



Issue Date: 15 April 2019

CASE NO.: 2017-CAA-00001

In the Matter of:

ANTHONY HO, JR.,
Complainant,

v.

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES,
Respondent.

DECISION AND ORDER
DENYING WHISTLEBLOWER COMPLAINT

This action arises under the employee protection provisions of the Clean Air Act (“CAA”), 42 U.S.C. § 7401-7671, found at 42 U.S.C. § 7622, and accompanying regulations found at 29 C.F.R. Part 24.¹ I conducted an in person hearing in Honolulu, Hawaii from September 19 to 21, 2017. Attorney Anthony Bothwell represented Anthony Ho, Jr. (“Complainant”). Attorneys Claire Chinn and Henry Kim represented State of Hawaii, Department of Accounting and General Services (“Respondent”).

At the hearing,² the following exhibits were admitted into evidence: Complainant’s exhibits (“CX”) 1, 2 (only pages 3 to 7, 10 to 23), 3 to 5, 6 (only pages 1 to 17, 23 to 26), 7 (only pages 2 to 7, 13 to 22), and 8, TR at 19-21, 665, 734-45; and, Respondent’s exhibits (“RX”) A and B, with extensive attachments.³ Hearing Transcript (“TR”) at 9.

Respondent filed a closing brief on December 26, 2017, and Complainant filed a closing brief on December 29, 2017, which were marked respectively as ALJX 1 and ALJX 2. The record closed on December 29, 2017.

¹ Complainant also filed allegations under the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622, which were dismissed for lack of jurisdiction by written order dated November 9, 2017.

² The rules of evidence for administrative hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, Subpart B, apply to this matter. 29 C.F.R. § 24.107(a).

³ RX C, a copy of an arbitrator decision, was not admitted. TR at 9, 29-34; *see* Order Denying Admission, November 16, 2017. In his closing brief, Complainant complained that Respondent had only three exhibits, but with “innumerable” attachments that violated the pre-hearing order. Complainant raised no objection at the hearing and complained for the first time in his closing brief about the exhibits. Any objection to Respondent’s exhibits is overruled. ALJX-2 at 5.

Complainant alleges that Respondent violated the whistleblower protection provisions of the CAA when it took a series of alleged adverse actions against him allegedly in retaliation for reporting safety concerns related to the presence of asbestos at two schools on the Big Island of Hawaii. On December 13, 2016, the Occupational Safety and Health Administration (“OSHA”) denied Complainant’s whistleblower complaint. Complainant objected to the finding, and on January 30, 2017, this Office received his request for a de novo hearing.

The record demonstrated that Complainant had a long and contentious employment history at Respondent, but there was no credible evidence that the actions taken by Respondent, including his ultimate termination, were in any way motivated by Complainant’s alleged exposure and complaints about asbestos. As explained below, after a thorough review of the entire and substantial record, I find that Complainant has not proven his case by a preponderance of the evidence and deny his request for relief.

I. ISSUES IN DISPUTE

This matter presents the following disputed issues:

1. Did Complainant engage in protected activity within the meaning of the (“CAA”)?
2. Did Complainant suffer an adverse action?
3. Has Complainant shown by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged?
4. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Respondent established by a preponderance of the evidence that it would have taken the same adverse action in the absence of Complainant’s protected activity?
5. If Complainant prevails, what compensatory damages and other actions, if any, should be awarded, such as reinstatement to his former position, compensation, back pay, front pay, and attorney’s fees and costs?⁴

29 C.F.R. § 24.109(b)(2); C.F.R. § 24.109(d)(1).

II. TIMELINESS OF THE CLAIM

Respondent terminated Complainant on May 9, 2011, which was confirmed in a discharge letter sent on May 27, 2011. Complainant filed his complaint with OSHA under the CAA on June 15, 2011. He amended his complaint to OSHA on January 17, 2012, seeking to add as an allegation that Respondent refused to pay for periodic asbestos medical monitoring. OSHA denied the amendment finding it was not timely filed because Respondent provided Complainant unequivocal notice on March 22, 2010, that it would not cover the monitoring.

⁴ Complainant seeks damages near \$1,000,000, reinstatement, compensation for emotional and mental distress and loss of his home, and an order that Respondent notify parents of school children on the big island and provide testing to them related to cancer or other illness related to asbestos exposure. TR at 28-29.

In its closing brief, Respondent alleges that other than his May 2011 termination, any other adverse actions should be dismissed as they were not timely filed under the CAA. *See* ALJX-2 at 23. Respondent did not raise timeliness as an issue pre-hearing and it was not covered as a potential issue during the prehearing conference held on September 11, 2017. *See* Order Following Pre-Hearing Conference, September 15, 2017. In his closing argument, Complainant referenced timeliness in an obtuse way related to a hostile work environment, and not in relation to the CAA statutory requirements.⁵ *See* ALJX-1 at 3. At the hearing, I specifically told Claimant that if I found the attempt to amend and add the March 2010 failure to allow medical monitoring was not timely, I would dismiss it. TR at 24-27. Claimant did not address timeliness of the medical monitoring in his case or closing argument. The allegation that medical monitoring was not provided is dismissed as an adverse action because it was not timely filed.

Under the CAA, an employee who believes he has been discharged or otherwise discriminated against by any person must raise the violation with the Department of Labor within 30 days after it occurs. 42 U.S.C. § 7622(b)(1); 29 C.F.R. § 24.103(d). The 30-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of an adverse employment action. *Jenkins v. U.S. Environ. Prot. Agency*, ARB No. 98-146, OALJ No. 88-SWD-2, slip op. at 13 (Feb. 28, 2003) (EPA had contested timeliness throughout). The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Id.* The 30-day limitations period is not jurisdictional and is subject to modification (waiver, estoppel and equitable tolling) “when fairness requires.” *Id.* citing *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995); *see, e.g., Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, slip op at 16 (ARB June 2, 2006). When deciding whether to relax the limitations period in a particular case, the Board has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). The Third Circuit recognized three situations in which tolling is proper: (1) [when] the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Id.* 18-20 (1981) (citation omitted).

Complainant never made any specific allegations about what adverse actions he was alleging were retaliatory or discriminatory here, other than his termination and Respondent’s failure to pay for medical monitoring which were raised at OSHA. TR at 24-27. At hearing, Complainant gave a sprawling account of his entire work history at Respondent, and left timelines and instances of alleged misconduct open, making it difficult to follow and defend. Complainant raised no arguments about whether timelines should be tolled and I did not find any reasons justifying tolling. Other than the two adverse actions specified in the OSHA complaint (termination and medical monitoring), I will not consider any other potential adverse actions as independent causes of action

⁵ On the whole, I found Complainant’s closing argument to be unhelpful and off topic regarding the narrow issues to be determined in this case. In his closing brief, he raised arguments related to the first amendment that were not relevant and were not tied to the issues to be decided here. I reviewed the brief, but did not find the presentation of the arguments helpful, which were generally cut and pasted case notes without specific analysis or discussion relating them to the facts other than in a very conclusory manner. Some of the assertions were not supported by the record, such as stating that Complainant was diagnosed with asbestosis, when there was no evidence of that fact provided. *See* ALJX-1 at 17. Often, the arguments were by innuendo and conjecture, with no realistic basis in the record and with no tie to what I determined the facts to be. I did not find merit in the arguments.

but will consider them as they might be relevant to allegations of retaliation and discrimination in a more global context. *See Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 9-10 (ARB July 14, 2000).

III. FACTUAL FINDINGS⁶

Background

1. On January 22, 2002, Respondent hired Complainant as a Janitor II with its Central Services Division on the island of Oahu, Hawaii. On December 16, 2002, Complainant received a promotion to a Building Maintenance Worker I in the Hawaii District Office at the Hilo base yard on the island of Hawaii. At the Hilo base yard, Complainant's duties and responsibilities were to independently perform skilled building maintenance, repair and construction work, and other related duties as assigned. EX B at 937-39. In his position, Complainant performed carpentry, painting, masonry, welding, and minor electrical and plumbing work in the public schools and public buildings in the cities of Hilo and Kau on the island of Hawaii. *Id.*; TR at 68-69.

Complainant's 2008 Child Pornography Allegation

2. On May 30, 2008, Complainant reported to Glenn Okada, who was the former Hawaii District Engineer that on August 21, 2007, his co-worker Carl Imade saw a now retired co-worker Paul Imamura viewing child pornography while at work at the Hilo base yard. Respondent conducted an investigation and Mr. Okada advised Complainant in a letter dated June 26, 2008, that there was "no evidence that Mr. Imade or any employee at the Hilo Maintenance base yard had witnessed anyone, including Mr. Imamura, viewing child pornography on August 21, 2007." EX B at 1171-72. The evidence demonstrated that Complainant did not personally witness any of the alleged events that he reported, but reported what other people allegedly told him occurred. Complainant did not explain why he waited nine months to report the allegations involving child pornography. Complainant has not accepted the results of the Respondent investigation and continued to claim that child pornography was viewed at the Hilo base yard on August 21, 2007. Complainant has repeatedly maintained that he has a compact disk ("CD") with evidence to substantiate his claims about the child pornography, but despite several requests, Complainant has never made the CD available to Respondent. EX A at 655, 660, 663, 693; EX B at 1171-72.

3. Russ Saito was the State Comptroller, and was head of the Respondent agency and appointed by the Governor. TR at 534-35, 542. Prior to the conclusion of the child pornography investigation, Complainant sent a letter to Mr. Saito dated June 14, 2008, asking for Mr. Saito's assistance in investigating problems at the Hilo base yard because Mr. Okada had not responded to any of Complainant's complaints or concerns. EX B at 1134. Mr. Saito sent Complainant a letter dated June 30, 2008, informing him that Respondent reviewed its files and determined that it had responded to all of the complaints and concerns that Complainant brought to their attention, including the alleged child pornography. EX A at 648. Mr. Saito informed Complainant that he did

⁶ Overall, Respondent's exhibits made more logical sense and were chronologically consistent. Respondent's exhibits generally included the information in Complainant's exhibits, but were often more complete and included attachments to letters that Complainant's exhibits did not. For that reason, for the most part, I cited to Respondent's exhibits. Where Complainant's exhibits were inconsistent or had different information, I also cited to Complainant's exhibits.

not follow the process laid out for him regarding his questions and concerns when he faxed his letter directly to Mr. Saito, and then called Mr. Saito on June 24, 2008, but Complainant disagreed. EX A at 648.

4. Complainant wrote Mr. Saito again on July 21, 2008, stating that he had called Mr. Okada and told him, “this letter is untrue” and to “stop writing UNTRUTHFUL things.” EX B at 1205. (emphasis in original). Complainant also claimed that “un-fortunately for mr. okada I HAVE THE CD's to prove it,” and asked Mr. Saito again for help “because the chain of command dose [sic] not work hear [sic] in Hilo.” *Id.* On July 28, 2008, Complainant sent another letter to Mr. Saito stating, “where are the findings, who did the investigations, who was interviewed, what questions were asked because if you ask the wrong people the wrong question that’s what your [sic] going to get nothing plus nothing is nothing.” *Id.* at 1207. On August 7, 2008, Mr. Saito responded to Complainant and asked him to send him copies of the CDs that Complainant claims to have, as well as any other evidence that Complainant feels would support his allegations about child pornography and stolen ladders from the Hilo base yard. EX A at 655.

5. On April 23, 2007, prior to the alleged child pornography incident, Respondent had instituted a log-on procedure and programmed all computers at the Hilo base yard requiring authorized users to enter a password in order to access the computer. EX B at 1171. Complainant sent a letter to Mr. Okada on October 3, 2008, stating that, before he would agree to the log on procedure, Mr. Okada had to answer his questions first and assure him that no one would be able to access his personal log on. EX A at 658. Complainant stated, "I am willing to sign if you can put in writing that I or any other DAGS worker form [sic] the Hilo base yard will not get blame for child porn since this issue is still not resolved." *Id.*

6. On October 9, 2008, Mr. Saito invited Complainant to give the CDs and any other evidence he had relating to his July 21, 2008, letter to Julie Noji and Sharon Nakamura, who were meeting with Complainant on October 15, 2008, to interview him about an incident at Keaau School on August 20, 2008. EX A at 659-60. Mr. Saito said that Ms. Noji or Ms. Nakamura would personally deliver any information to him when they returned to Oahu. *Id.* Complainant showed two CDs and some photos to Ms. Noji or Ms. Nakamura on October 15, 2008, but did not give them any information. Instead, Complainant told them "No, I want Russ Saito to come here and get them." *Id.* at 536-37. On October 30, 2008, Mr. Saito sent a letter to Complainant telling him that because he chose not to provide the CDs and other evidence that he continued to claim he had about child pornography, ladders that were stolen from the base yard and “other matters,” Mr. Saito would take no further action and the matter was closed. *Id.* at 663.

Complainant’s 2010 Child Pornography Fax and Termination

7. On October 25, 2010, Respondent received a complaint from the Department of Education (“DOE”) Hawaii District located on the island of Hawaii that Complainant sent an anonymous facsimile to 34 public schools in the Hawaii District on October 18 and 19, 2010, alleging a cover-up of child pornography by Respondent and DOE at the Hilo base yard. EX A at 719-20. On December 16, 2010, DOE told Respondent that three additional schools, for a total of 37 schools, received the anonymous fax. EX A at 261. Complainant admitted giving information to a business to send faxes to the schools on October 18 and 19, 2010. TR at 158; 173.

8. The October 18 and 19, 2010, faxes sent by Complainant stated in pertinent part:

I am a concern parent who found these Hawaii documents (No CE-01-682) as well as other and several CD recording in a box marked RESPONDENT child porn at the Keaau Solid Waste Center. Is there a threat of someone accused or committed an act of child porn. It also states that management is covering it up and not doing a proper investigation. Are there also child porn accessories to the crime in covering this up because if they are covering up child porn they are just as guilty and I strongly feel that these people should not work in the school system or for the State period. . . . If no action is taken I will approach the PTSA and the PUBLIC AWARENESS GROUPS in Hilo to deal with them. . . . [sic]

EX A at 113 (emphasis in original).

9. The October 25, 2010, DOE complaint states in pertinent part:

The documents blindsided principals on school days with egregious allegations of a DAGS/DOE cover-up of a child pornography scandal. Principals and their staff took precious time out of their schedules to report their receipt of their respective documents to us and to question what action they should take considering there may be State employees working on DOE campuses in the close proximity to children who are allegedly involved in child pornography. Furthermore, the documents threaten that if principals do not act, these damaging allegations will be provided to “the PTSA and the public awareness groups in Hilo to deal with them.” Last, the documents indicate that Hawaii State Senator Donna Kim was for some unknown reason provided a courtesy copy of this anonymous complaint.

...

The above ordeal and finding is disconcerting. HLRB Case No. CE-01-682 does not sustain [Complainant’s] allegations about, among other things, a case of child pornography within State government. We are taken aback by [Complainant’s] threats to spread chilling yet unsubstantiated allegations to the PTSA and other community groups while representing himself as someone else. From our standpoint, [Complainant] is a State employee often assigned to work on DOE campuses who on October 18, and 19, 2010, went through extraordinary lengths to cause confusion and panic within the DOE and threatened to harm the DOE’s reputation through adverse publicity and/or embarrassment by spreading fraudulent documents throughout the community.

EX A at 46-47, 719.

10. On November 16, 2010, Respondent informed Complainant that it would be conducting an administrative investigation of the DOE complaint and that he would have an opportunity to respond to the allegations at a meeting with the investigators, and warned that the results of the investigation could lead to disciplinary action. EX A at 102-03, 231, 722; TR at 160,

162. In response, on November 23, 2010, Complainant faxed a letter with seven attachments to the DOE and the Respondent Personnel Offices, which stated in part:

This is a reply to the Nov 17th letter about me spreading fraudulent documents throughout the 'community.' if you don't stop and you continue to blame me for something you assume by an anonymous fax I will start spreading this out to the community today ... if no one calls me back by 12 noon today Nov 23 2010 I will start spreading this out after 12 noon today. [sic]

EX A at 80, 101, 231; TR at 162-65. DOE requested that Complainant's November 23, 2010 letter be added to its existing complaint. EX A at 89. The DOE asserted that, "this latest communication from [Complainant] strikes at the heart of the concerns we have over Complainant hindering and causing confusion within State government and threatening to harm, bog down, and/or embarrass the DOE (and now DAGS) publicly." *Id.*

11. On November 29, 2010, Jerry Watanabe, the Public Works Manager who oversaw the Hawaii District Office, received letters from the three DOE Hawaii District complex area superintendents⁷ requesting that Respondent not permit Complainant to work on any DOE campus or facility within their resource complex areas until further notice. According to the superintendents, they found Complainant's November 23, 2010 letter to be "a catalyst to alarm the school-communities and bully school administrators," and that Complainant's presence on their campuses "may create unnecessary disturbance."⁸ EX A at 99, 142, 184. On December 2, 2010, Respondent informed Complainant that until further notice, he was not to report to any DOE campus or facilities on the island of Hawaii. Complainant was allowed to temporarily work at the Hilo base yard. *Id.* at 233; CX 5-10.

12. Respondent assigned the investigation to Ms. Noji and Lori Young. As part of the investigation, Ms. Noji and Ms. Young interviewed Complainant on January 12, 2011. EX A at 81-82, 531. Alton Nosaka, who was the union steward for the United Public Workers ("UPW") was present with Complainant during the interview. *Id.* at 532. During his interview, Complainant admitted that he sent the anonymous fax from the Paradise Business Center, but denied writing the

⁷ Valerie Takata, Hilo-Laupahoehoe-Waiakea Complex Area Superintendent, EX A at 99, Mary Correa, Kau-Keaau-Pahoa Complex Area Superintendent, *Id.* at 142, and Arthur Souza, Honokaa-Kealakehe-Kohala-Konawaena Complex Area Superintendent, *Id.* at 184.

⁸ Ms. Noji and Ms. Nakamura interviewed a number of DOE witnesses on December 16, 2010. Nicholas Hermes stated that the phone calls from the schools started coming in on the morning of October 19, 2010, and that the schools took the letter seriously and were alarmed because they were being told there was a predator out there. The principals are on the front line and have to answer to the public so the last thing they need is another headline or want calls from the press and negative publicity. Mr. Hermes also said that the schools were concerned about how broad the complaint was so he had his office compile a list from the three complex areas of what schools received the fax. Larry Kaliloo explained that the DOE felt that the anonymous fax was egregious enough that they should file a formal complaint with Respondent. Mr. Kaliloo sent an e-mail to the schools on October 19, 2010, to put them at ease, and to let them know DOE was looking into it. EX A at 258, 321. Valerie Takata was really concerned about the anonymous fax because of the nature of what was being said, and that the schools were shocked about the allegations of child pornography. *Id.* at 372. Mary Correa knew the schools were concerned about the anonymous fax. She asked the schools share whatever information they had and inform her immediately if anything else happened. *Id.* at 453. Arthur Souza was interviewed on January 18, 2011, and said the schools were baffled and aggravated by the fax because "they have enough things to deal with without this nonsense." *Id.* at 559.

anonymous letter and said he could not recall who did. *Id.*; TR at 173. Complainant said he sent the anonymous facsimile to the schools because:

The reason was to let the principals know what's happening. To make them aware the kids are still getting exposed without their knowledge every time there's construction done on the Big Island. I am sorry. I didn't mean to hurt anyone's feelings or get anyone scared. I believe it's the principals' responsibility to keep the kids safe from these exposures.

EX A at 532. Ms. Noji found Complainant's explanation about why he sent the fax to be not credible because the anonymous letter referred to an alleged incident of child pornography and does not refer to any "exposure" from construction. EX A at 29-30.

13. At his interview on January 12, 2011, Complainant acknowledged that two of the attachments to his letter were incomplete and missing pages, but said he included the documents because they alleged a cover-up of his exposure to asbestos. EX A at 540-42. Complainant did not include the other documents from the Hawaii District Office and Respondent responding to the allegations in the attachments (e.g., child pornography, asbestos exposure, and health and safety violations). He included a document from Ms. Matsuura dated July 30, 2008, because he was working at Naalehu on July 12, 2007, and got exposed to asbestos. *Id.* He claimed that the Naalehu staff told him there was no hazard assessment and kids were exposed. *Id.* He alleged that he talked to Unitex workers over coffee in the morning at the Hilo Base yard and they would "talk story" and that they confirmed they picked up asbestos tiles at Naalehu and took them to the landfill. *Id.*

14. At Complainant's January 12, 2011, interview, Mr. Nosaka said, "In your investigation, DOE said he's faxing fraudulent stuff. But this ain't fraudulent. So why are they covering it up? All we want is for them to stop putting children at risk. Complainant may send the wrong message but the intent is there. When is this exposure to kids and workers going to stop?" EX A at 540. Complainant added,

Even child porn. If they're covering up child porn, to me, that's bad. They're making me look like a liar and a bad person. These guys lie all the time on everything. Warren is lying. Chester is lying. If they're covering up child porn, what else are they covering up? For the safety of the kids and myself, what else are they covering up? You guys should restrict them from going to the schools. When the Feds come, the Feds come. So you guys let the guys covering up child porn go to the schools but not me?

Id. Complainant acknowledged receiving Mr. Okada's June 26, 2008, letter informing him that based on the investigation, there was no evidence that anyone viewed child pornography on August 21, 2007, or any other occasion. EX A at 538-39, 646-47. Complainant claimed, "I filed against the investigation because it was incorrect. They falsified everything. Afterwards, they said the case was closed." Complainant then gave a detailed account of his belief about the child pornography incident, including an allegation that Glenn Okada and Cory Kaizuka "falsified the information and covered up everything." *Id.* at 539.

15. Complainant provided a memo to Respondent and DOE that he signed and had notarized on January 21, 2011. He stated that during his interview on January 12, 2011, he told Ms. Noji and Ms. Young the same thing he has been telling Mr. Okada and Mr. Kaizuka about child

porn, asbestos, and lead exposure but that they covered it up. He claimed that Respondent allowed Chester and Warren to go to the elementary schools freely without consequences but they may have “asseries” [sic] and that no hazard assessments were ever made about exposure to lead and asbestos. He claimed to have CDs that would show gross negligence and falsification on the part of Respondent (Okada and Kaizuka) and DOE and their investigations about him. He asked that Respondent take corrective action to protect the keikis (children) and public. He also stated he was filing a complaint with the EEOC and other federal departments for retaliation over the years. CX 1-8.

16. Ms. Noji and Ms. Young concluded in a report dated April 19, 2011, that Complainant had sent the anonymous fax to the 37 schools in the Hawaii District on October 18 and 19, 2010, but were not able to conclude that Complainant authored the anonymous letter that was faxed to the public schools. EX A at 37. Respondent’s investigation concluded that the fax resulted in significant and widespread disruption to the DOE’s Hawaii District operations in the schools and at the district office and that Complainant sent the November 23, 2010, letter in retaliation for conducting its administrative investigation into the faxes to the schools, which also resulted in widespread disruption of the DOES’s Hawaii District operations. *Id.* at 38-39. The investigation further concluded that Complainant had not complied with repeated direction from Respondent to stop rehashing the same complaints and issues that had been previously investigated and responded to when he sent the faxes. *Id.* Respondent concluded that it was the second time that Complainant had caused disruption of the DOE operations, with the first incident being on August 20, 2008, at Keaau School when Complainant received a 10-day suspension for his disruptive, threatening, intimidating and confrontational behavior. *Id.*

17. On April 25, 2011, Bruce Coppa, who was the new State Comptroller, advised Complainant that it was recommending that he be terminated from his employment with Respondent and would give him an opportunity to offer facts or arguments as to why his discharge was not appropriate at an April 28, 2011, pre-discharge hearing. EX B at 1079-1099. At the April 28, 2011, pre-discharge meeting, Complainant was represented by his union agent, Mr. Nosaka and presented his side of the story. TR at 171-72. Complainant said he gave the alleged CDs to his union representative to offer in his union grievance. *Id.* at 176-77. Mr. Nosaka raised the child pornography allegations again on behalf of Complainant and stated that he was told by Warren Omija, who worked for Respondent, that he saw the now retired Mr. Imamura sitting at the computer at the Respondent’s Hawaii District Office, that Mr. Imamura got up and left, and when Mr. Omija touched the mouse, an image of pornography came up on the computer. EX A at 738; EX B at 1101-02. Mr. Nosaka brought Mr. Omija to the pre-discharge meeting because he allegedly observed the child pornography incident but was afraid and had reported the incident to Mr. Tomono, his supervisor. EX B at 1101-02.

18. Respondent sent Complainant a seven page letter dated May 12, 2011, terminating his employment because he sent the anonymous facsimile to 37 elementary, intermediate, and high schools which was disruptive, intimidating and confrontational. Respondent also terminated Complainant for insubordination for not complying with related directives and warnings from Respondent to cease rehashing complaints and issues that were previously investigated and responded to, and because he did not follow the chain of command. EX A at 799-805; CX 5-12 to 5-18. The only reference to possible asbestos exposure is on page 4 of the May 12, 2011, discharge letter:

[Complainant] repeatedly claimed that in addition to [his] allegation of child pornography, DAGS did not investigate and respond to [his] other complaints such as lead and asbestos exposure at the schools; Hilo base yard employees stealing doors, ladders, gravel and other materials from the Hilo base yard; failure to conduct hazard assessments; workplace violence; harassment; hepatitis B testing; forging of your workers' compensation reports and forms; Mr. Nosaka stated that he is also frustrated because [Complainant] kept complaining but nobody did anything; that the only recourse [Complainant] had was to go to the school principals and let them know what was happening; that the investigations that were conducted were one-sided and shoddy; and that the Hawaii District Office covered up what was going on at the base yard.

EX A at 802.

19. The Respondent discharge letter clearly sets forth that Respondent limited its consideration for discharge to the acts of sending the facsimiles to the schools and not for reporting unsafe conditions:

You are not being disciplined for reporting unsafe conditions as Mr. Nosaka claimed when he cited Section 46.06.b. of the Unit I collective bargaining agreement. As stated in my letter dated April 25, 2011, we are taking action against you for sending an anonymous facsimile to the public schools in the Hawaii District on October 18, 2010, and October 19, 2010, and for sending your letter of November 23, 2010, to the DOE and DAGS. Based on our investigation, it was determined that your actions resulted in significant and widespread disruption of the DOE's operations on the Big Island. It was also determined that you were insubordinate because you did not comply with repeated directives and warnings from DAGS to cease rehashing complaints and issues that the Hawaii District Office and/or the State Comptroller previously investigated and responded to you, and because you did not follow the chain of command.

EX A at 804.

20. Respondent sent Mr. Nosaka a letter dated May 27, 2011, addressing the concerns about child pornography that were raised at the pre-discharge meeting by Mr. Nosaka and Complainant. EX B at 1101-1102. Respondent reviewed the investigation done back in May 2008 when Complainant reported the child pornography incident that allegedly occurred on August 21, 2007. *Id.* at 1102. The reports made at the pre-discharge meeting were inconsistent with the information given by Complainant back in 2008, but because Mr. Omija changed his story from 2008, they would follow up and provide additional information. *Id.* They asked Mr. Nosaka to provide any additional evidence no later than June 9, 2011. *Id.*

21. Respondent re-interviewed Mr. Omija on June 6 and 20, 2011, to corroborate Mr. Nosaka's statement. EX B at 1106. Mr. Omija stated that he did not see anyone, including Mr. Imamura, on the computer when he walked into the office; he only saw Mr. Imamura walking out of the office; and when he touched the computer mouse the screen went blank then showed a video player. Mr. Omija did not see any kind of image on the screen, such as a picture, photo or video,

but acknowledged that he did see a title, but could not remember the name. According to the Respondent's investigators, Mr. Omija's June 6 and 20, 2011, statements were consistent with the previous account he gave to Mr. Okada and Mr. Kaizuka on June 5, 2008. Therefore, Complainant's allegation that Mr. Omija saw Mr. Imamura sitting at the computer viewing child pornography was not substantiated. Respondent sent a follow up letter to Mr. Nosaka on July 27, 2011, stating that Mr. Nosaka did not provide any additional information regarding the investigation and that it was unable to substantiate any of the allegations Complainant made about child pornography at the pre-discharge meeting. EX B at 1104-1106.

Naalehu-Kau School Alleged Asbestos Exposure May 2007

22. On June 5, 2007, Chester Tomono completed a supervisor's accident report reporting that Complainant said he was working at Naalehu Elementary School on May 23, 2007, when asbestos work was allegedly being done. EX B at 899; CX 1-2. Complainant also reported that management should have notified him of asbestos hazards in the area. EX B at 899. Complainant said he was fixing the storage roof and may have been exposed to airborne asbestos in the area. *Id.*

23. Complainant submitted a copy of a June 7, 2007, newspaper article from the Hawaii Tribune-Herald (Hilo) referencing an asbestos scare at Naalehu Elementary and Intermediate Schools. CX 3-1. The article referenced air monitoring on May 22 and aggressive clean-up that was completed on May 24, 2007. *Id.* There was a follow-up article on June 17, 2007, reporting a community meeting about asbestos and that one week after saying it was clear, there were old reports showing traces of asbestos in had previously been found floor tiles and glue. CX 3-2 to 3-6.

24. On November 5, 2004, an inspection at Naalehu Elementary School showed asbestos containing material ("ACM") in building P-1 and Classroom A. EX B at 858, 871. There were guidelines developed for the removal of asbestos and abatement at Naalehu, including a building information sheet dated November 5, 2004, for P-1 and Classroom Building A. *Id.* at 1046-68, 1072, 1074. The job was inspected on March 19, 2007, by Brian Jenkins and his observations were noted. *Id.* at 1074. Vinyl flooring was removed from P-1 on April 10, 2007, following the standard company procedures, including doors and windows remained shut during the vinyl floor removal, and was placed in 6 mil plastic bags and transported by van to trash "Rolloff Bin" bin on site and then removed to the Hilo landfill on May 17, 2007. *Id.* at 860-61, 864-65. ACM was suspected and confirmed to be in the vinyl floor on May 21, 2007. *Id.* at 863, 866. The asbestos work appears to have been completed on May 21, 2007. *Id.* at 861.

Baseline Asbestos Testing

25. Dianne Matsuura, who was the State Personnel Office, sent Complainant a letter dated July 30, 2008, stating that they had not received his asbestos baseline report or an examination invoice based on the May 23, 2007, alleged asbestos exposure at Naalehu School. EX B at 902; CX 2-10. The letter advised Complainant to see his treating physician and have the physician send the baseline report and examination invoice to Respondent. *Id.* at 902. Complainant said he got a letter from Dianne Matsuura in 2008 that he was approved for baseline, but says Mr. Okada did not approve it until January 28, 2010, and he thought he could not go because Mr. Okada had not approved it. TR at 703-04. On August 1, 2008, Mr. Okada reported that in response to Ms. Matsuura's letter, Complainant said that Carl Imade (his then-supervisor) told him to get a chest x-

ray done, which he did and he gave the bill to Mr. Imade. *Id.* at 904. Keith Nakao, who was a supervisor at the Hilo base yard, did not have the bill and there was no record that a bill was ever received. *Id.* Complainant had an x-ray at Hawaii Radiologic on September 25, 2008, that cost \$137 and was billed to Respondent. *Id.* at 910. A receipt shows that the bill was paid by MasterCard in the amount of \$142.71 on November 20, 2008. *Id.* at 912.

26. On September 29, 2008, Complainant sent a memo to Mr. Okada signed by Mr. Nakao confirming that Mr. Nakao said Hilo Respondent would work with workers who thought they were exposed to asbestos at the Keaau School gym. EX B at 908, 918, 1221; CX 2-11, 2-12. On December 22, 2009, Complainant requested a baseline evaluation from his personal physician based upon exposure at Naalehu and Keaau. EX B at 907, 917, 1220; CX 1-5. This was after Ms. Matsuura sent him a letter to get a baseline test. TR at 389-90. Complainant sent another fax to Mr. Okada on January 22, 2010, about getting a baseline test based upon exposure at Naalehu and Keaau Schools. He included a copy of a request for baseline test dated December 22, 2009, and a copy of the September 29, 2008, memo where Nakao agreed to work with those who thought they might be exposed. EX B at 916; CX 1-6; TR at 152-54.

27. Mr. Okada sent a written request dated January 28, 2010, directly to Dr. Kaawaloa requesting that Dr. Kaawaloa provide Complainant with a baseline asbestos medical examination based upon his alleged exposure to asbestos on May 23, 2007. EX B at 920-21. At that time, Dr. Kaawaloa was Complainant's personal doctor. TR at 89; CX 2-16. The letter included a medical questionnaire that was mandatory for the provider to complete for those exposed to asbestos. EX B at 922-936. Mr. Nakao informed Complainant on January 28, 2010, that the forms had been sent to Dr. Kaawaloa and, once received, he could be baseline tested for asbestos. *Id.* at 941. Mr. Nakao told Complainant to wait three to four working days for Dr. Kaawaloa to receive the forms by mail. *Id.*; CX 2-15. Dr. Kaawaloa responded on February 4, 2010, that he had received the packet from Mr. Nakao, but that Complainant had not established care with Dr. Kaawaloa at that location. EX B at 943. Complainant sent a fax on February 4, 2010, to Jerry Watanabe and Cory Kaizuka about his baseline testing and asked that they please respond in writing; he sent the document because he wanted them to respond in writing. TR at 89-91, 151-52; CX 2-18. Mr. Watanabe responded the same day that Complainant was to follow his chain of command regarding the testing and that the matter was closed referring to the baseline evaluation, and not all of his complaints, but Complainant did not read it that way. CX 2-19; TR at 155-56.

28. On March 16, 2010, Complainant received a verbal warning for not responding truthfully to Mr. Nakao on February 4, 2010. EX B at 979, 1277-78; CX 5-1, 2. CX 5-3, CX 5-5. Complainant told Mr. Nakao that he had contacted his doctor on February 4, but the office was closed. When Mr. Nakao checked, he confirmed that the office was not closed on February 4. CX 5-1, 2. Complainant provided an undated written statement explaining the doctor's office incident had resulted from a misunderstanding. CX 6-12. Complainant thought the doctor's office was closed that day because he had tried to repeatedly call the doctor and could not get through, but he said it was because the office took a long lunch break. He told Mr. Nakao, but it did not matter and he was accused of lying because Mr. Nakao was able to reach the office the same day. TR at 104-07; CX 5-1.

29. Even though the evidence appears to show that Respondent paid the asbestos baseline bills, Complainant disputes it and said Respondent did not pay for asbestos monitoring. TR at 145-46. Mr. Nakao's letter does not state that Respondent would pay for asbestos monitoring,

but only baseline testing, but Complainant insists he was told that Respondent would cover medical monitoring. CX 2-15; TR at 148. However, Complainant did not provide any documents and there was no testimony or evidence other than Complainant's that Respondent would pay for medical monitoring.

30. On February 9, 2010, Mr. Watanabe informed Dr. Kaawaloa that Complainant could see Dr. Benjamin Ono, who was a pulmonologist, for baseline testing. EX B at 945. On April 7, 2010, Mr. Kaizuka sent a formal memo to Dr. Kaawaloa authorizing Complainant to see Dr. Thomas Pollard for asbestos baseline evaluation. *Id.* at 954, 956. The information provided to Dr. Kaawaloa in a letter dated January 28, 2010, was re-sent to Dr. Pollard on June 7, 2010. *Id.* at 958-975; CX 2-16-17. On July 3, 2010, Mr. Kaizuka sent a memo to Complainant telling him that they had still not received a completed evaluation report for asbestos baseline testing. CX 2-20; EX B at 985. Complainant said he does not remember Mr. Kaizuka telling him to tell Dr. Pollard to send the bill to Respondent. TR at 141-44; *see* RX B at 958-60. Mr. Watanabe resent the information to Dr. Pollard in a letter dated February 10, 2011, because it was unclear if Dr. Pollard had provided the information requested for baseline asbestos medical examination. EX B at 1010-1029.

31. On December 31, 2008, Complainant filed a grievance related to the asbestos testing and requesting Respondent provide monitoring and by yearly checks for his asbestos and lead levels. EX B at 952. Respondent denied the grievance on March 22, 2010, informing Complainant that the standards related to asbestos do not require Respondent to provide medical surveillance and that it would not pay for monitoring or biyearly checks for asbestos and lead levels. *Id.* at 947-50. The response included references to allegations as of December 27, 2006, and damaged clothing. *Id.* at 949.

32. On March 18, 2010, Complainant received a separate verbal warning for behaving in a rude and disrespectful manner towards Hawaii District Office supervisors during an administrative investigation into allegations that he did not follow chain of command. EX B at 979, 1280-81; TR at 133-34. Complainant was asked by Mr. Kaizuka about a tape recorder he brought to the meeting on February 10, 2010, and Complainant held it up to Mr. Kaizuka's face and, demonstrating, said "this is on, this is off." *Id.* at 1280-81; TR at 134-35. Complainant admits to showing Mr. Kaizuka the tape recorder and saying those words, but not putting it in his face. TR at 135, 697.

33. On August 24, 2010, Respondent suspended Complainant for three working days from September 8 to 10, 2010, for repeatedly ignoring reminders and warnings to follow the chain of command and for knowingly and deliberately disregarding repeated and clear notification that the Hawaii District Office would pay for his asbestos baseline testing. EX A at 705, 707; EX B at 977; TR at 108-09, 111-12, 136; CX 5-3, 5-4, 5-5, 5-9. Mr. Saito warned Complainant again that his continual failure to abide by the chain of command, failure to comply with directives from his superiors, and any other misconduct in the future will not be tolerated, and will result in more severe disciplinary action that may include discharge from State service. EX A at 707a; EX B at 977-980; CX 5-6 to 5-9.

34. According to Complainant, he finally saw Dr. Pollard for baseline testing after two years of waiting. TR at 117-18; CX 7. Complainant said that Dr. Pollard told him he would have to be monitored because asbestos can show up after many years. TR at 118. Dr. Pollard, who was chosen by Respondent, would fly over from another island and examine patients. *Id.* Complainant saw Dr. Pollard 6 to 10 times between May 2010 and November 2011, but then stopped because Dr.

Pollard told him Respondent would no longer pay. TR at 117-19; EX B at 982-83, 988-95, 1000-1008; CX 7-4 to 7-7, 7-13 to 7-21. Complainant provided a bill dated June 5, 2013, from Dr. Pollard for \$881.13 for his various appointments. CX 7-22. Insurance paid the majority of the bill leaving a balance of \$9.42, which Complainant paid on June 7, 2010, after receiving a past due notice dated May 25, 2010. CX 7-2-3, 7-5, 7-7. Complainant called Mr. Watanabe and Mr. Kaizuka on January 13, 2012, to inquire about who would pay for Dr. Pollard's bills. On February 7, 2012, Mr. Kaizuka memorialized a conversation with Complainant that occurred on January 13, 2012, where Mr. Kaizuka told Complainant that Respondent would not pay for the office visits as it had only authorized the baseline asbestos medical examination. EX B at 1031. Complainant, however, said that Mr. Nakao told him that Respondent would cover the costs of medical monitoring and baseline testing because he was exposed. TR at 89.

Keaau School Incident August 20, 2008

35. On August 20, 2008, while he was on vacation, Complainant received a phone call from someone he knew but would not identify telling him that there was asbestos work being done at Keaau School, but the safety regulations were not being followed. TR at 76-78, 126-27. According to Complainant, they were working in the walkways, there were no signs, no safety barriers, no safety monitors, and the children were walking freely in the asbestos abatement area. *Id.* at 78. Because he said he was concerned about the children, Complainant went to the school to see for himself. *Id.* Complainant agreed that he could have gone to DOE or called the principal, but he went to the school parking lot instead. *Id.* at 127-28. Complainant was aware that all visitors must report to the principal, but said he was authorized to go to the school as a UPW safety member. *Id.* at 132-33. Complainant said he had called Mr. Nosaka before going to the school, but he did not have permission to be on the campus and did not follow the union protocols for going to campus to address a safety situation. *Id.* at 132-33, 501-02, 705-06, 732.

36. When Complainant arrived, school was in session and he observed children within four feet of the truck that was allegedly taking away the asbestos debris. TR at 80, 132. He took pictures of what he felt were gross violations and negligence. *Id.* at 80-81; *see* CX 8 (photos he took at Keaau School on August 20, 2008). Complainant said that the principal, Jamil Ahmedia, approached him while he was walking from his truck and taking pictures. TR at 82. Complainant said Mr. Ahmedia was yelling at him and asking what he was doing with a camera and taking pictures; Complainant said Mr. Ahmedia was waving and swinging his arms around "violently"; he was loud and his demeanor was unprofessional. *Id.* at 82-84; 659. Complainant included a three page asbestos fact sheet that he alleged was part of the pre-construction meeting notes from 2006 about Keaau School, highlighting a portion that said "other precautions that should be taken during the project, including warning signs." TR at 92-93; CX 2-21-23.

37. On August 25, 2008, Mr. Okada informed Complainant that effective immediately, he was not to report to or conduct any investigations at Keaau School due to his inappropriate behavior on August 20, 2008. CX 4-3. On August 26, 2008, Mr. Ahmedia gave Complainant a notice to remain off the Keaau School grounds or the police would be called, along with a notice about the trespass laws. CX 4-4. On August 28, 2008, Mr. Ahmedia sent an email to "370 KMS FACULTY & STAFF," responding to concerns of possible asbestos exposure from construction at the gym. *See, e.g.*, EX A at 108; CX 1-3. The email said that proper procedures had been followed to remove asbestos and that at no time were any students or adults on campus exposed to asbestos. *Id.* Mr. Okada informed Complainant on October 16, 2008, that effective immediately, Complainant

was not to report to or conduct any investigations within the DOE Hawaii District Office in Hilo. CX 4-5.

38. Complainant provided a letter he wrote noting that he was interviewed by Ms. Noji and Ms. Nakamura on December 17, 2008, in the presence of Mr. Nakao and Mr. Nosaka. CX 4-6, 4-7, 4-8. Ms. Noji and Ms. Nakamura reported that Complainant did not identify himself as a Respondent employee when he went to Keaau School, even though Complainant said he went in his capacity as a UPW Safety Committee member. TR at 501-02. Complainant signed a statement on October 15, 2009, saying the statement by Ms. Noji and Ms. Nakamura was true and accurate. CX 4-9.

39. On June 3, 2009, Mr. Saito suspended Complainant for 10 days in June 2009 for his disruptive, threatening, intimidating, and confrontational behavior at Keaau School on August 20, 2008, and required him to attend anger management training. EX B at 979; TR at 99-100, 128-29; CX 2-13, 2-14; CX 4-4. Complainant's conduct violated Respondent's workplace violence policies and procedures. Mr. Saito's letter said Complainant was expected to comply with directions from his superiors and individuals in charge of State facilities where he is assigned to work. EX B at 979.

40. On July 13, 2011, OSHA responded to a Complaint About State Program Administration ("CASPA") and recommended that the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division ("HIOSH") reinvestigate the August 2008 claim, including considering whether it was a "dual motive" case and to not solely rely upon the internal investigation by Respondent. OSHA recommended HIOSH talk to Complainant's witnesses, provide training, and ensure that future discrimination investigations follow the noted principles. CX 6-24 to 6-25. It was not clear at what point and how OSHA became involved in the CASPA complaint, but it was not related to Complainant's June 7, 2011, complaint to OSHA about his May 9, 2011, termination. See CX 6-23.

Miscellaneous Work-Related Concerns

41. On July 8, 2005, Carl Imade reported Complainant's personal tools that he brought to the job in 2002 were stolen from the paint shop shed at Hilo base yard on March 17, 2004, though no police report was made. EX B at 1108-15. There appear to be receipts from October and November 2004 for the replacement costs of the tools. *Id.* at 1116-18.

42. On March 28, 2006, Complainant reported safety and health hazards to HIOSH, which were basically that he was exposed to sewage water. CX 1-1; TR at 124. Complainant characterized his complaint to HIOSH as about a number of "safety concerns", and that management did not tell them about potential hazards on the work orders such as lead, asbestos, sewage water, or mold. TR at 124-25. On August 23, 2006, HIOSH sent a letter to Complainant notifying him of its findings. CX 1-1. The same date, August 23, 2006, HIOSH issued a citation and notice of penalty to Respondent for failing to implement and maintain a written exposure control plan designed to eliminate or minimize employee exposure to potentially infectious materials, not making hepatitis B vaccinations available to employees who had occupational exposure to potentially infectious materials, and not performing an employee exposure assessment at Pahoehoe High School to determine if any employee may have been exposed to inorganic lead in old paint within a certain reading in an eight hour time frame. EX B at 1031, 1037-39; CX 1-1; see CX 2-

7 (April 2006 lead inspection at Pahoehoe High School). Respondent signed a settlement agreement and paid reduced fines on September 11, 2006, after certifying that the violations were corrected and the remedial action had been taken. EX B at 1041, 1043-44; CX 2-3. Complainant said that Respondent never told him what was being done after HIOSH issued the notification of penalty. TR at 125-26.

43. On May 15, 2006, Respondent responded to Complainant's safety concerns raised in a letter dated April 10, 2006. Complainant raised eight complaints about his supervisor and 15 complaints about unsafe work conditions from September 2004 to March 15, 2006. TR at 701; EX B at 1121; *see* EX B at 1129-32 (Complainant's April 2006 complaint letter). Complainant complained that he pressure washed a trash enclosure and when he was nearly completed, his supervisor said he hoped it was not lead paint. EX B at 1122. The paint was water based paint, not lead based paint, but his supervisor was admonished about safety and verifying work conditions rather than simply making statements about safety. *Id.* There was also reference to a restraining order filed against Complainant preventing him from working at Mt. View Elementary School. *Id.*

44. Complainant sent a letter dated July 13, 2007, to Mr. Saito alleging that he was discriminated against because he was not allowed to attend training on July 9, 2007, with the supervisors and other employees who perform temporary work assignments. After an investigation by Mr. Okada, Mr. Saito denied Complainant's discrimination allegation on July 25, 2007, instructing Complainant to follow workplace protocol when he has any questions or concerns, and as he goes up the chain of command, to explain to each person why he feels the response he received from the previous person was unsatisfactory. EX A at 690; EX B at 1160-62. Complainant faxed a memo to Mr. Saito on July 26, 2007, which Mr. Saito referred back to Mr. Okada to handle. EX B at 1163.

45. On August 27, 2007, Mr. Tomono completed a supervisor's accident report stating that Complainant alleged on August 13, 2007, that he had been subject to continuous harassment as of July 9, 2007. CX 4-2; TR at 97-98. The report reflected that Complainant wanted training for supervisors to stop harassment because only telling them verbally was not working. Complainant alleged that Mr. Tomono had bullied and harassed him throughout his employment. TR at 98. On August 29, 2007, Ms. Matsuura sent Complainant a letter stating that Respondent would formally investigate his allegations about harassment and workplace violence referencing incidents going back to 2004. EX B at 1164. Ms. Matsuura said Complainant should send a copy of all memos and documents he referenced in his letter back to 2004. *Id.*

46. Complainant called and complained to Mr. Saito on Friday, September 28, 2007, about work being done by unlicensed electrical and plumbing contractors. He then faxed a letter to Mr. Saito on October 2, 2007, complaining that Mr. Okada had not yet sent a memo to stop all electrical and plumbing work that requires a license. EX B at 1169. On November 1, 2007, Mr. Okada responded to Complainant reminding him that he was previously instructed by Mr. Saito to follow workplace protocol when he has questions or concerns, and informed Complainant that he did not follow this protocol when he faxed his letter directly to the State Comptroller. *Id.* at 1166-67.

47. Complainant filed a prohibited practices complaint with the Hawaii Labor Relations Board ("HLRB") on July 15, 2008, which included allegations about child pornography. EX B at 1177; EX A at 669. Complainant alleged that Respondent had engaged in prohibited practices from 2003 to the time of the filing including workplace violence and mistreatment, not addressing

problems or doing proper investigations, forging accident reports, continuous harassment, retaliation, disparate treatment, slander, no hazard assessments, stealing, gambling, child porn and cover up by management. EX B at 1177; EX A at 672. Complainant sent a copy of the first page of the complaint as part of the fax to the schools in October 2010. *See e.g.*, EX A at 46, 48. The HLRB found that Complainant did not identify any specific incident that would give rise to a prohibited practice which had occurred within the 90 days prior to the filing of his complaint, that he did not provide any factual details supporting the allegations in his complaint, and he did not provide any specific details underlying his conclusory statements to the Board. EX A at 676, EX B at 1180. HLRB granted Respondent's motion to dismiss on September 5, 2008, noting that "it appears beyond doubt that [Complainant] cannot prove any set of facts which would entitle him to relief" EX B at 1184.

48. Complainant sent a separate letter on October 6, 2008, to Mr. Okada with the subject listed as "Lead Exposure Again" stating that he was going to notify HIOSH about Respondent's failure to comply with the April 4, 2006 HIOSH report. CX 1-4. Complainant alleged that on October 3, 2008, he went to Kenoepoko to access a material list and saw paint peeling, which later came up positive for lead, and complained that Mr. Okada should show more interest in his work and not expose workers to hazards. *Id.* Complainant appeared to send a courtesy copy of the October 6, 2008 document to the UPW safety committee and the news media. *Id.*

49. Complainant filed a grievance against Respondent on December 30, 2008, alleging that Mr. Tomono, Mr. Okada, and Mr. Imade changed an accident report and made false statements. EX B at 1187. He alleged he told management, but they did nothing. *Id.* On January 6, 2009, Mr. Nakao wrote a memo to Complainant reporting that Mr. Okada said it was an old way of doing things by allowing Mr. Tomono to harass Complainant and that Mr. Okada would rather train a supervisor than reprimand him. EX B at 1208.

50. On January 28, 2009, Mr. Okada sent a letter to Complainant in response to two "Grievance Fact Sheets" that Complainant submitted to the Hawaii District Office on December 31, 2008, about damaged clothing and MAXIMO training. Mr. Okada told Complainant that unless he could provide new information or evidence, he was directed to cease rehashing complaints and issues that the Hawaii District Office and/or the State Comptroller previously investigated and responded to. The matters were considered closed and Complainant was expected to comply with this directive, and if he did not, it would be considered insubordination and he would be subject to discipline. EX A at 682-82. Complainant sent a letter to Mr. Okada on February 18, 2009, listing all the grievances he had filed and against whom. EX B at 1210.

51. March 20, 2009, Complainant filed a harassment claim against Mr. Tomono based upon an incident where Mr. Tomono is alleged to have asked Complainant three times whether a particular form was an original. EX B at 1189. On March 24, 2009, Respondent said it would formally investigate the allegations. *Id.* at 1192, 1194.

52. On August 10, 2009, Complainant sent a memo to Mr. Imade stating that Mr. Tomono made an inappropriate statement about respirators not being important, but nothing was done. EX B at 1190; CX 4-1. On January 25, 2010, following an investigation, Mr. Okada found that an incident had occurred with raised voices, but no harassment was substantiated. EX B at 1196, 1198. Mr. Tomono was reminded to treat everyone in a courteous, respectful and civil manner. *Id.* at 1196, 1198. Complainant also sent a memo to Mr. Okada, Mr. Kaizuka, and Mr.

Watanabe also on January 25, 2010, regarding the lack of follow up to his various complaints against Mr. Tomono. *Id.* at 1204. Mr. Watanabe sent a memo dated February 23, 2010, following an investigation and meeting about improving the working relationship between Mr. Tomono and Complainant. *Id.* at 1200-1202.

53. On October 15, 2009, Complainant filed an EEOC discrimination complaint alleging harassment. EX B at 1231-37. Respondent responded to the complaint on March 10, 2010. EX B at 1239-48. The EEOC dismissed Complainant's complaint on September 13, 2010, noting that upon investigation, it was unable to conclude that any of the information established violations of statutes. *Id.* at 1250. Complainant filed a separate EEOC complaint on September 20, 2010, alleging disparate treatment by Mr. Tomono. *Id.* at 1253-59. Respondent filed its response to the EEOC complaint on November 16, 2010. *Id.* at 1261-75.

54. On December 3, 2009, Complainant sent a memo to Ms. Noji with a copy to all news stations and newspapers that his many allegations had not been investigated. EX B at 1211. Complainant asserted that Respondent had made up a story, did not interview his witnesses or any parents that were present, and had not provided a hazard assessment before doing the work and were not providing a safe environment for kids. CX 1-9, CX 6-26. On December 11, 2009, Complainant sent a letter asking that Mr. Okada not be assigned to any of his investigations. EX B at 1209. On December 17, 2009, Complainant sent a letter to Mr. Okada seeking clarifications regarding the boundaries of Keaau School regarding trespassing. *Id.* at 1212-1217. On January 28, 2010, Mr. Okada sent a memo to Complainant stating that, in response to Complainant's January 27, 2010, fax, all of his complaints had been thoroughly investigated and responded to in writing. *Id.* at 1224. On February 1, 2010, Complainant sent a memo to Mr. Okada stating that his concerns about Mr. Tomono had still not been addressed. *Id.* at 1227. On February 3, 2010, Mr. Watanabe responded to Complainant that the response is the same as previously sent. *Id.* at 1229.

55. On March 17, 2010, Ms. Matsuura sent a letter to Complainant in response to his letter dated December 3, 2009, asking her to investigate his claims because Ms. Noji had not. EX A at 684-85. Ms. Matsuura informed Complainant that they reviewed his documents and found only one complaint ("exposed one year later at Naalehu no hazard assessment") that may not have been previously brought to their attention or addressed. Ms. Matsuura asked Complainant to provide additional information by April 1, 2010, so they can determine whether the alleged incident or complaint warrants further investigation, but if he did not respond by that date, no further action would be taken and they would consider the complaint withdrawn. Ms. Matsuura also reminded Complainant that unless he could provide new information or evidence, he was directed to cease rehashing complaints and issues that the Hawaii District Office or the State Comptroller had already investigated and responded to. Ms. Matsuura also told Complainant that if he has any workplace concerns in the future, he should timely notify his immediate supervisors through the chain of command. All of the previous complaints and issues were considered closed and that he was expected to comply with this directive, and failure to do so would be considered insubordination and he would be subject to disciplinary action. EX A at 684-85.

Complainant's Hearing Testimony⁹

56. Complainant became a union steward for the UPW, and formed the Safety Committee with Mr. Nosaka in 2008 or 2009. TR at 70-71. As a Chief Union Steward and Safety Officer, he was allowed to do investigations for safety concerns. *Id.* at 99. Complainant alleged that anonymous people would come to the safety committee and discuss lead based paint issues at the schools. *Id.* at 72. The Safety Committee also addressed asbestos issues at Naalehu and Keaau Schools, and he said that he personally brought asbestos issues to the attention of Respondent's management and outside agencies, including complaining to Claire Chinn, the Department of Labor, the EEOC, and HIOSH, as well as city council and state officials. *Id.* at 73-74. He was familiar with what he described as an AHERA report. *Id.* at 75; CX 2-1.

57. On June 21, 2010, Mr. Kaizuka gave Complainant a memo saying he was under investigation which could lead to discipline for not following chain of command about his baseline testing concerns and whether Respondent would pay the bill. TR at 108-09; CX 5-3, 5-5. Complainant said he went through the chain of command regarding his asbestos baseline issues verbally for over two year, but then put it in writing. TR at 109. He said he always followed the chain of command, but once he went up the chain, it was useless to start over because the chain had changed. *Id.* at 109-10. After receiving a late notice about payment for his asbestos testing that had not been paid for three months, he eventually paid the bill himself even though Respondent said they would pay. *Id.* at 111.

58. On June 17, 2009, Complainant said he sent a memo and documents to someone named Dyanne Oshima, though he did not know who that was: "I forgot which department I send this to . . . somewhere in the state facility." TR at 108-09. The documents were meant to file a discrimination complaint alleging that he suffered discrimination and retaliation for reporting many complaints to management, both verbally and in writing, involving health and safety issues, which were dismissed, put aside, not investigated, and his witnesses were not being interviewed. *Id.* at 115-17; CX 6-1 to 6-4. He said the people who were responsible and caused the complaint were treated differently. TR at 115-17. Complaint provided an outline of dates of his alleged discrimination, retaliation, harassment and work place violence beginning in 2004 and ending on March 31, 2009. CX 6-5 to 6-11. Complainant did not mention HIOSH until January 29, 2009, when he referenced asking Mr. Okada and Mr. Saito to fix a building since 2007 but nothing was done until Mr. Kaizuka helped. CX 6-10. Complainant mentioned a news article and email from June 18, 2007, stating that he may have been exposed to asbestos at Naalehu one year before without a hazard assessment. CX 6-8. He reported work place violence on August 14 and 20, 2008, but did not list any information about asbestos exposure. CX 6-9.

59. Complainant alleged asbestos exposure as early as 2007 and then 2008 at Keaau, but did not tell his family about either exposure until 2010 because he did not want to burden them. TR at 149-51. Complainant said he told various people through the chain of command that Respondent should be testing and monitoring his workmates and the children, and even said he filed grievances

⁹ Complainant took the oath and responded with "Ae" which is Hawaiian for yes. I told him that he would have to answer in English. TR at 68. Portions of his hearing testimony are incorporated into the earlier factual findings because it made logical sense to do so and the evidence flowed better. For example, his testimony about the August 20, 2008, Keaau School incident is incorporated into the earlier factual findings. *See* F.F. ¶ 39-40.

on their behalf. TR at 121. When pressed, Complainant could not say the dates he alleged asbestos exposure for the children or when he filed grievances, and to whom he gave specific information about asbestos and the children, but said it was his chain of command that included Mr. Tomono, Mr. Okada, and Mr. Kaizuka. *Id.* at 122, 181-183. He was asked if it was unusual to file grievances on behalf of children and he responded that he cares about everybody and if they needed to be tested, they should be tested. *Id.* at 122-23. However, Complainant equivocated and would not answer directly whether he filed a grievance with the union about children:

Question by the Judge: So, [Complainant], I understood, as Ms. Chinn just asked you, I understood that your testimony on direct examination was that you filed a grievance with the UPW union related to asbestos exposure for children. Did you or did you not file a grievance with your union, UPW, related to asbestos exposure of children?

Complainant: Well, if I did, I'm sure I put down kids was included because...

Judge: Your answer is "if you did"?

Complainant: Yeah. I got to look at the UPW records.

Question by Ms. Chinn: So you don't know if you did?

Complainant: I'm pretty sure I did. I mean that's my concern about the (speaks Hawaiian).

Id. at 182-83.

Anthony, Ho, Sr.

60. Anthony Ho, Sr., is Complainant's father. TR at 49. In 2010, Mr. Ho, Sr. found out about Complainant's alleged 2007 asbestos exposure in 2007. *Id.* at 58-59. He could tell something was wrong with his son because of how he was acting at home, and he had to "dig it out of him." *Id.* at 50. Mr. Ho, Sr. said he wrote a letter to Mr. Watanabe and Mr. Kaizuka dated December 13, 2010, because he was concerned about airborne asbestos and his wife had been doing the laundry at home during that time. *Id.* at 51-52; CX 1-7. Even though there was no signature on the letter, Mr. Ho, Sr. swears that he wrote it and not his son. TR at 57.

61. He said he wrote a second letter on January 14, 2011, out of concern for his wife, son, and grandchildren because, referring to asbestos, "once you get it, you can't get rid of it." TR at 52; CX 6-14. When asked if he wrote the January 14, 2011, letter, he replied: "I guess so. It says "Anthony Ho" on the bottom," even though he acknowledged there was no signature. TR at 59. The January 14, 2011, letter is typed but not signed, and asked about possible asbestos exposure of his son, but he could not provide dates, times, or locations and said: "As for the dates, times and locations, I believe [Respondent] have that information, so please don't ask me. All I wanted was a simple 'yes' or 'no' answer." CX 6-14. Mr. Ho, Sr. said he wrote the letter, but it was not convincing and not entirely clear that he did. *See Id.*

62. Mr. Ho, Sr. said he received the January 18, 2011, response from Respondent closing the case, but was not happy with the response since it did not really tell him anything. TR at 52; CX 6-15. Even though the response asked for information, Mr. Ho, Sr. was not willing to provide information they requested because he was not privy to it. TR at 64-65; *see* CX 6-15. He was also not happy with the response on February 9, 2011, because they closed the case and he was just concerned about asbestos. TR at 53; CX 6-16, 6-17.

Kenneth DeCoito

63. Kenneth DeCoito works for the Hawaii DOE as the head custodian at Naalehu Elementary School on the Big Island. He has worked for DOE for 28 or 29 years, with the last 20 years at Naalehu. TR at 224-25. Mr. DeCoito has known Complainant since elementary school and would see Complainant when he came to Naalehu School to do general repairs. *Id.* He was aware that Complainant was part of the UPW Safety Committee and everyone went to him with anything about safety. *Id.* at 226.

64. Mr. DeCoito said that once the contractor started renovating a portable classroom at Naalehu School, he saw children were near the portable and the contractor was not doing the asbestos removal correctly and treating it like a regular classroom. TR at 230. He immediately brought it to the attention of Randy Higa, who was the Safety Director for DOE, in the morning and by that afternoon Mr. Higa was on campus and stopped the work that same day. TR at 229, 233, 241. Mr. DeCoito received yearly training from Mr. Higa, and was giving phone numbers and procedures to report issues. *Id.* at 241. After the work was stopped, they notified Complainant. *Id.* at 233-34.

65. Complainant and two other workers thought they were exposed to asbestos on May 23, 2007; the workers told Complainant who helped get them to doctors. *Id.* at 233, 243-44. Respondent held a parent meeting and left it to the parents about whether to get the children checked for asbestos. *Id.* at 235. In 2006 or 2007, Mr. DeCoito went to two meetings with parents, one in the cafeteria and one in the gym but was told by Glen Okada and Mary Correa that the meeting was for the parents and not to speak. *Id.* at 235-40, 244-45. Mr. Higa hired a second company to come in and do an investigation, who determined there were only trace amounts of ACM found. *Id.* at 242.

Alton Nosaka

66. Alton Nosaka worked for the County of Hawaii, Parks and Recreation, Maintenance Division, but was never employed by Respondent. TR at 327. He is an agent of UPW and a member of the Safety Committee, where he served with Complainant. *Id.* Mr. Nosaka had no knowledge of chain of command violations but was aware that Complainant made complaints about asbestos and lead exposure to children because Complainant told the Safety Committee out of a concern for safety. *Id.* at 328-30. Mr. Nosaka believed Respondent was unhappy about the complaints because they were fined by HIOSH. *Id.* at 330-31. Mr. Nosaka believed that management did not interview all of Complainant's witnesses because he filed grievances through the union and made requests for information that were not forthcoming. *Id.* at 342. He never subpoenaed information from Respondent but used a request under the contract for information. *Id.* at 368-69. In his experience as a UPW business agent and filing grievances, he felt that Respondent was one sided in its investigations. *Id.* at 345.

67. Unitex was doing abatement at Keaau school gym in 2007 or 2008 and had the ribbon off. TR at 333-34. He read about asbestos at Naalehu School in the local newspaper, but could not recall how Respondent's management responded to asbestos problems at Naalehu or Keaau Schools. *Id.* at 334-35, 338. He was told about child porn being viewed and reported it to Respondent's management. *Id.* at 346-47. He said Complainant brought up asbestos at Kau School multiple times because Respondent was not doing anything about it. *Id.* at 348. When Complainant went to Keaau School in August 2008, he was a member of the union and on the Safety Committee. It was standard for union members to go and investigate allegations when made. *Id.* at 360-62.

68. On cross examination, Mr. Nosaka could not recall the details of many of the incidents described. *See generally* TR at 365-368, 373, 380. He agreed that Complainant had violated chain of command and was suspended in September 2010, but no grievance was filed by the UPW. TR at 364-65. Complainant and Mr. Tomono did not have a great working relationship. *Id.* at 365-66. He was aware that Complainant was suspended for 10 days following the August 20, 2008, school incident and appeared at the arbitration for Complainant's termination. *Id.* at 370-73.

Carl Imade, Elmer Enoka, and Kenwyn Sato

69. Carl Imade knew Complainant as a co-worker at the Hilo base yard, but was not aware of any asbestos hazards at Keaau or Naalehu schools, and he was not aware of Complainant making any complaints about asbestos exposure in those schools. TR at 220. Mr. Imade also did not know about Complainant complaining about lead exposure in the schools and was not aware of Complainant violating chain of command or for lying to anyone. *Id.* at 220-21.

70. Elmer Enoka has known Complainant since he started working at Respondent, but had no firsthand knowledge of any of the allegations. TR at 215. Kenwyn Sato worked for Respondent and was called to lay the foundation for the arbitrator's decision, which was ultimately not admitted into evidence. *Id.* at 255-61.

Dianne Matsuura

71. Dianne Matsuura retired from Respondent on December 31, 2016, after working there for 29 years. Her last position was as the Department Personnel Officer, where she was the division head and reported to the State Comptroller, who was the head of Respondent. TR at 534-35. Respondent provides a variety of support services to departments all over Hawaii, in addition to Oahu, and services buildings on the outer islands that belong to the state of Hawaii and the Department of Education. *Id.* at 536-37. Ms. Matsuura was familiar with Complainant because she was involved in his termination, several EEOC complaints he filed, and an HLRB complaint he filed, as well as complaints with other agencies and offices outside of Respondent. *Id.* at 538. She was kept informed on all those actions. *Id.*

72. There were approximately 30 employees at the Hilo base yard, which was headed by the District Engineer who most recently was Jerry Watanabe after Glenn Okada. TR at 538-39. She was made aware that a fax had been sent to DOE on October 18, 2010, by Mr. Watanabe, who also faxed it to her. *Id.* at 539-40. The comptroller was Russ Saito at the time, who was appointed by the Governor. *Id.* at 542. The comptroller makes decisions about termination or suspension, but all other discipline is handled at a lower level such as reprimands. *Id.* at 549-50.

73. Ms. Matsuura received the October 25, 2010, letter from DOE about the time it was sent and she found it unusual; in her 29 years of experience, she could only recall one or two times that an outside agency asked for an investigation. TR at 543-45. Based upon the serious allegations, she discussed the matter with Mr. Saito and suggested that her office take the lead in conducting the investigation. *Id.* at 545-46. She sent a letter to Complainant notifying him that an investigation had been initiated, which was standard and usually generated in this type of matter. *Id.* at 546-47. The investigation was initially assigned to two people, but Ms. Noji took over the investigation when she became available. *Id.* at 547. The Department received a fax from Complainant on November 23, 2010, after the notice of investigation, which she took as a threat to the department. *Id.* at 550-51. DOE received the same fax, which they asked to add to the investigation. *Id.* at 551-52.

74. The investigation took several months, which is not unusual particularly since it was on an outer island. TR at 555-56. Ms. Matsuura reviewed and signed off on the completed report on April 19, 2011, because she would be meeting with the comptroller to decide how to go forward. TR at 558-61; RX A at 9 to 709. Ms. Matsuura recommended that Complainant be terminated because of the serious nature of the complaint, the disruption it caused to a large number of schools, and the incident was similar to other disciplinary actions taken against Complainant. *Id.* at 562-63. The Comptroller agreed with the recommendation. *Id.* at 563. Ms. Matsuura's office drafted a letter for the Comptroller to sign explaining the discipline and recommendation for dismissal which was sent to Complainant. *Id.* at 563-65. Complainant was placed on paid leave through his termination date of May 9, 2011, per union contract. *Id.* at 565.

75. There was a pre-termination hearing where Complainant had one more chance to discuss his side, which he did through his union agent. *Id.* at 566. At the pre-termination meeting, Complainant said he had a picture of Paul Imamura who was looking at child porn, and alleged that Mr. Imamura was a friend of Mr. Tomono and Mr. Okada. TR at 597. The child porn investigation was re-opened after the pre-termination meeting because there was information given that was inconsistent with what they learned initially, which was separate from the termination. *Id.* at 597, 599-600, 633. She had an additional meeting to discuss the information at the pre-discharge meeting with the Deputy Comptroller and the Comptroller, where they made the decision to proceed with termination. *Id.* at 567-68. Complainant was terminated, but they restored 1.5 hours of leave since they determined that he had not actually gone to Paradise Business Center to send the fax on October 19, 2010. *Id.* at 568. Complainant filed a grievance challenging his termination, but he did not provide any new evidence to consider. *Id.* at 570-71. The case then went to arbitration. *Id.*

76. Ms. Matsuura was familiar that Complainant alleged he went to Keaau School on August 20, 2008, because he was concerned with asbestos exposure to children and workers, and that he had also claimed asbestos exposure at Keaau and at Naalehu School in 2007. TR at 573-74. She learned of the Naalehu alleged exposure through an accident report filed on June 5, 2007, for an exposure on May 23, 2007. *Id.* at 574-76. Complainant complained about asbestos exposure but not contamination at the two schools. *Id.* at 587. Chester Tomono completed the report, which said Complainant "may have been exposed" and referred it to Glenn Okada. *Id.* at 576-77. Respondent ordered a baseline test for Complainant in response which it said it would pay for, but he never got the baseline test; Ms. Matsuura sent Complainant a letter stating that he never got a baseline test, and it was his responsibility to follow up with his doctor and send the bill to the state. *Id.* at 577-80. Respondent believed Complainant was not exposed to asbestos, but due to his persistence, they allowed the baseline testing for him and others. *Id.* at 579, 634. Respondent never cutoff

monitoring because it never authorized monitoring, only a baseline test. *Id.* at 624-25. Respondent did not receive any complaint that Mr. Ahmedia assaulted Complainant during the investigation, but Complainant brought it up during the course of the investigation. *Id.* at 605. Complainant did not file a grievance related to the 2008 Keaau School incident and his 10-day suspension. TR at 573-74.

Keith Nakao

77. Keith Nakao worked for Respondent as Building Construction and Maintenance Supervisor III, and he was in charge of the supervisors for each shop. TR at 205-06. He worked in the Hilo base yard for just over four years before he became a supervisor in 2008. *Id.* at 209, 211. At the Hilo base yard, the chain of command was Complainant to Chester Tomono to Mr. Nakao to Cory Kaizuka, then Glenn Okada or Jerry Watanabe, who became the supervisor after Mr. Okada retired. *Id.* at 207. Mr. Nakao worked with Complainant on the Safety Committee for UPW before he became management and has known him since they were 12 years old. *Id.* at 192, 209.

78. From 2006 to 2010, Mr. Nakao was aware that there was asbestos and lead at the schools, but there was no exposure to the children. TR at 193-94. Mr. Nakao received reports from Unitex, which is how he knew the children were not exposed and he was not aware of a foreman trying to shut down the asbestos operation. *Id.* Management investigated Complainant's complaints about asbestos and lead in the schools. *Id.* at 196. Complainant was disciplined for going to Keaau School and presenting himself as an inspector for Respondent, which occurred on his day off. TR at 197, 208. Mr. Nakao was not present at the incident, but the principal and custodian were. *Id.* at 210. Complainant was not disciplined related to asbestos, but because he did not listen to management and violated the chain of command. *Id.* at 202. Complainant would go around Mr. Nakao if he did not think he was getting satisfaction from him. *Id.* at 203.

Cory Kaizuka

79. Cory Kaizuka has worked for Respondent since 2008 as a Public Works Area Engineer and has been in the Hawaii District Office for about five years. TR at 275-76. When he began working for Respondent, he oversaw the base yards and maintenance crews that provided repair and maintenance at state facilities, and supervised the shop supervisors at three base yards in Kona, Hilo, and Honokaa. *Id.* at 276-77. When Mr. Kaizuka started, he worked in the Hilo State Office Building, which was a couple of miles from the Hilo base yard where Complainant worked. *Id.* at 281. Complainant would call Mr. Kaizuka after March 2008 with concerns and ask that memos be written about certain matters and Mr. Kaizuka would write memos and distribute them. *Id.* at 282-86. Complainant brought up hazardous materials, such as asbestos and lead, work base concerns with the condition of the buildings, and personal protective equipment. *Id.* at 283-84.

80. Mr. Kaizuka's position also involved investigations, and he was assigned to investigate a claim about child pornography and the theft of ladders. TR at 286; RX A at 646. Mr. Kaizuka met with Complainant on May 30, 2008, to listen to his concerns as part of the investigation. TR at 287-88. Mr. Kaizuka then drafted a letter for Mr. Okada's signature that said unless Complainant brought up new evidence, he was directed to cease rehashing complaints and issues with the Hawaii District Office and/or the Comptroller that had previously been investigated with responses provided to Complainant; those matters were otherwise closed and Complainant was to comply with those directives. *Id.* at 289. Complainant had rehashed the same allegations before Mr. Kaizuka worked for Respondent central services engineer. *Id.* at 291. Mr.

Kaizuka referenced phone calls with Complainant on December 23 and 29, 2008, telling him to resolve his issues through the chain of command because the supervisors have a better idea about what was going on. *Id.* at 291-92.

81. Mr. Kaizuka discussed Complainant's "Grievance Fact Sheets" and Respondent's responses at a meeting on February 26, 2010, attended by Complainant, Mr. Nosaka, Mr. Watanabe, Mr. Kaizuka, and one other person. TR at 292-93; EX A at 686. Mr. Watanabe sent Complainant a letter dated March 22, 2010, reminding him that he was previously instructed to cease rehashing complaints and issues on matters that are considered closed; failure to do so would be considered insubordination and he would be subject to disciplinary action. TR at 293-94; EX A at 686-89.

82. Mr. Kaizuka also addressed management monitoring and bi-yearly check on asbestos and lead levels. He looked at HIOSH and the applicable standards and their policies, and determined Respondent was in compliance. TR at 293-94. Mr. Kaizuka denied the request for monitoring because there were no standards or policies within HIOSH or at Respondent requiring bi-yearly or continuous monitoring of Complainant. *Id.* at 294-95. Respondent approved baseline testing for Complainant to establish his condition at the time of the alleged exposure, but denied the monitoring request. *Id.* Respondent sent information and forms to Dr. Kaawaloa to provide the baseline report and invoice to Respondent, which was the same information given to Complainant. TR at 383-84; RX B at 920. Mr. Kaizuka also referenced the January 28, 2009, information about rehashing the same allegations and said that Mr. Nakao had given Complainant information about baseline testing and the issue was closed. TR at 297-99; CX 2-19. Mr. Kaizuka told Complainant two or three times that Respondent would pay for his baseline testing, and he is aware that Mr. Nakao and Mr. Watanabe did as well, yet Complainant still paid and Respondent could not understand why. TR at 303-04. Complainant was reminded that he was expected to abide by the Hawaii District Office directives to follow the chain of command when he has work-related questions and concerns, and warned him that refusal to follow the chain of command will be considered insubordination and will result in disciplinary action. CX 6-13; EX A at 703.

83. Mr. Kaizuka also investigated an allegation about whether students or adults on campus at Keaau School had been exposed to asbestos. TR at 296. Mr. Kaizuka reviewed the incident and the notes from Unitex, which was the abatement contractor, and found that all policies and procedures had been followed pursuant to the specifications of the project. *Id.*

84. Mr. Nakao gave Complainant a verbal warning in writing, which means he was documenting that the verbal warning had been given, because Complainant had not communicated honestly with Mr. Nakao about whether Dr. Kaawaloa's office was closed. TR at 299-300; CX 5-1, 5-2. He was not aware of any witnesses to the allegation that Complainant lied about the doctor's office closure. TR at 416. On March 18, 2010, Mr. Watanabe gave Complainant a letter documenting a verbal warning for behaving in a rude and disrespectful manner toward the Hawaii District Office's supervisors at a meeting on February 10, 2010, where Complainant put a tape recorder in Mr. Kaizuka's face and said in a sarcastic tone, referring to the tape recorder, that this was on, this was off. *Id.* at 301-02.

85. On October 18 and 19, 2010, Mr. Kaizuka became aware of the faxes from DOE and met with two personnel officers from DOE who filed a written complaint over the fax incident and Complainant's involvement, which Respondent investigated. TR at 305-07, 311, 313-17; RX A 46 to 77, 226. Complainant sent another fax shortly after this incident which was added to the

complaint. TR at 314-17; RX A, 83-89. On December 2, 2010, the complex superintendents stated they did not want Complainant sent to their work facilities so Respondent wrote a letter to Complainant stating that he would not be allowed at DOE facilities. TR at 317-20; RX A at 233-34. Complainant was discharged as a result of the investigation, but Mr. Kaizuka was not consulted or otherwise involved in the discipline that was imposed. TR at 320-21.

86. Mr. Kaizuka was involved in investigating Complainant's allegations of asbestos violations at Keaau School and exposure at Naalehu School, but there were no violations. TR at 401. Mr. Kaizuka was unaware of any asbestos issues at Naalehu or Keaau, and they investigated Complainant's complaints to that effect and to resolve his concerns. *Id.* at 412. According to Mr. Kaizuka, there was no ACM disturbed during the May 23, 2007, construction work at Naalehu School, which was on a different day and work order from when Complainant was alleging exposure. *Id.* at 390. Complainant violated chain of command by sending memos directly to Mr. Okada, when he should have gone through other supervisors like Mr. Nakao and Mr. Tomono. *Id.* at 405-06. Complainant could bring up allegations again if he did not feel they were adequately investigated, but here, they had been. When Complainant had new information, it was investigated again. *Id.* at 409-10. When the child pornography investigation was reopened, Complainant had provided new information, and the matter was reinvestigated by Mr. Kaizuka and Mr. Watanabe, but they could not substantiate the claims. *Id.* at 438-39. Complainant made allegations against Mr. Tomono after 2008 when Mr. Kaizuka started and they were resolved. *Id.* at 414. Mr. Kaizuka recalls Complainant making an allegation around 2008 or 2009 that Mr. Tomono forged a report, but he investigated and did not recall any substantiating evidence that documents were forged or suspiciously changed with the intent to cause harm. *Id.* at 434-24.

Julie Noji

87. Julie Noji worked for Respondent from October 2001 to November 30, 2015, when she retired as a Personnel Management Specialist. TR at 448. She has a bachelor's degree in psychology and an MBA in human resources. *Id.* at 448-49. Her duties at Respondent included labor relations, where she conducted investigations as part of her job. *Id.* at 449. She assisted writing the response to the OSHA complaint in this matter and had dealings with Complainant over four or five years and was familiar with his past complaints and allegations. *Id.* at 450-52; *see* RX A with attachments.

88. Ms. Noji investigated the complaint by DOE that Complainant had sent a fax to 37 schools on the Big Island, which were disruptive and caused confusion, which was received on October 25, 2010, and completed on April 19, 2011. *Id.* at 456. Because the complaint was from outside Respondent, it was handled at the administrative level and she had experience conducting investigations and writing up reports, which is why she was the lead investigator. *Id.* at 457. One of the faxes sent by Complainant went to the Central Services Division, which is not part of Respondent. *Id.* at 465-66. She interviewed witnesses, reviewed relevant correspondence, and interviewed Complainant. *Id.* at 458.

89. She concluded that Complainant sent the fax to the schools, and substantiated that it caused significant and widespread disruption at the schools. TR at 459-60. She further found that Complainant had not complied with past directives to stop rehashing complaints and issues that had been investigated and responded to by Respondent. *Id.* She also substantiated that Complainant had not followed the chain of command when he sent the anonymous fax to the schools instead of

bringing the concerns to the District Office. *Id.* at 459. She found that the attachments to the November 23, 2010, fax were misleading because some documents were incomplete and did not include the responses from Respondent. *Id.* at 460. She also substantiated that the Hawaii District Office had investigated his past complaints about base yard pornography at work and concluded it did not occur, yet Complainant would not accept the results of the investigation. *Id.*; RX A at 40. She was not involved in the child porn investigation and never told Mr. Nosaka that she would come back and investigate that allegation. TR at 515-17.

90. Ms. Noji knew that Complainant was discharged, but she did not make any recommendations about discipline other than that Complainant should be appropriately and progressively disciplined; the actual discipline was up to the Department Personnel Office and Comptroller. TR at 461-62. Ms. Noji thoroughly and meticulously explained why each document was part of the investigation report, and the 44 attachments to her report were what was relied upon to make her conclusions and recommendations. *Id.* at 464-80, 492. She interviewed Complainant in person on January 12, 2011, but he did not ask her to interview anyone. *Id.* at 480, 484-85. Ms. Noji said that the DOE complaints took the faxes very seriously and created a lot of misunderstanding and disruption to the operations of the schools, and confusion and concern about what was contained in the faxes. *Id.* at 486. The schools were also concerned that the fax was anonymous and had no point of reference, no basis to understand who sent it and why. *Id.*

91. Ms. Noji was the lead investigator in a separate investigation involving Complainant at Keaau School on August 20, 2008. TR at 493, 497. Complainant sent a fax to Mr. Saito saying he had CDs that would show Mr. Okada's letter was untrue. *Id.* at 493. Mr. Saito offered to have Ms. Noji pick them up when she was there to interview witnesses on the Keaau complaint, but Complainant did not give her the information but instead wanted Mr. Saito to come and get it himself. *Id.* at 495. Ms. Noji substantiated that Complainant was disruptive, intimidating and confrontational when he went to Keaau School on August 20, 2008. *Id.* at 497. She obtained documentation from the contractor that they properly followed the asbestos removal procedures. *Id.* at 498. She also found that Complainant had misrepresented why he was there when he said it was on behalf of the UPW Safety Committee investigating a complaint. *Id.* Complainant was not authorized by the UPW Safety Committee to conduct an investigation at Keaau School and did not follow the UPW Safety Committee protocols for obtaining approval to go to the school. *Id.* Mr. Nosaka told her that normally the school schedules a visit, but Complainant had gone to the school without any prior warning or scheduling. *Id.* at 502.

92. Ms. Noji said that Complainant complained about the conduct of Mr. Ahmedia during the investigation, but Mr. Ahmedia was the person who made the complaint about the school incident. TR at 509. Complainant never gave her a list of names to interview in either the Keaau School incident or the 2010 fax incident. *Id.* at 512. During the 2008 investigation, she did talk to a parent at the request of Complainant and Mr. Nosaka, but the parent witnessed only part of the incident and left after picking up their child and was not present when the situation escalated. *Id.* at 500-01. Complainant was told if he had new evidence, he could bring it forward, but otherwise to stop rehashing the same information that had been investigated and responded to. *Id.* at 514.

IV. ANALYSIS AND CONCLUSIONS OF LAW

The following conclusions of law are based on analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 5 U.S.C. § 556(d); 29 C.F.R. § 24.109. In deciding this matter, the administrative law judge (“ALJ”) is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002).

A. The Clean Air Act

The CAA is “a complex and comprehensive environmental statute enacted to preserve and protect the nation’s air and public health.” *Tomlinson v. EG&G Defense Materials, Inc.*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 15 (ARB Jan. 31, 2013). Under the CAA, protected activities include commencing or causing to commence, testifying or being about to testify, and assisting or participating in a proceeding under the CAA or for the administration or enforcement of any requirement imposed under the CAA or an applicable implementation plan, or “in any other action to carry out the purposes of the act.” 42 U.S.C. § 7622(a). The term “proceeding” is construed broadly and encompasses all phases of a proceeding that relate to public health or the environment, including the raising of internal concerns to an employer of a violation. *Sasse v. Office of U.S. Attorney, U.S. Dep’t of Justice*, ARB Nos. 02-077, 02-078 and 03-044; ALJ No. 98-CAA-7, slip op. at 11 (ARB Jan. 30, 2004); *Melendez*, ARB No. 96-051, slip op. at 16.

To prevail in a case arising under the CAA, Complainant must establish by a preponderance of the evidence that his protected activity caused or was a motivating factor, at least in part, in the adverse action alleged in the complaint. 29 C.F.R. § 24.109(b)(2); *Melendez*, ARB No. 96-051, slip op. at 11. “[T]he preponderance of the evidence standard requires that the employee’s evidence persuades the ALJ that his version of events is more likely true than the employer’s version. Evidence meets the preponderance of the evidence standard when it is more likely than not that a certain proposition is true.” *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at 11 (ARB Apr. 25, 2014) (internal citations omitted).

If Complainant meets his burden, then relief may not be ordered if Respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 24.109(b)(2).

B. Credibility

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence, to draw inferences from such evidence, and is not bound to accept the opinion or theory of any particular witness. *Banks v. Chi. Grain Trimmers Ass’n*, 390 U.S. 459, 467 (1968). An ALJ is not bound to believe or disbelieve the entirety of a witness’ testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat’l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3rd Cir. 1975). An ALJ “should provide findings concerning witness demeanor in connection with resolution of conflicts in the pertinent controverted testimony.” *Seater v. S. Cal. Edison Co.*, 95-ERA-13, slip op. at 17 (ARB Sept. 27, 1996). In resolving conflicts in testimony, “the ALJ may also rely on factors related to the content of the witnesses’ testimony, e.g., internal inconsistency, inherent improbability, important discrepancies, impeachment and witness self-

interest.” *Id.*; see also *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963) (the credibility of witnesses “involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.”).

In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass’t Sec’y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005).

1. Complainant

Having reviewed the entire record, and after observing Complainant’s demeanor at the hearing, I do not find Complainant to be a credible or reliable witness. Complainant was argumentative at hearing, refused to listen to direction, volunteered information, and offered explanations for events that were inconsistent with other more convincing evidence in the record.¹⁰ Complainant’s demeanor was consistent with that observed and reported by Respondent over the course of his work there. The character and quality of Complainant’s testimony was significantly different when compared to the character and quality of testimony from the other witnesses, including those witnesses who testified on his behalf. Complainant’s explanations at times did not make logical sense, and he did not explain some obvious issues related to his recall and recollection of events.

For example, Complainant was strident in his view about alleged child pornography in the work place, which was investigated and addressed by Respondent. Complainant did not himself observe the events that he reported, but instead reported what other people told him they observed. Complainant learned of the alleged child pornography incident in August 2007, but reported it to his supervisors in May 2008, nine months later. Complainant asserts that his only concern about child pornography was the school children, yet he waited nearly nine months before reporting what he was allegedly told about child pornography. He never offered any explanation for why he waited such a long period of time to report the incident if his greatest priority was the safety of children.

When the witnesses were asked about the alleged pornography events, they contradicted Complainant and the version of what Complainant insisted was the correct recitation of the facts even though he did not observe the incidents in question. Complainant repeatedly refused to accept the outcome of Respondent’s investigation and, over the course of years, raised the same allegations over and over, none of which had anything to do with the CAA. Complainant insisted that there was more to the story even though Respondent talked directly to the witnesses Complainant said were the percipient players. Complainant refused to accept that the witnesses did not corroborate

¹⁰ The following examples demonstrate Complainant’s difficult demeanor: Complainant volunteered information about an anonymous phone call and whether it was trustworthy even though directed not to, TR at 77-78; continued to talk even though directed not to, TR at 140; argumentative and not responsive about paying or sending of bill, TR at 140-41; argumentative and kept volunteering information, TR at 152; dodging the question and refused to answer, and appeared to be doing so intentionally, TR at 145-47; recalcitrant witness and being difficult on re-cross examination, TR at 711.

what he believed to be the truth, even though, again, he was basing his opinions on what other people said happened, not on his own observations. Complainant said he had CDs that would support his claims, but he never brought the proof forward even though he was asked to provide it multiple times. At one point, he said he would only provide it if the State Comptroller, who happens to be the head of his agency and based on another island, came over and got it from him in person. I found his explanation related to the child pornography to be suspect and find it significantly impacted his credibility.

Complainant's explanation for sending the faxes in October 2010 for which he was ultimately terminated also did not make logical sense and contradicted the more convincing and overwhelming weight of evidence in the record. Complainant sent or caused to be sent a fax related to the 2007 child pornography incident to 37 schools on the Big Island of Hawaii, which caused significant and widespread disruption at the local schools. Complainant explained that he sent the anonymous fax related to the child pornography investigation because he was concerned about the children. He later attempted to state that he sent the fax because of asbestos at the school, but the fax that was sent and received on October 18 and 19, 2010, and later his threatening fax sent on November 23, 2010, do not mention asbestos exposure or the CAA. Instead the anonymous faxes mention only child pornography. Complainant's claim that he sent the facsimile to make the principals aware that "the kids are still getting exposed without their knowledge every time there's construction done on the Big Island" is not consistent with the evidence because the letter refers to an alleged incident of child pornography and does not refer to any "exposure" related to asbestos from construction. His attempt to rewrite the history of what occurred for the purposes of this hearing detracted significantly from his credibility and I did not believe his explanation.

When Respondent interviewed Complainant on January 12, 2011, as part of the investigation into the October 2010 faxes, Complainant acknowledged that two of the attachments to his letter were incomplete and missing pages and that he did not include the other documents where Respondent responded to his allegations. He alleged that the faxes were sent because of exposure to children and said he included some information in the faxes concerning his alleged exposure to asbestos in 2007 which he said was covered up. Complainant did not include in the attachments any mention that the allegations were from 2007, over three years before he faxed the schools, and had been investigated and found not to be substantiated or that he disagreed with those findings. In fact, and Complainant was aware, the person he alleged was the culprit and viewed child pornography in 2007 had in fact retired from Respondent. The investigation found his assertions not credible because he did not mention asbestos in the actual faxed letter sent to the schools. It was after-the-fact and in hindsight that Complainant was trying to make the faxes about asbestos. It appears that Complainant selectively sent the information in order to mislead and cause the most amount of disruption and fear at the schools that received the anonymous faxes.

Prior to Complainant sending the anonymous facsimile to the schools, Respondent had given Complainant numerous directives and warnings relating to his complaints and issues, including the alleged child pornography. By sending the anonymous faxes to the schools, Complainant did not comply with the previous directives to cease rehashing complaints and issues that Respondent previously investigated and responded to unless Complainant could provide new information or evidence. Complainant continued to allege that Hilo base yard employees viewed child pornography at the workplace, and maintained that he had CDs and other evidence to prove his allegations of child pornography and other matters but he did not provide them to Respondent even though it had made numerous requests that he do so. Complainant was also warned by Respondent that if he did

not comply, it would be considered insubordination and he would be subject to disciplinary action. Yet, Complainant persisted.

When he was interviewed in January 2011 as part of the investigation into the faxes, he alleged that they were sent because of exposure to children and said he included some information in the faxes concerning his alleged exposure to asbestos in 2007. However, the investigation found his assertions not credible because he did not mention asbestos in the actual faxed letter sent to the schools. It was after-the-fact and in hindsight that Complainant was trying to make the faxes about asbestos.

Even at the April 2011 pre-termination meeting, Mr. Nosaka only briefly mentioned exposure of the children to asbestos before he and Complainant again pursued the child pornography allegations even though Complainant never provided the information he said could corroborate his claims. Based upon information discussed at the pre-termination meeting, which Respondent thought might be different or new information not previously received, Respondent again investigated the child pornography allegations. Respondent specifically asked Mr. Nosaka and Complainant to provide any additional information regarding the allegations, but neither Complainant nor Mr. Nosaka provided anything more after the pre-termination meeting. Respondent followed up in writing asking for input, but again neither responded. After talking to the alleged percipient witnesses who Complainant asserted had new information, Respondent could not confirm Complainant's account. Respondent compared the information to the earlier investigation and found it was all consistent and again closed the investigation.

Regarding asbestos, Complainant initially reported only that he might have been exposed to asbestos at Naalehu School in 2007 because he was allegedly on the Naalehu campus when asbestos work was being done. Complainant later appeared to expand his concerns about asbestos exposure to children and his co-workers, but that was not what was reported when the incident initially occurred. Mr. Higa, who was Safety Director for DOE, immediately took preventative action and ensured that the proper removal procedures were being followed. Mr. Higa was aware of and handling the incident before Complainant was alerted to the incident by Mr. DeCoito. Complainant also went to Keaau School in August 2008 based upon alleged work that was not being done according to safety standards, but again, he was sidetracked by his own argumentative, confrontational and combative nature, and was ultimately disciplined. The evidence showed that Complainant's motives for going to the school were suspect. He was a member of the union safety committee, but he did not follow the union protocol for addressing safety issues at the school and he did not contact the school or his supervisors to notify them of the potential issue, but instead went on his own time to the school to take matters into his own hands and document what he saw. He did not identify himself as a UPW member or an employee of Respondent. He took pictures, but was more concerned with confronting and arguing with the principal who did not know who he was than he was about potential asbestos issues. Complainant never made a formal complaint about asbestos at Keaau School.

I did not find it credible that Complainant said all of his actions were only in the best interest of the children. It appeared that allegations of exposure were directly related to how much trouble his own conduct was getting him into. Complainant may have confabulated the reasons for his conduct in his own mind, but the evidence does not bear out that he was worried about children and asbestos. Complainant even alleged that he filed grievances on behalf of the children, but he could

not say when, and there was no independent evidence that this was true. Even Mr. Nosaka, the union representative, did not corroborate Complainant's grievance allegations on behalf of children.

While reviewing the evidence in this matter, I tried to set aside Complainant's demeanor while testifying and the difficult and tense work environment he created. I attempted to recognize that perhaps his behavior was just misunderstood or he was a poor communicator, which was getting in the way of some important information. I tried to examine the evidence independently without considering Complainant and his behavior towards Respondent, but I did not find any independent evidence that supported his allegations. There was no evidence that any of his supervisors or co-workers, or any of the administrators did anything other than consider, investigate, and respond to his multiple claims and then engage in progressive discipline related to his purposeful conduct. Complainant did not like the outcomes and alleged bias against him, but there was no evidence of bias shown. I did not find any reason to give much weight to Complainant's testimony and found overall that he was not credible and his testimony was not entitled to significant, if any, weight.

2. Complainant's Witnesses

Mr. Nosaka appeared as a witness for Complainant and was less credible than other witnesses. Overall, I did not find his testimony to be trustworthy or entitled to significant weight, though I did not discount it entirely. Mr. Nosaka was Complainant's union representative and his testimony reflected what I found to be a bias in favor of Complainant and against Respondent. As his union representative, it is understandable that Mr. Nosaka would take his advocate role seriously, but he did so to the detriment of his credibility. At Complainant's pre-termination interview, he asserted only briefly on Complainant's behalf that there was exposure to the children, but then appeared to focus and object to the child pornography investigation. Mr. Nosaka even brought an alleged witness to the child pornography incident with him, Mr. Omija, who appeared to change his story from the earlier child pornography investigation which prompted Respondent to re-open and re-examine the prior investigation. Respondent specifically asked Mr. Nosaka for input and any evidence he might have, including the alleged CDs, as part of the re-opened investigation, but Mr. Nosaka did not respond and did not provide any additional information. Mr. Nosaka was well aware of the contents of the fax sent by Complainant to the schools and that it had nothing to do with asbestos exposure. Respondent determined that there was no change from the prior investigation and no inconsistencies between the initial investigation and the re-opened investigation in May 2011.

Mr. Nosaka also answered questions reluctantly (or evasively) at times and appeared to minimize Complainant's conduct and behavior, though he did acknowledge not proceeding with grievances on at least one suspension which suggests he recognized that Complainant's conduct was deserving of discipline. Mr. Nosaka could not recall information for which, as the union representative, it appeared that he reasonably should have had the knowledge or information, and his recall appeared to be worse when asked questions that might tend to support Respondent. He also did not seem to take the whole proceeding as seriously as would be expected and his demeanor while testifying did not reflect the gravity of what was occurring. I did not discount his testimony in its entirety, but did not find it overall entitled to the same weight as the other witnesses.

Complainant's father was also a credible witness, but given the obvious connection and support for his son, I found evidence of bias in how he approached the proceeding and testimony.

Mr. Ho, Sr. said he had learned about potential asbestos exposure in 2010, not when it occurred in 2007, because of how his son was acting at home. The evidence suggests that when Mr. Ho, Sr. became aware of the situation, Complainant was under investigation regarding sending the faxes to the schools, which more reasonably explains the observation of his son and the son's behavior rather than concern about asbestos. Mr. Ho, Sr. then said he wrote an unsigned letter to Respondent about asbestos, but there was concern about whether in fact he wrote and sent the letter about asbestos exposure or whether it was drafted and sent by Complainant in his name. The information was unresolved, but it did not overall affect the material issues to be decided here. I viewed his testimony with caution, but overall found him credible though ultimately not helpful to resolve the major issues in this matter.

There were three other witnesses who were credible but ultimately did not impact the issues to be decided. Both Mr. Imade and Mr. Enoka said they had no recollection of the relevant time frames and did not offer any helpful information. Ms. Sato offered only a foundation for an exhibit by Respondent that was excluded from evidence. These three witnesses did not affect the issues to be decided.

3. Respondent's Witnesses

The witnesses for Respondent did not suffer from the same problems and concerns that characterized Complainant's testimony and evidence. Respondent's witnesses were professional, respectful of the process, answered the questions posed without argument, and the other evidence supported their opinions and conclusions about the process and what occurred. They did not show any bias towards Complainant at the hearing or during the exhaustive investigations they conducted based upon his behavior over the years. I gave the testimony of Ms. Matsuura, Ms. Noji, and Mr. Nakao significant weight. I did not find any reason that called into question their veracity or otherwise showed bias towards Complainant or this process. The evidence documented corrective counseling and attempts to resolve the difficult relationship Complainant had with his immediate supervisor over the course of many years. Respondent's witnesses appeared to have keen awareness and knowledge of the issues presented and the overwhelming weight of the evidence supported their testimony and how they dealt with Complainant and his multiple non-CAA related allegations. In fact, the record demonstrated that Respondent showed extreme restraint in how it dealt with Complainant over the years and how it attempted to get him to become a successful employee over the course of years. Ms. Matsuura, Ms. Noji, and Mr. Nakao were direct, answered questions appropriately, and were otherwise credible. I gave each of their testimony substantial weight.

Mr. Kaizuka was also a credible witness, though his testimony was not as strong as that of the other witnesses for Respondent. Overall, I found him to be credible, if not a bit weak in his dealing with Complainant. Significantly, however, nothing that he said suggested any bias against Complainant or that he was anything other than truthful and professional in his testimony. His testimony was also supported by the great weight of the evidence in the hearing and documented in memos, letters and emails. Overall, I found his testimony entitled to significant weight.

C. Complainant's Case

1. Protected Activity

A safety and health complaint must at least be “grounded in conditions constituting reasonably perceived violations” of the CAA. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-0012, slip op. at 3 (ARB Apr. 8, 1997). For example, a complaint reasonably related to the release of unsafe substances into the environment or the release of toxins into the ambient air is covered under the CAA. *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-020, 2001-CAA-009, -011; slip op. at 9-11 (ARB June 30, 2004). As previously noted, even a complaint “related to air quality that ‘touch[es] on’ concerns for public health and the environment can be sufficient.” *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 16 (citing *Melendez*, ARB No. 96-051, slip op. at 11). Besides emissions of hazardous substances into the ambient air, there are “several ways to violate the CAA and its implementing regulations,” including violations of EPA work practice standards and the standards for disposal of asbestos waste. *Knox v. U.S. Dep’t of Labor*, 434 F.3d 724, 724, n.3 (4th Cir. 2006). Under the CAA regulations, “ambient air” is “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e).

“[T]he environmental acts do not require that a complaint articulate each statute or regulation that potentially could be violated because of a defect or safety issue.” *Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 15 (ARB Sept. 29, 1998). Likewise, “a detailed knowledge of the substantive law” is not necessary for a complaint to be protected activity. *Tomlinson*, ARB Nos. 11-024, 11-027; slip op. at 11 (citing *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op at 61-62 (ARB Mar. 28, 2012)).

However, in order to be protected under the whistleblower provisions of the CAA, Complainant must have had “a reasonable good faith belief” that his complaints were “in furtherance of the purposes of the [CAA].” *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 9 (ARB Dec. 28, 2012). The belief must be subjectively and objectively reasonable, “*i.e.* he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the employee’s] circumstances having [his] training and experience.” *Melendez*, ARB No. 96-051, slip op. at 28; *Tomlinson*, ARB Nos. 11-024, 11-027, slip op. at 13. An objectively reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. *Sylvestre v. Parexel Int’l LLC*, ARB No. 07-123; ALJ Nos. 2007-SOX-039; 2007-SOX-042, slip op. at 14 (ARB May 25, 2011); *see Harp v. Charter Communs., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). While it is not necessary for Complainant to prove an actual violation of the CAA, a complaint based on “assumptions and speculation” is not sufficient. *Saporito v. Cent. Locating Servs., LTD*, ARB No. 05-004, ALJ No. 2001-CAA-00013, slip op. at 6 (ARB Feb. 28, 2006).

A complainant proves a belief is subjectively reasonable by showing he or she held the belief in good faith. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-16, slip op. at 5, (ARB Jan. 21, 2016). In other words, the employee’s belief is subjectively reasonable if the employee “actually believed that the conduct he complained of constituted a violation of relevant law.” *Gilbert v. Bauer’s Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). A complainant need not convey his reasonable belief in order for it to be

protected. *See Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 11 (ARB Jan. 10, 2018). Where “Complainant has a reasonable belief that Respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant.” *Oliver v. Hydro-Vac Services, Inc.*, No. 91-SWD-1, slip op. at 9-13 (Sec’y Dec., Nov. 1, 1995).

After a thorough review of the record, including giving Complainant’s arguments much more latitude and consideration than the evidence showed they deserved, I find that there was some evidence that Complainant’s activities at Keaau School in 2008 may have been protected activity under the CAA. However, I have determined that there were no other activities engaged in by Complainant that were protected within the meaning of the CAA. I purposely use vague words such as “some evidence” and “may have” because on the whole, and as explained above, I did not find Complainant credible and did not believe his account of what occurred in those situations that may come within the CAA. Further, even though I found that the Keaau School incident was protected, and even if the Naalehu incident or the HIOSH complaint were considered protected activity, Complainant’s case still fails because he did not demonstrate that the protected activities were a motivating factor in any of the actions taken by Respondent, up to and including terminating his employment in May 2011.

a. Analysis of Complainant’s Protected Activity

1. Naalehu School May 2007 and Baseline Testing

The record showed that Complainant alleged that he might have been exposed to asbestos at Naalehu School in May 2007. Complainant did not raise this complaint at OSHA and there was not much information other than he said he may have been exposed. “[W]hether or not the term ‘good faith’ has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection.” *Melendez*, ARB No. 96-051, slip op. at 27. While Complainant does not need to cite or even know the relevant statute, he does need to show that he actually held a belief in the possibility of an asbestos release. *Jones*, ARB No. 97-129, slip op. at 15. After reviewing the record, I find that the Naalehu School alleged exposure was not protected activity.

On June 5, 2007, Complainant told his supervisor that he might have been exposed to asbestos at Naalehu Elementary School on May 23, 2007, when he was working at that location. Complainant did not offer testimony about this specific incident and there was a dearth of information about how he might have been exposed. The evidence showed that there was asbestos work being conducted at Naalehu School around that time, but the work was completed by certified asbestos workers and there were no complaints made about the work by others. There was no evidence that Complainant did any work that would have put him in contact with asbestos. Mr. DeCoito was present at the school and had concerns about whether procedures were being followed and immediately contacted Mr. Higa who shut down the operation and addressed the concerns. Mr. DeCoito also notified Complainant, but it was after Mr. Higa was made aware of the problem and began to remedy it. The school held two community meetings and also allowed the workers to seek baseline testing if they wanted even though the school assured everyone that there had not been any asbestos exposure. The evidence also established that the area had been inspected and that the work to be done was documented, and that the proper procedures had been followed. In fact, the evidence showed that the asbestos removal work had been completed days before Complainant alleged he might have been exposed at the school. Respondent maintained that Complainant was

not exposed to asbestos, but in order to appease him, agreed to allow him to have a baseline asbestos examination.

I find that the alleged exposure to asbestos at Naalehu School in May 2007 was not protected activity under the CAA.¹¹ In that incident, Complainant said, based only upon the information that ACM was being removed from Naalehu in May 2007, that he may have been exposed. He did not report any further information regarding this incident, and he did not report it until June 2007. He did not state how or why he thought he might have been exposed. There was no dispute that ACM work was being completed at Naalehu during the timeframe referenced by Complainant. Complainant appears to have had a subjective belief that he might have been exposed to asbestos at Naalehu School in May 2007. The subjective belief standard is low and Complainant appeared to believe, even if it was unreasonable, that he might have been exposed. There was scant evidence of the circumstances of his alleged exposure other than he was present at the school doing some other work while ACM was being removed. The ACM removal was being done pursuant to a work plan by a certified asbestos removal company. I find subjectively, Complainant believed there was a potential safety concern that fell within the CAA.

However, there was no information that a person in Complainant's position, with his knowledge and training, would have objectively thought that same thing. There was no communication about potential exposure other than asbestos removal work was occurring within the relevant timeframe by a licensed asbestos removal company. There was no evidence about the circumstances surrounding the event and it does not seem plausible that a maintenance worker with Complainant's background and work history would have had the same view under these circumstances. The only information available appears to be that Complainant was present on May 23, 2007, when asbestos remediation was being performed at the school by a certified asbestos company. Complainant offered nothing to explain why he thought he might have been exposed or other activity that implicated the CAA. Mr. DeCoito was present on campus during the same timeframe but did not make similar assertions about a potential exposure. That there was a later newspaper story about asbestos removal at Naalehu School also is not convincing on either the subjective or objective reasonableness at the time of the incident. I find that there is no evidence that it was objectively reasonable to believe that there was exposure to asbestos or some other implication of the CAA at Naalehu School in 2007.

Further, related to the Naalehu alleged exposure, Respondent agreed to provide Complainant an asbestos baseline test even though it did not believe there was exposure. Respondent made the same offer to any other worker who thought they might be exposed based upon Complainant's lobbying. I found that the Naalehu alleged exposure was not a protected activity under the CAA. The evidence documented repeated attempts by Respondent to get Complainant to complete the baseline test that he asked for related to the Naalehu School. Complainant did not follow through for nearly two years, and it was still not clear if he received the baseline testing that had been authorized. There is nothing about that process that I find implicates the CAA or other protected activity—either individually or collectively. The record demonstrates convincingly that Respondent attempted to assist Complainant getting the baseline test even though

¹¹ Naalehu School incident was referred to as the Naalehu School and Naalehu Kau School. I find on this record that there were not two separate exposures, but one incident in May 2007 and references to Naalehu School and Naalehu Kau School involved the same May 2007 alleged exposure.

it did not agree that there was an alleged exposure or any CAA violation, but it was Complainant's own conduct that delayed its receipt. Agreeing to the baseline test does not change the analysis about whether the alleged and disputed exposure fell within the CAA. There is no protected activity implicated by the baseline testing process.

2. Keaau School August 2008

On August 20, 2008, Complainant went to Keaau School and caused a disturbance after someone called him and told him that asbestos work was being done, but that there was no compliance with safety standards. Complainant took pictures and had a confrontation with the principal at the school. There was no evidence that any asbestos was released or that the children were at risk. On June 3, 2009, Respondent suspended Complainant for 10 days based upon his conduct at Keaau School. Complainant never reported asbestos exposure to anyone and, other than going to the school, did nothing to follow up after the incident. Complainant did not follow union or school protocols and appeared to mislead the investigators about whether he had permission to be at Keaau School on behalf of the union. The union acknowledged that he did not follow the procedures in place to investigate safety issues at school.

The Keaau School incident arguably meets the minimal threshold for protected activity under the CAA. The evidence showed that Complainant subjectively believed that there were safety violations occurring at Keaau that implicated the CAA. Complainant was called to the school and went there believing that the safety protocols for the removal of asbestos were not being followed. However, it is arguable whether it was objectively reasonable under these circumstances to believe there was a violation. While there was some indication that safety tape had fallen down, there was no evidence that the asbestos was being released into the ambient air or even that the removal of the ACM was still occurring. Respondent hired a certified asbestos removal company and was following the protocols outlined in the AHERA report and scope of work. I find it arguable at best that a person with similar training and experience under the circumstances observed at Keaau on August 20, 2008, would have believed that the CAA was implicated.

Given the purposes behind the whistleblower statutes, including encouraging employees to come forward¹² with complaints so that remedial action may be taken, I find that despite the factors weighing against Complainant's subjective belief, the evidence is sufficient to find he engaged in protected activity at Keaau School on August 20, 2008.¹³ His conduct was also belligerent and inappropriate, and whether he should have been disciplined is a separate issue. The evidence is not overwhelming, but merely sufficient to meet the minimal standard in light of the Board's guidance to

¹² See *Immanuel v. Wyoming Concrete Indus., Inc.*, 95-WPC-3, slip op. at 6-7 (ARB May 28, 1997) (“[t]he purpose of the whistleblower statutes is to encourage employees to come forward with complaints so that remedial action may be taken. If such a course of action also furthers an employee's own selfish agenda, so be it.” *Id.* at 7 (citations omitted)).

¹³ Complainant did not file a grievance or otherwise contest the 10-day suspension for his behavior at Keaau School on August 20, 2008. Because it was not timely challenged at that time, it is not considered here as an independent cause of action. *Melendez*, ARB No. 96-051, slip op. at 9. However, it is considered to the extent it has relevance to the other claims in this matter. While the discipline was close in time and therefore had temporal proximity to the protected activity, overall, had the issue been contested, I would have found no evidence that the 10-day suspension was motivated even in part by the asbestos allegations. Complainant's conduct on August 20, 2008, was an independent and intervening act unrelated to the protected activity. The overwhelming evidence and credible testimony established that the discipline was part of a progressive and ongoing discipline plan wholly unrelated to asbestos at Keaau School.

liberally construe the statute. At the time Complainant went to Keaau School, I find that his activity was protected under the CAA.

3. HIOSH March 2006

Complainant made a series of safety complaints to HIOSH, but mostly related to possible sewage water exposure. He did not raise his HIOSH complaint as potential protected activity to OSHA. He also stated there was possible lead exposure to paint and that Respondent was not providing proper hazard assessments before sending employees to work at certain locations. There was nothing specific in the HIOSH complaint related to asbestos or other activity that might come within the CAA. HIOSH investigated the allegations and ordered Respondent to remediate a number of violations and pay a reduced fine, but none of the violations or fines were related to asbestos or anything else related to the CAA. I do not find sufficient evidence that there was any complaint to HIOSH that falls within the activity protected by the CAA.

4. Faxes October - November 2010 and Termination May 2011

Complainant sent two faxes in October 2010 regarding his belief that child pornography had been viewed on a work computer at the Hilo base yard in August 2007, which Complainant reported in May 2008. The faxes, which were misleading and incomplete, were sent to a total of 37 schools on the Big Island of Hawaii and were designed to cause fear and disrupt the activities at those schools. After learning that he would be investigated for sending the inappropriate faxes, Complainant sent a third fax threatening further action in November 2010, including going to the media, if the investigation was not halted. None of the faxes sent in October or November 2010 referenced any conduct under the CAA and did not mention asbestos or other protected claims. Instead, the faxes focused entirely on Complainant's one-sided view about child pornography. A subsequent investigation by Respondent found that the faxes caused significant disruption in the school systems and it ultimately terminated Complainant's employment in May 2011 related to the three faxes.

When he was interviewed in January 2011 as part of the investigation into the faxes, he alleged that they were sent because of exposure to children and said he included some information in the faxes concerning his alleged exposure to asbestos in 2007. However, the investigation found his assertions not credible because he did not mention asbestos in the actual faxed letter sent to the schools. During his pre-termination meeting in April 2011, Complainant's union representative made a brief statement about asbestos exposure of children, but then spent the remaining discussion rehashing the child pornography investigation from 2008. The union representative brought an alleged witness from the 2007 child pornography incident to the 2011 pre-termination meeting. Based upon information at that meeting, Respondent reopened the child pornography investigation to consider potentially new evidence. Complainant and Mr. Nosaka as the union representative were asked to present any new information regarding the child pornography investigation, but did not follow up with Respondent. The subsequent investigation did not reveal any new evidence and the child pornography investigation was again closed.

I do not find that any of the information related to the 2010 faxes, subsequent investigation, and resulting termination were protected activities under the CAA. There was no evidence that Complainant implicated any of the requirements under the CAA when he sent the faxes and it was only during a the investigation interview and pre-termination meeting held six months after the

activity that Complainant referenced earlier exposure of children to asbestos. Independently, there was no evidence that Complainant's allegations related to child pornography in 2008 implicated the CAA in any manner.

The employee's belief is subjectively reasonable if the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). Here, there is no evidence demonstrating that Complainant subjectively believed that sending the faxes about child pornography in October 2010 implicated the CAA. Complainant attempted after the fact to suggest that he was concerned about exposure, but there was no information in the faxes and subsequent interview and investigation implicating the CAA. Similarly, it was not objectively reasonable given the facts surrounding the October 2010 faxes that a reasonable person with the same training and experience as Complainant would have thought he was complaining about an issue protected under the CAA. Based upon the conduct here, it was not objectively or subjectively reasonable that Complainant's reporting of child pornography and sending the faxes in 2010 implicated any protected areas under the CAA.

2. Adverse Actions

No employer subject to the CAA "may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee...engaged in" protected activities. 29 C.F.R. § 24.102(a); 42 U.S.C. § 7622(a). Prohibited conduct is that which "intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee . . ." 29 C.F.R. § 24.102(b). "The term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010). The list of prohibited activities is viewed "as quite broad and intended to include, as a matter [of] law, reprimands (written or verbal), as well as counseling sessions by [an employer], which are coupled with a reference to potential discipline." *Id.* at 10-11. In *Williams*, the ARB also held that a written warning or counseling session is presumptively adverse where: "(a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline." *Williams*, ARB No. 09-018, slip op. at 11.

The ARB has held that this standard is somewhat different from that applied in cases arising under Title VII of the Civil Rights Act of 1964. In Title VII cases, the Supreme Court has held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity]." *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 68 (2006) (citations omitted). The ARB has held that it is "not necessarily error" to rely on *Burlington Northern* as "[b]oth standards require some level of materiality that must be more than trivial harm,"¹⁴ but that it is unnecessary to turn to *Burlington Northern* to determine whether an employee was subject

¹⁴ Examples of trivial harms in *Burlington Northern* included "petty slights," "minor annoyances," "personality conflicts," or "snubbing by supervisors and coworkers." *Burlington N.*, 548 U.S. at 58. In *Williams*, the ARB stated that "isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees" should be excluded from coverage. *Williams*, ARB No. 09-018, slip op. at 15.

to an adverse action.¹⁵ *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149, slip op. at 9 (ARB Sept. 29, 2017). Instead, adverse actions must be construed consistently with the broad regulatory definition, which includes an explicit reference to “threats,” and therefore “more expansively than under Title VII.” *Id.* at 8. Further, “[w]here termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees.” *Id.* at 9 (internal citation omitted).

Here, there is no doubt that Complainant suffered adverse actions while working for Respondent. The more relevant question, discussed below, is whether Complainant has shown by a preponderance of the evidence that his protected activity caused or was a motivating factor, at least in part, in the adverse action alleged in the complaint. 29 C.F.R. § 24.109(b)(2); *Melendez*, ARB No. 96-051, slip op. at 11. Complainant never made it clear what information he was relying upon as adverse actions and he did not offer any evidence at hearing or otherwise connecting any work-related incidents to protected activity under the CAA. His attorney similarly offered no focus to the evidence or case and appeared to miss what might be covered and what type of jurisdiction I would have to remedy. At OSHA, Complainant alleged only that his May 2011 termination was an adverse action. He attempted to include Respondent’s denial of asbestos monitoring as an adverse action, which OSHA dismissed as untimely and I have similarly dismissed it here for the same reason.

Termination, Suspensions, and Warnings

Certainly, Complainant’s termination on May 12, 2011, was an adverse action. Complainant contends that failure to pay for medical monitoring was an adverse action. I dismissed the medical monitoring as an independent adverse action because it was not timely filed. Prior to his 2011 termination, Complainant had received four disciplinary actions in the previous two years, all of which I find were adverse actions: 1) a 10 day suspension in June 2009 related to his disruptive, threatening, intimidating, and confrontational behavior at Keaau School on August 20, 2008; 2) a written-verbal warning for being dishonest and not responding truthfully to Mr. Nakao on February 4, 2010; 3) a written-verbal warning for behaving in a rude and disrespectful manner at meeting with his supervisors on February 10, 2010; and, 4) a three day suspension in September 2010 for repeatedly ignoring reminders and warnings to follow the chain of command, and for knowingly and deliberately disregarding repeated and clear notification that the Hawaii District Office would pay for his asbestos baseline testing. All of these events qualify as adverse actions.

¹⁵ Although in *Williams* the ARB based its conclusion on the statutory and regulatory language describing a broad definition of “adverse action” under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), the ARB’s analysis in *Williams* is appropriate to apply here. As the ARB noted, the regulations implementing the AIR 21’s prohibition against discrimination, found at 29 C.F.R. § 1979.102(b), list identical prohibitions to those found under the environmental whistleblower regulations at 29 C.F.R. § 24.102. *Williams*, ARB No. 09-018, slip op. at 10, n. 50; compare 29 C.F.R. § 1979.102(b) with 29 C.F.R. § 24.102(a). Additionally, the standard articulated in *Williams* has been adopted for whistleblower cases arising under other statutes. See, e.g., *Menendez v. Halliburton, Inc.*, ARB No. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 20 (ARB Sept. 13, 2011) (adopting the *Williams* standard in cases under the Sarbanes-Oxley Act); *Fricka v. National Railroad Passenger Corporation*, ARB 14-047, ALJ No. 2013-FRS-035 (ARB Nov. 24, 2015) (applying the *Williams* standard in cases under the Federal Rail Safety Act).

Miscellaneous Work-Related Concerns

While not specifically arguing what actions by Respondent he asserts were adverse actions, Complainant appears to contend that a number of disciplinary actions taken by Respondent were adverse actions. Most, if not all of the events were before any protected activity under the CAA. Some actions were taken after the protected activity, but Complainant did not testify or offer evidence about the incidents; they were simply events that occurred and were included in Respondent's exhibits. I do not sit at a "super personnel" department and I am not evaluating any of the conduct by Respondent other than to the extent that any decision was motivated by protected activity within the meaning of the CAA. The first part of that inquiry is determining if there were any adverse actions taken against Complainant that fit within the definition under the CAA. Complainant's counsel made a generic reference to past conduct and ongoing protected activity, but the vague argument made in closing briefs and referenced in opening statement, had no connection to the evidence in this case. Because the record was amorphous about what conduct and allegations Complainant complained about, I briefly consider each of these incidents as potential adverse actions only to the extent that they might be relevant to the issue of animus and or causation.

In July 2005, Complainant alleged that his tools were stolen. There was limited information other than it appears that Respondent paid the cost to replace the tools. This incident predates any protected activity under the CAA, and there was no evidence connecting the July 2005 tool incident to any protected activity under the CAA or to Complainant's termination. This was not an adverse action. In July 2005, Complainant filed a prohibited practices action with the EEOC alleging a series of work-related allegations and incidents but made no reference to the CAA or other prohibited conduct. The EEOC ultimately dismissed the action. The EEOC complaint predates any protected activity under the CAA, and there was no evidence connecting the prohibited practices complaint to the CAA or other prohibited conduct. This was not an adverse action. In May 2006, Complainant made eight complaints about the conduct of his supervisor and 15 complaints about unsafe work practices that occurred between September 2004 and March 2006. The complaints were too remote in time and before any allegations related to the CAA and asbestos exposure, which were in 2007 and 2008. I found the alleged exposure in 2007 at Naalehu School was not a protected activity within the meaning of the CAA. Complainant offered no testimony at hearing explaining why these complaints should be considered as adverse actions, and independently there was insufficient evidence to find that they were. In the abstract, the information is of the type that could be adverse, but there was insufficient proof to find they were. These events were not considered by me as adverse actions.

In July 2007, Complainant made a complaint about not receiving training that other workers had received. The complaint about training was about the timeframe when Complainant alleged that he was exposed to asbestos at Naalehu School, which I found was not a protected activity. There was no evidence connecting the training complaint to any protected activity under the CAA. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was. In October 2007, Complainant made a complaint that certain work at Respondent was being done by unlicensed electricians and unlicensed plumbers. The complaint was nearly one year before any protected activity under the CAA. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was. In June 2008, Complainant alleged that his supervisor stole ladders, and he filed an HLRB prohibited practices complaint in July 2008. Complainant offered no testimony at hearing

explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was.

In October 2008, Complainant alleged that he saw paint peeling at one of his worksites and was concerned that there was lead in the paint. Subsequent investigation revealed that the paint was water-based paint and there was no lead. The complaint occurred shortly after the August 2008 incident at Keaau School that I found was protected activity, but there was otherwise no connection to the CAA or to Complainant's termination. There was no information that Respondent took any disciplinary actions against Complainant related to the peeling paint complaint. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was.

In December 2008, Complainant filed a grievance alleging that his supervisors changed an accident report and made false statements. He alleged that management did nothing. This occurred while he was being investigated for the Keaau incident, which I found was protected activity. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was. In the abstract, the information is of the type that could be adverse, but there was insufficient proof to find they were. These events were not considered by me as adverse actions. In January 2009, Complainant made a complaint about damaged clothing that occurred at work and that he had not received computer training that other workers had received. It appeared to be the same complaint or related to the same complaint he made in July 2007. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was.

In August 2009, Complainant filed a complaint with Respondent alleging that his supervisor made a statement about respirators not being important for the job. Complainant alleged there was no follow-up in January 2010. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was. Complainant never explained how this might be considered retaliation under the CAA. In October 2009, Complainant made a complaint to the EEOC, but it was not pursued and Complainant did not allege any connection to his protected activity or the CAA. The only evidence about the EEOC complaint appeared in Respondent's exhibits. Complainant offered no testimony at hearing explaining why this should be considered an adverse action, and independently there was insufficient evidence to find that it was. In the abstract, the information is of the type that could be adverse, but there was insufficient proof to find it was. These events were not considered by me as adverse actions.

Each of the incidents alone do not rise to the level of an adverse action, and even if they did, they were not raised at OSHA or otherwise timely filed. Complainant offered little credible evidence demonstrating why these events should be considered to be adverse actions. The information generally came from Respondent's extensive and well-documented exhibits, which demonstrate that each of his complaints were handled in a professional and appropriate manner. Complainant has not shown how each of his complaints were adverse and he has not shown any connection individually or collectively to this case. None of the actions taken by Respondent were in anyway linked by Complainant to his protected activity and Complainant did not demonstrate how he suffered any adverse repercussions from the various work complaints.

3. Motivating Factor

Where a complainant proves that his actions were protected under the CAA, “he must then show ‘by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.’” *Tomlinson*, slip op. at 20 (citing 29 C.F.R. § 24.109(b)(2)). “A ‘motivating factor’ is ‘conduct [that is] . . . a ‘substantial factor’ in causing an adverse action.” *Onysko v. State of Utah, Dep’t of Env’t. Quality*, ARB No. 11-023, ALJ No. 2009-SDW-4, slip op. at 10 (ARB Jan. 23, 2013) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). To meet this standard, complainants “need only establish that th[e] protected activity was *a* motivating factor, not *the* motivating factor. . . .” *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at 14 (ARB Apr. 25, 2014) (quoting *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010)); *cf.*, *Cosa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (discussing the definition of “motivating factor” as used in discrimination cases under Title VII, and codified at 42 U.S.C. § 2000e-2(m)).¹⁶ Importantly in this case, to find discrimination established, “[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” *Melendez*, ARB No. 96-051, slip op. at 42 quoting *St. Mary’s Honor Center*, 450 U.S. 502, 519 (1993); *see Joyner*, ARB No. 12-028, slip op. at 11 (employee must persuade the ALJ that “[his or her] version of events is more likely true than the employer’s version.”).

A complainant may establish that the protected activity was a motivating factor by direct or circumstantial evidence. *See Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011). Circumstantial evidence may include temporal proximity, pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward Complainant after he or she engages in protected activity. *Id.* Proving causation through circumstantial evidence “requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013). An ALJ must consider the circumstantial evidence as a whole and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17-18 (ARB Aug. 29, 2014).

The chronology of protected activities and personnel actions is also important, as temporal proximity between protected activity and the decision to take an adverse action is relevant to the determination whether such action was motivated by retaliatory intent. *Melendez*, ARB No. 96-051, slip op. at 12 *citing Simon*, 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)). However, temporal proximity is not dispositive in determining whether the adverse action was retaliatory. *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1, slip op. at

¹⁶ “A complainant must prove more when showing that protected activity was a ‘motivating’ factor than when showing that such activity was a ‘contributing’ factor.” *Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 n.6 (ARB Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)).

13 (ARB Oct. 31, 2008); *Jackson v. Arrow Critical Supply Solutions, Inc.*, ARB No. 08-109, ALJ No. 2007-STA-042, slip op. at 7 n.5 (ARB Sept. 24, 2010).

An employer may terminate an employee for any reason, good or bad, as long as the reason is not proscribed by a Congressional statute. *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (referencing *NLRB v. Knuth Bros, Inc.*, 537 F.2d 950, 954 (7th Cir. 1976) and *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 679 (9th Cir. 1981); *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). Whistleblower statutes “do[] not prohibit an employer from imposing a wide range of requirements on employees,” even irrational or unfair policies, as long as those requirements are not retaliatory and do not interfere with protected activity. See *Timmons v. Franklin Elec. Cooperative*, ARB No. 97-141, ARB No. 97-SWD-2, slip op. at 6 (ARB Dec. 1, 1998); see also *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 12-002, ALJ No. 2006- WPC-001, slip op. at 6, n.4 (ARB Aug. 29, 2012) (an employer is not required to produce good reasons for an adverse action, but only required to show an adverse action was not motivated by protected activity).

I was not persuaded by Complainant’s evidence or by his version of the facts related to this matter. As discussed below, Complainant has not shown that any of the adverse actions individually or collectively were motivated even in part by his protected activity under the CAA, either by direct or circumstantial evidence. There was no temporal proximity between his 2008 protected activity and his 2011 termination. Complainant did not show any animus, temporal proximity, inconsistent application of Respondent’s policies, or shifting explanations for what was occurring, either collectively or individually, for the myriad of problems Complainant created and otherwise had in the work place.

a. Termination and Baseline Testing

Complainant sent two faxes in October 2010 regarding his belief that child pornography had been viewed on a work computer at the Hilo base yard in August 2007, which Complainant reported in May 2008. The faxes, which were misleading and incomplete, were sent to a total of 37 schools on the Big Island of Hawaii and were designed to cause fear and disrupt the activities at those schools. After learning that he would be investigated for sending the inappropriate faxes, Complainant sent a third fax threatening further action in November 2010, including going to the media, if the investigation was not halted. None of the faxes sent in October or November 2010 referenced any conduct under the CAA and did not mention asbestos or other protected claims. Instead, the faxes focused entirely on Complainant’s one-sided view about child pornography. A subsequent investigation by Respondent found that the faxes caused significant disruption in the school systems and it ultimately terminated Complainant’s employment in May 2011 related to the three faxes. I did not find the sending of the faxes to be protected activity and I do not find any evidence connecting the faxes to the CAA in any manner.

When interviewed about the faxes in January 2011, Complainant alleged he sent them because the principals needed to be aware of asbestos exposure. The assertion was not credible because there was absolutely no mention of asbestos in the faxes. During his pre-termination meeting in April 2011, Complainant’s union representative made a brief statement about asbestos exposure of children, but then spent the remaining discussion rehashing the child pornography investigation from 2008. The union representative brought an alleged witness from the 2007 child pornography incident to the 2011 pre-termination meeting. Based upon information at that meeting, Respondent reopened the child pornography investigation to consider potentially new

evidence. Complainant and Mr. Nosaka as the union representative were asked to present any new information regarding the child pornography investigation, but did not follow up with Respondent. The subsequent investigation did not reveal any new evidence and the child pornography investigation was again closed.

I do not find any evidence connecting the 2010 faxes, the subsequent investigation, or the ultimate 2011 termination to any protected activity at Keaau School in 2008. Therefore, I do not find any evidence that Respondent's termination of Complainant was motivated even in part by the protected activity at Keaau School. There was no temporal proximity between any protected activity and Complainant's ultimate termination. Complainant sent the faxes over two years before after any incident involving asbestos, and was too remote in time from the Keaau protected activity. I rejected Complainant's explanation as not credible that he sent faxes to schools in 2010 about child pornography in 2007 because he was concerned about asbestos exposure in 2008. There was no evidence connecting Keaau, the faxes, and his termination. Independently, there was no evidence that Complainant's allegations related to child pornography implicated the CAA in any manner. I am not persuaded by a preponderance of the evidence or otherwise (I am not persuaded at all) that Respondent was motivated even in part by anything related to protected activity under the CAA. The overwhelming evidence was that Respondent terminated Complainant due to the faxes he sent that caused widespread disruption to the DOE.

Complainant did not timely allege any independent causes of action related to any protected activity, but I considered whether the record as a whole could be relevant in the motivating factor analysis. Complainant alluded to an ongoing pattern of retaliation, and even suggested that it was pretext, *see* ALJX-1 at 27-28, but other than his unsubstantiated accusations, there was no evidence supporting this contention. Further, there was no ongoing pattern or practice related to any protected activity. In fact, at each juncture of what I found to be arguable protected activity, Respondent stepped up and handled the matters professionally and appropriately, and applied its policies consistently. In May 2007, following the Naalehu School alleged exposure, Respondent, despite not agreeing that Complainant was exposed to asbestos, agreed to provide him with a baseline testing. Complainant was still complaining about baseline testing even though the evidence clearly established it was approved years before. It is still not clear whether Claimant even followed through and had a true baseline examination or whether he just saw a doctor for an examination. I did not find this activity to be protected under the CAA, but even if I had, Complainant did not show that it was a motivating factor in any adverse actions, including his termination. That Complainant refused to follow through for nearly two years was not due to Respondent's actions, but instead to his own behavior and conduct and refusal to follow through. The head of personnel specifically told him that he should get a baseline line test, but he still did not get one instead saying because his supervisor did not tell him that, even though there was plenty of evidence that the supervisor had, he did not get the test. It was not credible and not believable.

I previously dismissed Respondent's failure to pay for medical monitoring as an issue for this hearing as it was not timely filed, but even assuming that failure to pay for medical monitoring in March 2010 was an adverse action, there was no temporal proximity to the protected activity in 2008 as that occurred more than a year before his May 2011 termination. There was also no evidence demonstrating that Respondent was motivated even in part by the Keaau School protected activity when it failed to provide medical monitoring to Complainant in 2010. The request for medical monitoring made by Complainant and agreed to by Respondent was the result of an incident in 2007 prior to the Keaau School protected activity.

The evidence did not support Complainant's contention that Respondent refused to pay for baseline testing, and the evidence demonstrated that Respondent never told Complainant that it would cover medical monitoring. Complainant said he was told that information, but did not produce any documents or other evidence to show who told him that monitoring would be covered. I did not find him credible generally, and on that specific point, I found Mr. Kaizuka's testimony to be much more convincing. Mr. Kaizuka sent Complainant a letter on March 22, 2010, unequivocally stating that it would not cover medical monitoring, but would pay for a baseline asbestos test. It was never clear if in fact Complainant had the baseline testing, but the evidence established that Respondent went out of its way to see that it was handled. Moreover, the May 2007 incident was four years before his termination. There was no connection in time between his termination and the 2007 alleged exposure or the 2008 incident.

Complainant's termination in 2011 was not related to protected activity, and therefore was not motivated by even in part the protected activity, but instead was related to his ongoing obsession with a 2007 allegation that child pornography was viewed on a work computer. The investigation had been conducted and closed, but Complainant refused to let the allegation go. Even during his termination, he raised the issue of child pornography again and Respondent reopened the investigation to explore what appeared to be new information. Complainant and his union representative did not follow through with any additional information and upon re-interviewing the witnesses suggested by the union. Respondent concluded again that there was no way to substantiate Complainant's allegations. Complainant was not a percipient witness to the incident, but was instead reporting what other people told him over nine months after the alleged incident. Complainant raised during the pre-termination interview that he was concerned about exposure to children, but the motive for raising that issue was suspect and not supported by any of the evidence in the record. Complainant sent the faxes in 2010 but did not reference in any manner asbestos exposure or testing. Complainant said he filed grievances on behalf of children, but there was no evidence to support that claim and I did not find it credible. The union did not file any grievances related to asbestos exposure or any other violation of the CAA. When Complainant was suspended for the 2008 Keaau School behavior, the union did not file a grievance contesting the discipline. This was the only activity that was arguably protected under the CAA and there was no connection between the August 2008 protected activity and his 2011 termination.

b. Suspensions and Verbal Warnings

Complainant received a 10 day suspension in June 2009 related to his disruptive, threatening, intimidating, and confrontational behavior at Keaau School on August 20, 2008. While the suspension was an adverse action, it was not timely contested and is not considered as an independent action here. Even if it were, Complainant did not show by a preponderance that the suspension was motivated in any part by protected activity, but instead was focused on Complainant's combative and inappropriate behavior at Keaau School. Considering the suspension in the context of the other allegations Complainant appeared to make, Complainant has not shown that the suspension was motivated even in part by any animus, change in policy, pretext, or shifting explanations for any conduct in this case.

In a separate incident, Complainant received a written-verbal warning for being dishonest and not responding truthfully to Mr. Nakao on February 4, 2010, a written-verbal warning for behaving in a rude and disrespectful manner to his supervisors at a meeting on February 10, 2010,

and a three day suspension in September 2010 for repeatedly ignoring reminders and warnings to follow the chain of command, and for knowingly and deliberately disregarding repeated and clear notification that the Hawaii District Office would pay for his asbestos baseline testing. These actions were over eight months before he sent the faxes to the school for which he was ultimately terminated, and nearly three years after the 2008 protected activity. None of the incidents were raised in the complaint to OSHA or individually at hearing. There was no evidence showing that the 2008 protected activity caused or was a motivating factor in either of the verbal written warnings or the suspension. Considering the three incidents together, Complainant did not show a pattern, animus, shifting explanations, or any other reason that might be considered sufficient to infer that there were motivated even in part by the 2008 protected activity. I do not find any evidence of motivation and certainly no evidence that would come close to what would be considered a preponderance.

I find Complainant has failed to prove by a preponderance of the evidence that the two suspensions and two written-verbal warnings taken by Respondent were motivated even in part by his 2008 protected activity. Instead, I find that the record established that Respondent increasingly held Complainant accountable for his work-related conduct, failure to follow directions, continual re-hashing of previously investigated complaints, his unwillingness to accept the result of the investigation, and his sending of faxes to the 37 schools to sow fear and disrupt the institutions. Complainant has not shown direct or circumstantial evidence to support his allegations or connect any of the progressive discipline to his protected activity. Complainant has not established any retaliatory animus against him, has not shown any evidence of pretext, and has shown any temporal proximity in this matter related to the 2008 protected activity.

c. Miscellaneous Work-Related Concerns

As previously noted, the record is filled with grievances and complaints filed by Complainant for a variety of activities related to supervisor harassment and personnel issues in the workplace. However, the record did not establish that any of the activities were related to any protected activity under the CAA. Complainant suggests that the actions were pretext and show retaliatory intent, but I did not find any evidence to support his assertion. *See* ALJX-1 at 27-28. I found no evidence of hostility or animus towards Complainant, but instead found that Respondent showed restraint and patience in its handling of Complainant and his complaints. Respondent requested that Complainant follow the chain of command, which is a potential issue concerning retaliatory behavior and animus, but the record did not establish a connection here. *See Melendez*, ARB No. 96-051, slip op. at 36-38. Respondent documented its attempts to deal with Complainant's requests and concerns on matters unrelated to his protected activity, and specifically related to his unwillingness to follow through on getting a baseline test. However, the memos and letters were often in response to Complainant's attempt to drive the conversation and have matters handled on his timeline as opposed to those of the supervisors or administrators. I found no evidence to support any finding of discriminatory animus towards Complainant.

I did not find that each of the incidents alone rose to the level of an adverse action. Similarly, there is no common thread throughout the various activities that Complainant has complained about, and, most notably, there was no tie to any activity protected under the CAA. In his closing argument, he argued by innuendo, and when he attempted to connect information to his case, it was contrary to the weight of the evidence and based upon his factual assertions that I rejected in the factual findings. Complainant offered little credible evidence demonstrating why

these events should be considered to be adverse actions. The information about his workplace concerns generally came from Respondent's extensive and well-documented exhibits. These actions do not demonstrate animus towards Complainant, they were not close in time the protected activity, and there was no evidence that Respondent offered shifting explanations for its behavior and handling of the matters. I also do not find that there was any indication of pretext or other retaliatory intent. Respondent's exhibits document the complaints and the professional manner in which Respondent dealt with each complaint. I paid particular attention to consider Complainant's complaints individually, and then again collectively, to see whether Respondent masked animus towards Complainant and whether the evidence supported contrary findings, but there was no such evidence. There is no question that Complainant's argumentative and confrontational demeanor, particularly with his managers and supervisors, created a difficult workplace, but Complainant failed to show that Respondent's actions were motivated even in part by any protected activity under the CAA.

4. Conclusion

On the whole, I find the evidence insufficient to establish that protected activity caused or was a motivating factor, at least in part, in any adverse actions taken by Respondent against Complainant. 29 C.F.R. § 24.109(b)(2); *Melendez*, ARB No. 96-051, slip op. at 11. There was no evidence—none—that connected Complainant's termination to any protected activity within the meaning of the CAA. I also considered the extensive record and do not find any evidence that the general discipline actions, which appeared to be appropriate, restrained, and progressive in nature, were in anyway motivated or caused by any protected activity under the CAA.

Therefore, I find that Complainant has not proven his case by a preponderance of the evidence. Complainant, who I did not find to be a credible or believable witness, arguably engaged in protected activity under the CAA in August 2008, but he did not show that the 2008 protected activity was a motivating factor in Respondent's termination of his employment in May 2011 or in any of the other incidents mentioned in the record. The record is devoid of any credible evidence connecting protected activity to any adverse action.¹⁷

Complainant had the burden to show by a preponderance of the evidence – to convince me that his version of the events was more likely true than not—and I find that Complainant has failed to prove his case. The evidence is overwhelmingly against his assertions and allegations and I do not find it to be even a close call. Accordingly, Complainant's claim under the CAA is dismissed.

¹⁷ Once Complainant has proven discrimination, Respondent may demonstrate by a preponderance of evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 01-CAA-4, slip op. at 4, n.1 (ARB Jul. 30, 2004); 29 C.F.R. § 24.109(b)(2). Because Complainant has not proven his case, I do not reach this issue. However, if it is not clear from the decision denying the complaint, had I reached the question, I would have found that Respondent has proven its case well beyond a preponderance of the evidence that it would have taken the same action against Complainant in the absence of any protected activity. The evidence overwhelmingly supported Respondent's termination of Complainant as unrelated to and not motivated even in part by any protected activity under the CAA.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

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

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from

which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.