹⁰² He concluded that all of these factors, combined with the fact that the standards for disqualification, such as “unreliable” and “poor attitude,” “may include virtually anything with which the certifying/decertifying officer does not agree,” rendered Van Winkle’s disqualification “virtually, a foregone conclusion.”¹⁰³

Beyond Judge Phalen’s observations, here, there was not only a situation inviting whistleblower retaliation, but the investigation and subsequent disqualification of Van

¹⁰⁰ RDO at 19.

¹⁰¹ *Id.* at 20-21, n. 16. Bilyeu, as the Director of Chemical Operations, was clearly implicated in Van Winkle’s disclosures that BGCA’s monitoring was ineffective to detect VX nerve gas leaks. As noted above, the IG found that Bilyeu “did not adequately perform his supervisory duties” with respect to the placement of the V to G conversion pads. 2005 IG Report at 26.

¹⁰² RDO at 21, n. 18.

¹⁰³ *Id.* at 20-21, nn. 16 and 18.

Winkle were openly and explicitly premised on protected activity – namely, Van Winkle’s alleged attempts to have other BGCA employees support his efforts to disclose health and safety concerns outside of BGCA and his whistleblower litigation against BGCA. Of course, under the employee protection provisions of the CAA and SWDA quoted above, an agency may not take any adverse action against an employee because of protected disclosures or because of participation in, or plans to participate in, proceedings under the Acts, including whistleblower litigation. Thus, there is direct evidence that the disqualification was retaliatory.

The initial temporary disqualification was premised on “suspect queries to crew members,”¹⁰⁴ which, Bilyeu testified, referred to concerns that Van Winkle was asking employees to “give statements or cooperate in his activities.”¹⁰⁵ Bilyeu stated in his interview for the CPRP investigation that he took the temporary disqualification action because Van Winkle had solicited co-workers to participate in “some sort of action against the government.”¹⁰⁶

Hancock’s report of the investigation which followed the temporary disqualification and recommended permanent disqualification states that the allegations

¹⁰⁴ JX 7, at 6.

¹⁰⁵ Tr. 694 (Bilyeu).

¹⁰⁶ Bilyeu stated: “Mr. Van Winkle’s supervisor, Gary Stanfield, came to me and stated that one of Mr. Van Winkle’s co-workers had related that he had been approached by Mr. Van Winkle and asked to take part in an unspecified legal action against BGCA. At that point, I decided that it would be prudent to start an inquiry into Mr. Van Winkle’s suitability for continued service in the Chemical Personnel Reliability Program. Statements provided by several of Mr. Van Winkle’s co-workers confirmed that he had solicited participation in some sort of action against the government. At that time he was temporarily disqualified from the CPRP under the provisions of AR 50-6.” JX 7 at 35-36.

against Van Winkle were that he “had engaged in behavior that was not consistent with his duties [under the Chemical Surety Program], to wit, that he had solicited participation in an unspecified legal action against BGCA from his co-workers.”¹⁰⁷ The issue posed to Van Winkle in the inquiry was “Have you ever enlisted fellow workers to pursue a lawsuit against the government? Have you ever used the word subpoena to fellow co-workers?”¹⁰⁸

Hancock’s investigation report also relied on the responses to the four questions to Van Winkle’s co-workers posed by Bilyeu.¹⁰⁹ The questions asked, as well as a statement employees were asked to sign, evidence that management was using the CPRP investigation not only to target Van Winkle’s protected activities, but to root out and suppress protected activity by anyone else who might choose to assist Van Winkle or engage in whistleblowing of their own.

Specifically, the questions were:

- 1) Are you aware of any BGCA employee soliciting other employees to participate in a phone call or sign any document pertaining to BGCA operations, policies, procedures or anything else related to BGCA?
- 2) Have you personally ever been requested by anyone to provide information (verbal or written) to any entity (person/group/organization) outside Blue Grass Chemical Activity? If yes, who, when, where?
- 3) Have you ever participated in any action to provide information (verbal or written) to any government organization outside of the Chemical Material Agency? If yes, who else participated, when, and where? Do you know the organization involved in this matter? Do you know anything about the intent of this action?

¹⁰⁷ JX 7, p. 1.

¹⁰⁸ JX 7, p. 31.

¹⁰⁹ JX 7, p. 1.

4) Have you ever participated in any action to provide information (verbal or written) to any private entity (person/group/organization) outside of the Chemical Material Agency? If yes, who else participated, when and where? Do you know the organization involved in this matter? Do you know anything about the intent of this action?¹¹⁰

These questions make clear that the disqualification investigation was directed at Van Winkle's protected activity, and specifically whether he had engaged other employees to help him to provide information to outside entities. While one must assume that the questions were relevant to Van Winkle, since the investigation concerned his CPRP disqualification, they are so broad that it is clear that the agency was using the investigation not only to gain information not only about Van Winkle's protected activities and what other employees may have been participating in them, but about potentially protected activities by the employees in general.

In response to these questions, three employees made statements about communications they had with Van Winkle, discussed below. The other 14 employees were asked to, and did, sign a statement stating:

I hereby state that I have no knowledge of any Blue Grass Chemical Activity employee requesting another employee to participate in nor did I participate in any action to collect and/or provide information (verbal or written) concerning BGCA operations, policies, procedures or anything of a non-public nature to any entity (person/group/organization) outside of the Chemical Materials Agency, except as directed by my chain of command.¹¹¹

Thus, management used the CPRP investigation not only to retaliate against Van Winkle, but to send a message to the rest of the work force not to assist Van Winkle in his

¹¹⁰ JX 7, p. 7.

¹¹¹ JX 7, p. 11-24.

protected activities or to engage in similar activity. Employees testified at the hearing that they viewed the statement they were asked to sign as a promise that they would not go outside of BGCA to report anything and that they were pressured to sign.¹¹²

Management statements in the CPRP investigation provide additional evidence that management faulted Van Winkle, and believed disqualification to be appropriate, because of his protected disclosures outside of his chain of command. Bilyeu faulted Van Winkle because the V to G pad issue was not raised through “proper channels” and was taken directly to the union.¹¹³ Bonnie McCoy, the Supervisory Chemist who had directed that the V to G pads be placed outside the igloos, faulted Van Winkle for the same reasons.¹¹⁴ As noted above, whistleblower disclosures do not lose their protection because the whistleblower fails to observe established channels. In fact, a manager’s dissatisfaction with the fact that an employee did not follow the chain of command in reporting safety issues can itself be evidence of pretext. *See, Nichols v. Bechtel*

¹¹² James Jackson testified that the message conveyed when he was asked to sign the statement was “do not challenge management.” Tr. 115 (Jackson). He signed because he had yet to get his CPRP clearance and “had to keep my nose clean.” *Id.* Ken Kenly agreed that the statement he signed was saying that he would never go outside of Blue Grass and report anything. Tr. 330 (Kenly). He signed because the employees were “required” to sign, and because action possibly would be taken against them if they did not. Tr. 330-31 (Kenly). The fact that employees were pressured to sign these statements as part of the CPRP investigation also calls into question whether other statements gathered in the investigation containing negative comments about Van Winkle were pressured. As noted above, neither Van Winkle nor his union representative were allowed to be present when those employees were interviewed.

¹¹³ JX 7, p.35. Van Winkle had called Jimmy Bowling, President of the Union at BGAD, from the training course to alert him to the V to G pad issue. Tr. 336 (Bowling). Bowling then asked management to shut down the VX igloos until the safety concerns were resolved. *Id.* He had to threaten management with going to the press to get them to agree. Tr. 337 (Bowling)

¹¹⁴ JX 7, p. 33.

Construction, Inc., 87-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 11.

While the agency did give some other reasons for the disqualification in addition to Van Winkle's protected activity, these other reasons are pretextual and not credible. *See Burdine*, 450 U.S. at 255-566 (a plaintiff may succeed in proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence"). The lack of credibility of the employer's claimed non-retaliatory reason for its action, together with the elements of the prima facie case, can "suffice to show intentional discrimination." *St. Mary's Honor Ctr.*, 509 U.S. at 511.¹¹⁵

First, the stated reasons for the disqualification are inaccurate or vague and unsupported. The reasons given were:

There is lack of trust between you and myself (your certifying official) and the crew (your peers). You made threats to coerce the chemical crew members. You show signs of a disgruntled employee and display a lack of positive attitude; both are security concerns. Overall your attitude and observed actions displayed in the workplace towards management and peers are unacceptable and places the stockpile in jeopardy.¹¹⁶

There is absolutely no evidence of "threats to coerce the chemical crew members." Judge Phalen found that Van Winkle did not threaten co-workers when he informed them about possible legal actions he might take or asked them to sign

¹¹⁵ At the least, even assuming that there were other legitimate motives in addition to retaliation for protected activity for Van Winkle's disqualification, dual motive analysis would apply. The agency would be required to prove that it would have reached the same decision even if the employee had not engaged in protected conduct. *See Am. Nuclear Resources*, 134 F.3d at 1295. "The employer bears the risk if the two motives prove inseparable." *Id.* The agency cannot meet that burden of proof here.

¹¹⁶ JX 15, ¶ 2.

statements.¹¹⁷ The only statements in the record by employees who were approached by Van Winkle contain no evidence whatsoever of coercion or threats. In fact, the evidence leads to the opposite conclusion.

Wiley Flynn, one of the three employees who purportedly supplied evidence of coercion,¹¹⁸ signed a statement in the AR15-6 report to the effect that: “Mr. Van Winkle asked if I would answer questions over the phone or sign a statement. He didn’t explain what the issue was. I declined to take part and he dropped the issue.”¹¹⁹ Carol Hunter signed a statement saying that when she declined to go with Van Winkle to an appointment with the Commander where he would raise a complaint, Van Winkle did not pursue the issue further.¹²⁰ She also made a statement that she had overheard Van Winkle say in the break room “that he was sticking his neck out for everybody else because they didn’t want to get involved. But if they were subpoenaed they would have to tell what they knew.”¹²¹ Archie Babb stated that Van Winkle had told him that he was going to sue the government and that he had a lawyer. Babb told Van Winkle that he did not want to be involved. According to Babb, Van Winkle’s reply was that he might have to have Babb subpoenaed. Babb went on to say: “His last remarks that [sic] he was going to make them pay for his breathing that igloo air.”¹²²

¹¹⁷ RDO at 7, n.7; at 29, n.23.

¹¹⁸ Tr. 740-41 (Bilyeu).

¹¹⁹ JX 7, p.25; JX 7, p. 9.

¹²⁰ JX 7, p. 26.

¹²¹ JX 7, p. 8.

¹²² JX 7, p. 10.

These statements evidence that Van Winkle was making complaints, and possibly attempting to gather evidence and planning to bring a lawsuit in which BGCA employees might be subpoenaed – matters of obvious concern to management, but perfectly legitimate activities which are protected by the environmental whistleblower laws.¹²³ They do not evidence any threats or coercion. The claim of coercion was an unsupported pretext.

The other stated reasons for the disqualification, “lack of trust between you and myself [Bilyeu], “disgruntled employee,” and “lack of positive attitude,” are unsupported by any further explanation or evidence in the disqualification memo. These terms are, as Judge Phalen pointed out, so general as to encompass virtually anything with which the certifying official does not agree. *See Bobreski*, DOL Rptr. at 19 (“Vague and subjective reasons about personality issues may also suggest that the employer's reasons are pretextual or in reality complaints about whistleblowing”).

That any of Van Winkle’s attitudes or actions could amount to a “danger to the stockpile” is on its face absurd. Even if Van Winkle did in fact attempt to coerce fellow employees to sign statements and threatened them with subpoenas, this would not amount any evidence that Van Winkle would place the stockpile of chemical weapons in jeopardy. This defamatory accusation implies that Van Winkle might engage in terrorist activity, and evidences a retaliatory animus towards him.

Second, the additional reasons stated in Hancock’s report also appear to be

¹²³ The CPRP documents seem to assume that telling an employee he might be subpoenaed in a lawsuit is some sort of misconduct that would obviously support disqualification from the CPRP. This assumption reveals BGCA management’s ignorance of whistleblower rights. Van Winkle’s plans to bring whistleblower litigation were protected, and in fact some of the BGCA employees *were* subpoenaed in the hearing in this case as a perfectly normal incident of the proceeding.

pretextual.¹²⁴ Hancock concluded that Van Winkle had problems keeping his equipment running and thus “was not highly competent,” and that he was “characterized as a negative presence by the majority of those interviewed”¹²⁵ These claims are highly suspect. First, it should be noted that Hancock considered “the most damaging evidence” against Van Winkle to be his affidavit containing his protected disclosures,¹²⁶ indicating that his recommendation for permanent disqualification was motivated at least in large part by retaliation for protected activity. Also, as noted above, there was testimony that employees were pressured to sign statements as part of the investigation. Van Winkle and his union representative were not permitted to be present when the employees were interviewed. Thus, the interview statements gathered in the investigation are suspect.

Moreover, directly contrary to the claims that Van Winkle had problems with his equipment or was not highly competent, prior to his protected disclosures, management had stated in his performance evaluations that that he did an “exceptional job of maintaining his equipment.”¹²⁷ They also stated that “His work is always done right and on time,” that he was “very team supportive,” “very dependable and reliable,” and “constantly seeks to improve his skills and knowledge.”¹²⁸

¹²⁴ Presumably, the disqualification must be supported only by the reasons given in the actual disqualification memo. However, in case the reasons given in Hancock’s report are also considered to potentially supply legitimate non-retaliatory reasons for the disqualification, they are discussed here.

¹²⁵ JX 7 at 3.

¹²⁶ JX 7 at 3.

¹²⁷ JX 82, p.2; *see also*, JX 81, p.2.

¹²⁸ JX 82, p. 2; *see also* JX 81, p. 2: “Mr. Van Winkle possesses an excellent technical knowledge ... is very dependable and reliable.”

The last evaluation in which Van Winkle received these favorable comments was signed by Stanfield and Bilyeu on February 15, 2005, while Van Winkle was at the mini-cam training course, just days before he began his disclosures and complaints about the placement of the V to G pads.¹²⁹ Yet, directly contrary to his statement in the 2005 performance evaluation that Van Winkle was “very team supportive,”¹³⁰ Stanfield stated in the CPRP investigation that “he isn’t a team player.”¹³¹ Bilyeu, after stating in the 2005 performance evaluation that Van Winkle “does an exceptional job maintaining his equipment,” and always did his work “right and on time,”¹³² stated in the CPRP investigation that “his equipment routinely malfunctioned” and he had an “inability to keep his equipment in service,” causing the need to repeat work.¹³³ These complete reversals of position, made in support of BGCA’s effort to disqualify Van Winkle after he made his protected disclosures, strongly support a finding of retaliation. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983) (retaliation found where prior to protected activity employee had superior performance evaluations, but adverse action taken based on claimed poor performance).

¹²⁹ JX 82, p. 1.

¹³⁰ JX 82, p. 2.

¹³¹ JX 7 at 30. The ARB has found that a claim that an employee is “not a team player” cannot support adverse action when it penalizes the employee for protected activity. *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998), slip op. at 6.

¹³² JX 82 at 2.

¹³³ JX 7 at 35.

Co-worker witnesses at the hearing also confirmed Van Winkle's competence and conscientiousness. Examples of such testimony are: "He was extremely competent and very precise and concise about whatever I asked him."¹³⁴ "He knew what he was doing."¹³⁵ "I think he's a very knowledgeable, upstanding type guy, you know."¹³⁶ Hunter testified that everyone's equipment sometimes went down.¹³⁷

Finally, the irregular procedures and unfairness in the course of the CPRP disqualification proceedings also support a finding of retaliation. While the ARB found that DOL does not have authority under the environmental whistleblower laws to review compliance with Army procedures in the disqualification proceedings, and thus the agency action cannot be reversed based on failure to comply with the agency's own procedures, irregular procedures can supply evidence of retaliation. *DeFord*, 700 F.2d at 287 (6th Cir. 1983); *Johnson v. Old Dominion Security*, 86-CAA-3, 4 and 5 (Sec'y May 29, 1991). Here, as detailed above, Van Winkle was not allowed to confront the witnesses against him, or even see their statements in order to formulate his rebuttal. The reasons he was given for his permanent disqualification – "lack of trust," "signs of behavior of a disgruntled employee," and "lack of positive attitude" – lacked sufficient detail to enable him to prepare a meaningful response. The non-specific nature of the allegations is also a violation of the Chemical Surety Regulation, AR 50–6. Section 2-29 requires that the written notification of permanent disqualification:

¹³⁴ Tr. 270 (Schafermeyer).

¹³⁵ Tr. 317 (Rogers).

¹³⁶ Tr. 335 (Bowling).

¹³⁷ Tr. 311 (Hunter).

cite specific circumstances that support the certifying official's decision to disqualify. Except for a physical or mental condition documented in the individual's health record, statements such as "Alcohol abuse," "Drug abuse," "Contemptuous attitude," or "Courts-martial conviction" are inadequate by themselves.¹³⁸

These irregular procedures suggest that BGCA had pre-determined to disqualify Van Winkle and did not intend to give him a fair opportunity to rebut the allegations against him. They are further evidence of retaliation.

In sum, the record demonstrates that Van Winkle's CPRP disqualification was motivated, at least in part, and in fact primarily if not solely, by Van Winkle's protected activity in making disclosures and in preparing for litigation under the whistleblower laws. BGCA cannot prove that it would have disqualified Van Winkle absent his protected activity. The disqualification thus constituted prohibited retaliation under the environmental whistleblower statutes.

IV. VAN WINKLE WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT

In addition to the CPRP disqualification, Van Winkle suffered other actions and conditions constituting a hostile work environment. The combination of the CPRP disqualification and the hostile work environment ultimately culminated in a constructive discharge, as discussed below.

The ARB has found that hostile work environment claims are cognizable in whistleblower cases. *E.g. Lewis v EPA*, ARB No. 04-117, ALJ Nos. 2003-CAA-005 and 006 (June 30, 2008), DOL Rptr. at 5.

¹³⁸ JX 39, p.2. The Merit Systems Protection Board ruled on exactly this point, finding that the "statement 'contemptuous attitude toward the law' is not a specific description of the circumstances [that] warranted CPRP revocation as required by AR 50-6. Thus . . . the appellant has proven the agency erred in not complying with its own regulation." *Hijar v. Dep't of the Army*, 2008 MSPB LEXIS 2113 at *14 (M.S.P.B. April 11, 2008).

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. To succeed on a hostile work environment claim, Lewis must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) he suffered intentional harassment related to that activity, 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment, and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect him.

Id. (footnotes omitted and internal quotation marks omitted).

As described in the Statement of Facts, prior to the disclosures and complaints outlined above, Van Winkle's career at BGAD/BGCA had progressed steadily. He started out in 1999 as a GS-5 security guard, and by 2003 was a grade 10 Air Monitoring Systems Operator/Mechanic.¹³⁹ He was offered training that allowed him to progress to more skilled jobs.¹⁴⁰ His goal, which he believed he was likely to achieve based on his experience up to that point, was to progress to a GS-11 physical science technician.¹⁴¹ In pursuit of that goal, in addition to taking training offered by BGCA, he was enrolled in a college chemistry degree program.¹⁴²

Van Winkle's first and second line supervisors at BGCA, Gary Stanfield and Thomas Bilyeu, gave him the highest possible ratings as an air monitor.¹⁴³ As further evidence of success at BGCA, in the 18 months prior to his permanent disqualification in

¹³⁹ Tr. 32 (Van Winkle).

¹⁴⁰ Tr. 200 (Van Winkle); JX 102.

¹⁴¹ Tr. 200-01 (Van Winkle).

¹⁴² Tr. 201 (Van Winkle).

¹⁴³ JX 81; JX 82.

January 2006, Van Winkle received 3 “Commander’s Coins” and a \$250.00 cash award.¹⁴⁴

After his disclosures, things changed dramatically for Van Winkle. The hostile work environment described below evidences the animus towards Van Winkle for his whistleblowing, and thus supports a conclusion that both the incidents of the hostile work environment and the CPRP disqualification were retaliatory.

A. Shunning and Disparaging Remarks

After his disclosures, people at BGCA stopped talking to Van Winkle and socializing with him. Some people in management would not even respond when he said “good morning.” He was looked at with hatred and contempt.¹⁴⁵ Van Winkle learned from co-workers that members of management, including Bilyeu, McCoy and Susan Epperson, were making discrediting remarks behind his back about his personality, his job performance and his character.¹⁴⁶ When Kim Schafermeyer was hired in August 2005 as a physical scientist, Bilyeu told him to avoid Van Winkle because he was problematic and had made misrepresentations.¹⁴⁷ According to Schafermeyer, management spoke about Van Winkle in a negative and condescending manner numerous times.¹⁴⁸ When Bilyeu learned that Schafermeyer had talked to Van Winkle about

¹⁴⁴ JX 17. p. 5. Commander’s coins were handed out on recommendations from superiors for outstanding performance. Tr. 593 (Shuplinkov).

¹⁴⁵ Tr. 225-26 (Van Winkle); Tr. 83-84 (Jackson).

¹⁴⁶ Tr. 227, 247 (Van Winkle).

¹⁴⁷ Tr. 268-69 (Schafermeyer).

¹⁴⁸ Tr. 271, 280-81 (Schafermeyer).

continuing education, Bilyeu admonished Schafermeyer and stated, “I’ll take care of Mr. Van Winkle’s future” in an ominous and threatening manner.¹⁴⁹ McCoy and Epperson would regularly complain about the extra work they had to do because of the investigations spawned by Van Winkle’s disclosures, saying that it was “That damn Rip’s fault.”¹⁵⁰ McCoy told James Jackson, then a BGCA physical science technician, that they needed to do something to get Van Winkle away from BGCA.¹⁵¹ Lt. Col. Shuplinkov found it necessary to call an all-hands meeting to tell BGCA employees that Van Winkle was still a member of the organization and should be treated with respect.¹⁵²

B. Lowered Performance Evaluation

The drastic change in Van Winkle’s supervisor’s attitudes towards him after his disclosures is reflected in the change in his performance evaluation. His performance rating went from “1,” the highest possible rating, for 2003 and 2004,¹⁵³ to 3 for 2005.¹⁵⁴ Prior to his disclosures, he received many positive comments, such as “excellent technical knowledge . . . work is always done right and on time . . . team supportive . . . dependable and reliable.”¹⁵⁵ The only comment added to his rating in 2005 was that he had been temporarily disqualified since August 3, 2005, and had been unable to perform

¹⁴⁹ Tr. 272-73 (Schafermeyer).

¹⁵⁰ Tr. 273 (Schafermeyer). “Rip” was Mr. Van Winkle’s nickname.

¹⁵¹ Tr. 110 (Jackson).

¹⁵² Tr. 527, 615 (Shuplinkov).

¹⁵³ JX 81, p. 2; JX 82, p. 2.

¹⁵⁴ JX 83, p. 3.

¹⁵⁵ JX 82, p. 2; *see also*, JX 81, p. 2

his regular duties. All of the positive comments from the last two years disappeared. This was despite the fact that Van Winkle continued to do good work in the maintenance department after his CPRP disqualification.¹⁵⁶ As noted above (at 16), the DOD IG civilian reprisal unit found this lowered performance evaluation to be retaliation for Van Winkle's protected disclosures.

Moreover, as detailed above in Sec. III, both Stanfield and Bilyeu made statements in the CPRP investigation that were directly contrary to the statements they had made only a few months earlier in his performance evaluation, now claiming that he had problems with his equipment and was the cause of work being repeated, and was not a "team player."

C. Training and Education

Van Winkle began to be denied training.¹⁵⁷ In particular, he was denied training on Hewlett-Packard Dynatherm air monitoring equipment; training he would need to perform the duties of a physical science technician.¹⁵⁸ When Van Winkle met with Bilyeu about this denial, Bilyeu told Van Winkle that he would not send him to any more job training outside his job description. This was despite the fact that other employees were being given training outside their job descriptions, which could help them advance

¹⁵⁶ JX 83, p. 3; Tr. 197 (Van Winkle). During Van Winkle's temporary and permanent disqualifications, he continued to work in the maintenance building with Virgil Chasteen as his supervisor. Tr. 668 (Chasteen). Chasteen testified that Van Winkle was a conscientious employee who showed no resentment or unwillingness to do his job because he had been disqualified from the CPRP. Tr. 680 (Chasteen).

¹⁵⁷ Tr. 202 (Van Winkle).

¹⁵⁸ Tr. 202-03 (Van Winkle).

to a higher position.¹⁵⁹ His request for tuition assistance for course work towards his chemistry degree was denied.¹⁶⁰

D. Faulty Equipment

Van Winkle was also given faulty equipment. Three days after he made the allegation of unsafe practices in the suit laundry, McCoy took away the RTAP Van Winkle was using and reassigned him one that was in such disrepair that it was a fire hazard and it took him almost a month to bring it up to operating standards.¹⁶¹ There was actually a hay bale of bird's nest in the engine compartment. Stanfield advised Van Winkle to report the problems, take the vehicle out of service, call Security and take pictures to document its condition.¹⁶² Stanfield testified that he had "no idea" why McCoy would assign Van Winkle a vehicle like that.¹⁶³

In addition, on numerous occasions Van Winkle would find when he reported to work that the equipment he had repaired and was ready to use had been taken away, and he would have to find other equipment, which was in ill-repair or not working. As a result, he was unable to do work which had been assigned to him.¹⁶⁴ Buttons would be

¹⁵⁹ Tr. 203-205 (Van Winkle). In addition to the examples provided by Van Winkle, McCoy testified that she took several courses offered by the Army for supervisory positions prior to becoming the Supervisory Chemist, in preparation for that position. Tr. 824 (McCoy).

¹⁶⁰ Tr. 206 (Van Winkle).

¹⁶¹ Tr. 207-09 (Van Winkle).

¹⁶² Tr. 209 (Van Winkle); Tr. 355-56 (Stanfield).

¹⁶³ Tr. 356 (Stanfield).

¹⁶⁴ Tr. 210 (Van Winkle).

taken off his mini-cam and his heat trace lines would be missing.¹⁶⁵ This type of incident occurred only once in a blue moon before his disclosures, but became increasingly frequent afterwards.¹⁶⁶

E. Removal of Duties

After raising complaints about the monitoring in the suit laundry in June 2005, Van Winkle was taken off that task, for which he had frequently received overtime pay in the past.¹⁶⁷ In addition to the laundry, he had frequently performed other tasks on overtime, such as testing min-cams, calibrating equipment and maintenance. These assignments also stopped after his disclosures.¹⁶⁸

In the summer of 2005, Van Winkle was moved from his air monitoring duties to the maintenance department. As such, he was not eligible for the level of hazard pay applicable to the Chemical Limited Area (CLA). His temporary and permanent disqualifications made him ineligible to perform any duties in the CLA.¹⁶⁹

F. Loss of Overtime

When Van Winkle was temporarily disqualified from the CPRP, he was no longer eligible for overtime in the CLA, but he was not been placed on an overtime roster at his new location in the maintenance department. As his union steward (Begley) testified, as

¹⁶⁵ Tr. 211 (Van Winkle).

¹⁶⁶ Tr. 210-11 (Van Winkle).

¹⁶⁷ Tr. 159, 161 (Van Winkle).

¹⁶⁸ Tr. 212 (Van Winkle).

¹⁶⁹ JX 8; Tr. 213 (Van Winkle).

far as overtime, he was “a man with no country.”¹⁷⁰ This resulted in Van Winkle only receiving one hour of overtime between late July and mid-December of 2005.¹⁷¹ This did not change until Begley threatened to file a grievance.¹⁷² Even when Van Winkle was allowed to receive overtime in his new building, he could only be asked after the six other people who worked in that building.¹⁷³ Begley negotiated with management, and felt that under the circumstances, this was the best that could be achieved.¹⁷⁴

G. Lack of Recognition on Departure from BGCA

When Van Winkle left BGCA, he was not given the usual going away party or plaque.¹⁷⁵

H. Van Winkle Was Subjected to an Actionable Hostile Work Environment

The combination of all of these conditions and incidents caused Van Winkle’s tenure at BGCA to be changed from one in which his career was progressing, he received positive performance evaluations and awards, he was given opportunities for training and overtime, and where he enjoyed the respect of his supervisors and co-workers -- to one in

¹⁷⁰ Tr. 420 (Begley).

¹⁷¹ That one hour occurred because everyone was held late getting off work. Tr. 222 (Van Winkle).

¹⁷² JX 40; Tr. 223 (Van Winkle); Tr. 420-21 (Begley).

¹⁷³ Tr. 422, 426 (Begley).

¹⁷⁴ Tr. 423, 426 (Begley). Half of Winkle’s “overtime” hours listed on the chart prepared by BGCA were actually comp time. JX 40. This is not actual overtime paid at time and a half, but reflected hours that Van Winkle worked at his regular salary to make up for hours he took off to go to college classes. Tr. 223 (Van Winkle); Tr. 663 (Alby). Because the chart lists only RTAP operators, it also does not reflect overtime hours that Van Winkle previously worked that were given to physical science technicians. Tr. 224 (Van Winkle); Tr. 662 (Alby).

¹⁷⁵ Tr. 373-74 (Stanfield).

which he was shunned and disparaged, his efforts to perform his duties were sabotaged by the provision of faulty equipment, his opportunities for training and overtime were eliminated, and his efforts towards advancement were stymied. This amounted to harassment that was “sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment,” and which “would have detrimentally affected a reasonable person and did detrimentally affect him.” *Lewis*, DOL Rptr. at 5.

V. THE HOSTILE WORK ENVIRONMENT WAS RETALIATORY

All of the incidents of the hostile work environment -- including shunning and disparagement, lowered performance evaluation, loss of duties and overtime, provision of faulty equipment, denial of training and education, and the failure to recognize his contributions when he left BGCA – occurred after Van Winkle made his protected disclosures, in the relatively short period between when his disclosures began in February 2005 and when he left BGCA in October 2006. Thus, proximity in time supports a finding of retaliation. *See Osage Tribal Council*, slip op. at 4 (proximity in time between the disclosures and adverse action supplies “solid evidence of causation”).

Moreover, Van Winkle’s treatment after the disclosures was a dramatic change from the situation prior to his disclosures. As described above, Van Winkle’s career had been steadily progressing prior to the disclosures and he had received positive performance evaluations and awards. The same managers who previously sang his praises in his performance evaluations rather suddenly found him uncooperative and incompetent. *See De Ford*, 700 F.2d at 287 (retaliation found because prior to protected activity employee had had superior performance evaluations and negative remarks were

made about the employee only after his protected activity); *Overall*, slip op. at 15-17, 32-33 (finding retaliation where prior to protected activity, employee had received excellent performance evaluations, inviting “scrutiny” of what caused adverse action, and finding employer’s asserted non-retaliatory reasons were refuted).

In addition, some of the incidents of the hostile work environment were direct responses to Van Winkle’s protected disclosures, such as management complaints that his disclosures caused extra work and claims that they involved misrepresentations.¹⁷⁶ McCoy’s comment reported by Jackson that “I wish Van Winkle would stop doing what he’s doing. We need to do something to get him away from here,” was made in the context of testing the functioning of the V to G pads in response to Van Winkle’s disclosures.¹⁷⁷

In sum, the hostile work environment suffered by Van Winkle was retaliation for his protected activity.

VI. VAN WINKLE WAS CONSTRUCTIVELY DISCHARGED

“To prevail on a constructive discharge claim, a plaintiff must show either that (1) the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign or (2) the employer by its discriminatory actions forced the plaintiff to choose between resignation or termination.” *Hall v. Dept. of Labor*, 476 F.3d 847, 860 (10th Cir. 2007), *cert. denied*, 522 U.S. 993 (2007) (internal quotation marks and citations omitted). Choosing retirement when there is “no definite prospect of continued employment with

¹⁷⁶ Tr. 268-69, 273 (Schafermeyer).

¹⁷⁷ Tr. 110 (Jackson).

the company" constitutes constructive discharge. *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1128 (6th Cir. 1998). *See also, Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989) (a "career-ending action" amounts to a constructive discharge); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-49 (Feb 28 2011), DOL Rptr. at 10 (stating standard for constructive discharge claim).

Van Winkle was constructively discharged from BGCA because he was forced to choose between resignation and loss of continued employment. He would not have resigned if he had believed there was any prospect of continuing his career at BGCA.¹⁷⁸ He reasonably believed that he had no choice but to take a permanent medical disability, because if he did not he would be let go. Beginning when he was still in the hospital, Begley suggested to him the possibility of a permanent medical disability.¹⁷⁹ Van Winkle's surgeon was unwilling to sign the necessary paperwork, because he believed it was much too early to tell if Van Winkle would be disabled.¹⁸⁰ The subject was raised again when Van Winkle returned to work on light duty. Begley told Van Winkle that he would not be able to stay in a light duty position forever. Management could do a job search, and if they did not find a permanent job he could do with his medical restrictions, he would lose his job.¹⁸¹ Van Winkle checked with the personnel department, and was

¹⁷⁸ Tr. 244 (Van Winkle).

¹⁷⁹ Tr. 228 (Van Winkle).

¹⁸⁰ Tr. 229-30 (Van Winkle).

¹⁸¹ Tr. 232-33 (Van Winkle).

told that if he did not get the medical disability, there were no jobs available for him.¹⁸²

Begley confirmed to him that if he did not get the medical disability, he would likely be fired.¹⁸³ Based on all of this information, Van Winkle applied for permanent medical disability.¹⁸⁴

In addition to what Begley was telling him, Van Winkle reasonably believed that management was trying to force him out with a medical disability because of his whistleblowing. He based this belief on the fact that management was telling him there were no jobs available that he could do with his restrictions when there actually were such jobs, because he was being treated differently from other employees whose disabilities were accommodated,¹⁸⁵ and because BGCA appeared to be so eager to have him take disability that they had their own doctor evaluate him, and that doctor declared him totally disabled in less than three minutes.¹⁸⁶

Begley testified that he encouraged Van Winkle to apply for disability on his own initiative, without any prompting from management.¹⁸⁷ He confirmed, however, that he communicated to Van Winkle his belief that management would not keep Van Winkle on light duty and that he would probably lose his job.¹⁸⁸ Begley viewed the likelihood of

¹⁸² Tr. 233 (Van Winkle).

¹⁸³ Tr. 234 (Van Winkle).

¹⁸⁴ Tr. 234-35 (Van Winkle).

¹⁸⁵ Tr. 235-36 (Van Winkle),

¹⁸⁶ Tr. 237-38 (Van Winkle).

¹⁸⁷ Tr. 432, 452 (Begley).

¹⁸⁸ Tr. 431-32, Tr. 491 (Begley).

Van Winkle losing his job as stemming from a combination of Van Winkle's disabled status and his whistleblowing. He confirmed that there probably were other jobs Van Winkle could have done.¹⁸⁹ He encouraged Van Winkle to get disability because he "wouldn't give a dime for his chances of surviving, being employed there."¹⁹⁰ That opinion was based on the fact that Van Winkle had challenged management and said management was incompetent at the CPRP meeting with Shuplinkov and Bilyeu.¹⁹¹

In addition, Van Winkle's tenure at BGCA was highly imperiled even before the accident because of his permanent disqualification from the CPRP. Van Winkle had been told by Rooney and Shuplinkov that his termination from the CPRP could be grounds to remove him from employment if there was not a vacancy in a non-PRP status.¹⁹² Van Winkle was given temporary duties but never had a formal position after his disqualification.¹⁹³ As such, his job was not secure and he could have been released.¹⁹⁴ Although management never explicitly said they were going to terminate Van Winkle after his disqualification from the CPRP, the loss of CPRP status often meant loss of a job. Begley testified that "The decision to permanently decertify somebody from PRP program, a lot of times will mean they won't have a career there much longer because

¹⁸⁹ Tr. 435 (Begley).

¹⁹⁰ Tr. 491 (Begley).

¹⁹¹ Tr. 492 (Begley)

¹⁹² Tr. 264-65 (Van Winkle).

¹⁹³ Tr. 700 (Bilyeu); Tr. 43-44 (Begley).

¹⁹⁴ Tr. 444, 445-46 (Begley). *See also*, RDO at 19: "CPRP certification may ultimately lead to placing jobs of such individuals in jeopardy as a result of CPRP decertification."

that's the job you was hired to do. . . . If you can't . . . get your PRP certification, it's very likely that you won't be employed there."¹⁹⁵ As Judge Phalen found, "Begley also felt that Respondent's management would find some way to get rid of [Van Winkle] without his CPRP."¹⁹⁶

Lt. Col. Shuplinkov testified that he had a plan to rehabilitate Van Winkle, with the goal of returning him to the CPRP.¹⁹⁷ However, that plan did not provide any real prospect of continued employment at BGCA. Shuplinkov had abandoned work on the plan when Van Winkle broke his back,¹⁹⁸ and he left the command of BGCA in July 2006.¹⁹⁹ As Bilyeu testified, the rehabilitation program "didn't really go anywhere."²⁰⁰ There was nothing in writing that the new commander who replaced Shuplinkov would have been obligated to honor.²⁰¹ Rehabilitation of someone who had been permanently disqualified had never been done before. Rooney, the highest official on civilian personnel issues,²⁰² did not know enough to be able to implement the plan.²⁰³ Moreover,

¹⁹⁵ Tr. 513 (Begley); *see also* Tr. 487 (Begley) (once Van Winkle was permanently disqualified, Begley thought that termination was "what's coming next.")

¹⁹⁶ RDO at 14.

¹⁹⁷ Tr. 540 (Shuplinkov).

¹⁹⁸ Tr. 540, 617-18 (Shuplinkov)

¹⁹⁹ Tr. 540 (Shuplinkov).

²⁰⁰ Tr. 706 (Bilyeu).

²⁰¹ Tr. 640 (Rooney).

²⁰² Tr. 622 (Rooney).

²⁰³ Tr. 639-40 (Rooney).

Bilyeu was never fully committed to the rehabilitation plan,²⁰⁴ and it would have been his decision, as the certifying official, as to whether trust had been re-established so that Van Winkle could re-enter the CPRP.²⁰⁵

Begley testified that he didn't see any receptive attitude towards working with Van Winkle in the future from anyone in management below Col. Shuplinkov.²⁰⁶ Coleen Sydor, the BGCA Chemical Surety Officer, testified that the surety regulation did not have a provision for rehabilitation. She disagreed with Col. Shuplinkov's decision on rehabilitation because "if you have an employee you do not trust, you get him away from the area. And if you don't have a job, then they're out the door. That's the way it's supposed to work."²⁰⁷

All of these factors, combined with the hostile work environment Van Winkle had endured since his disclosures, caused Van Winkle to reasonably believe that he had no future at BGCA. He was presented with a choice between being terminated from BGCA with no recompense and leaving with disability payments. Like the plaintiff in the *Scott* case, he had "no definite prospect of continued employment with the company" and "decided upon the option best suited to his needs with the understanding that he did not have the option of continued employment." *Scott*, 160 F.3d at 1128.

When Van Winkle decided to run for political office and was required to resign his position at BGCA before his disability came through, in essence he had already been

²⁰⁴ Tr. 705 (Bilyeu).

²⁰⁵ Tr. 705, 775 (Bilyeu).

²⁰⁶ Tr. 499-500 (Begley).

²⁰⁷ Tr. 802-03 (Sydor).

constructively discharged. In any event, at that point, he had no definite prospect for continued employment at BGCA and made his choice accordingly.

These circumstances meet the standard for a constructive discharge that “the employer by its discriminatory actions forced the plaintiff to choose between resignation or termination.” *Hall*, 476 F.3d at 860 (citing *Burks v. Oklahoma Publ'g Co.*, 81 F.3d 975, 978 (10th Cir. 1996); *Acrey v. Am. Sheep Indus. Ass'n*, 981 F.2d 1569, 1573-74 (10th Cir. 1992)). Choosing retirement when there is “no definite prospect of continued employment” constitutes constructive discharge. *Scott*, 160 F.3d at 1128. *See also, Price Waterhouse*, 825 F.2d at 473 (D.C. Cir. 1987) (a “career-ending action” amounts to a constructive discharge).

In sum, Van Winkle’s CPRP disqualification, combined with management’s other hostile, retaliatory actions towards him constituted a constructive discharge.

CONCLUSION AND RELIEF SOUGHT

In conclusion, Van Winkle engaged in protected activity and in response was subjected to a retaliatory CPRP disqualification and hostile work environment, ultimately resulting in a constructive discharge. The statutes under which Van Winkle proceeds, the CAA and the SWDA (or RCRA) provide for reinstatement, compensatory damages and attorneys’ fees and costs for prevailing parties, 42 U.S.C. § 6971(b) and (c) (SWDA); 42 U.S.C. § 7622(b)(2)(B) (CAA). Specifically, the CAA provides:

If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the

complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred....

42 U.S.C. § 7622(b)(2)(B). The SWDA provides:

If [the Secretary] finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee . . . to his former position with compensation.

42 U.S.C. § 6971(b). Attorney's fees and costs are provided in 42 U.S.C. § 6971(c).

The DOL regulations provide that

If the ALJ concludes that the respondent has violated the law, the order shall direct the respondent to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. . . . At the request of the complainant, the ALJ shall assess against the respondent, all costs and expenses (including attorney fees) reasonably incurred.

29 C.F.R. § 24.109(d)(1).

Van Winkle seeks reinstatement with back pay with interest²⁰⁸ and compensation for lost hazard pay and overtime, as well as reinstatement of the conditions of his former position, including entitlement to retirement and other benefits that he would have had if he had remained employed at BGCA.²⁰⁹ Van Winkle also seeks compensatory damages in the form of educational expenses he was forced to incur in order to prepare for another

²⁰⁸ See *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991); *Sprague v. American Nuclear Resources, Inc.*, 92-ERA-37 (Sec'y Dec. 1, 1994).

²⁰⁹ See *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), slip op. at 9.

career after being constructively discharged from BGCA. These expenses amount to approximately \$64,000.

In addition, Van Winkle seeks a \$75,000 award for emotional distress and a \$75,000 award for damage to reputation and career. *See e.g. De Ford*, 700 F.2d at 290-91 (reversing Board decision that award for medical expenses and damage to reputation not available in whistleblower cases); *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993), slip op. at 14 (compensatory damages may be awarded in a whistleblower case for pain and suffering, mental anguish, embarrassment and humiliation).

These awards are justified here by the emotional distress suffered by Van Winkle due to the retaliation and hostile work environment,²¹⁰ and the severe defamation of his character inflicted by BGCA, including statements in the press and the accusation that he “place[d] the stockpile in jeopardy,” implying that he might engage in terrorism. This accusation was particularly painful to Van Winkle, a highly patriotic individual and decorated veteran on the first Gulf War. In addition to causing emotional distress, these statements are in his record and are likely to damage his future job prospects.²¹¹ Damage

²¹⁰ *See Varnadore v. Oak Ridge National Laboratory*, 92- CAA-2, 5 and 93-CAA-1 (ALJ June 7, 1993), slip op. at 66-67 (awarding damages for stress caused by hostile work environment).

²¹¹ In fact, in the process of being hired as a surveyor, Van Winkle had to answer extensive questions about his situation with BGCA. His employer would not allow him to perform any jobs at BGAD, for fear that the Army might retaliate against the company if it knew that the company employed Van Winkle. Van Winkle also justifiably fears that the statements about him in the CPRP disqualification will hurt his chances to obtain a teaching position when he finishes his degree. Van Winkle would testify to these facts, which arose subsequent to the hearing in this case, either in person or by affidavit, if the submission of additional evidence on damages is permitted, as requested below.

to Van Winkle's career was also caused because if he had not been disqualified from the CPRP and constructively discharged, his career and his income and corresponding future retirement benefits would have advanced, as had occurred up to that point. He may well have achieved the GS 11 physical science technician position which was his goal.²¹²

In addition, emotional distress was caused by the fact that Van Winkle was unemployed for two years after he left BGCA, and underemployed for most of the time since then. He was forced to abandon the degree he was pursuing in chemistry and start a new college degree in surveying and mapping. The economic downturn in 2008 caused work to be unavailable in that field, and Van Winkle again became unemployed and needed to seek a degree in yet another field, education. *See e.g. Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996), slip op. at 3 (finding entitlement to compensatory damages for emotional distress, based on complainant having very little money after the discharge). As Van Winkle put it at the hearing, the whole thing "has been an overwhelming ordeal for me."²¹³ Begley confirmed how stressed Van Winkle was by the whole situation and the uncertainty of his future.²¹⁴ *See Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), slip op. at 22 (finding determination of non-economic damages is a subjective one, and upholding \$100,000 award based finding that the termination of the Complainant's employment caused emotional harm and damage to his reputation).

²¹² Tr. 200-01 (Van Winkle).

²¹³ Tr. 244 (Van Winkle).

²¹⁴ Tr. 442-43 (Begley).

Finally, Van Winkle also seeks an order reversing his CPRP disqualification and removing all documents related to his disqualification from his personnel files and other files maintained by BGCA/BGAD. Without relief from this tribunal, this action, including the defamatory statement that Van Winkle “place[d] the stockpile in jeopardy,” will remain on his record and follow him for the rest of his life. *See Doyle v. Hydro Nuclear Servs.*, ARB No. 98-022, ALJ No. 1989-ERA-22 (ARB Sept. 6, 1996), DOL Rptr. at 9, *rev'd. on other grounds sub nom Doyle v. U.S. Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002), (finding appropriate relief includes purging the employee's record or any inappropriate disciplinary actions or performance appraisals).

Because the ARB remanded for full reconsideration of Van Winkle’s complaint, and because his damages have continued to accrue since the hearing before the ALJ, Van Winkle requests the opportunity to submit additional evidence and documentation of his damages. If permitted, Van Winkle will do so with his Reply Brief. *See Pillow*, DOL Rptr. at 14 (ALJ on remand should take evidence regarding the amount of back pay and on compensatory damages). If Van Winkle is the prevailing party, counsel will submit a detailed justification of Van Winkle’s claim for attorney’s fees and expenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 26, 2011 I caused the foregoing Complainant's Opening Brief on Remand by overnight Express Mail on the following:

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