Date: May 8, 1995

Case No.: 94-CAA-7

In the Matter of:

LAWRENCE J. OPTHOF,
Complainant

v.

ASHLAND CHEMICAL COMPANY,
Respondent.

Appearances:

Michael D. Kohn, Esq.
Stephen D. Kohn, Esq.
For the Complainant

Patrick J. McCarthy, Esq.
Theresa A. Kelly, Esq.
For the Respondent

Before: THEODOR P. VON BRAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

Lawrence J. Opthof, the Complainant, on November 4, 1993 filed a complaint under the employee protection sections of six environmental statutes[1] after his firing by Ashland Chemical Company, the Respondent.

On December 7, 1993, the District Director of the Wage-Hour Division found Complainant's charges sustained. Respondent filed a timely appeal and the hearing in this proceeding was held in February and April 1993.

Identity and Background of the Parties

The Complainant

1. Lawrence J. Opthof, the Complainant, was employed as a plant engineer by the Electronics Chemical Division of Ashland Chemical Company in 1983. (Opthof 52). In 1986, his job title was changed to maintenance supervisor. (RX 8). He is an honorably discharged veteran of the Vietnam war with a 50% disability rating arising out of wounds sustained in that conflict. (Opthof 45-46).

2. Mr. Opthof has a B.S. in Management from Rutgers University and took chemical engineering at the New Jersey Institute of Technology and electrical engineering at Lafayette University in Easton, Pennsylvania. (Opthof 46). In his employment application filed with Ashland in 1983, Mr. Opthof stated he has a B.S. in management and a minor in engineering from Rutgers. (Opthof 47). He does not, in fact, have a minor in engineering as a formal degree and the statement is untrue. (Opthof 47, 51, 275, 277).

3. Mr. Opthof, as plant engineer, was responsible for capital projects and supervision of the maintenance department at Ashland's Easton, Pennsylvania facility. He reported to the plant manager. (Opthof 53).

4. Complainant's salary at the time of his termination was $55,000 a year and his benefit package was equivalent to an additional 31%. (Opthof 270).

5. Mr. Opthof, beginning in January 1992, engaged in extensive litigation with his employer. That litigation history may be summarized as follows:

(1) In January of 1992, Complainant filed an OFCCP Complaint with the Department of Labor against Ashland ("Opthof I") in which he alleged discrimination on the basis of disability and veteran status. (Docket No.

C920015.). . . . On September 17, 1992, the Department of Labor found that there was insufficient evidence to conclude that Ashland had violated its obligations of non-discrimination and affirmative action.

(2) In March of 1992, Complainant filed a Complaint with the Pennsylvania Human Relations Commission ("Opthof II") alleging discrimination on the basis of his disability and age. (Docket No. E-58700-A.). . . . In July of 1992, Ashland and Complainant entered into a settlement agreement.

(3) In June of 1992, Complainant filed a second Complaint with the Department of Labor against Ashland ("Opthof III") in which he alleged discrimination on the basis of disability and veteran status and intimidation. (Docket No. C920131.). . . . On December 2, 1992, the Department of Labor found that there was insufficient evidence to conclude that Ashland had violated its obligations of non-discrimination and affirmative action.

(4) In June of 1992, Complainant filed a lawsuit against Ashland in the United States District Court for the Eastern District of Pennsylvania ("Opthof IV")

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in which he alleged claims of negligence and fraud with respect to a 1986 promotion. (Civil Action No. 92-CV-3136.). . . . By Order entered October 21, 1992, the Court dismissed Complainant's lawsuit. By Order entered July 14, 1993, the Third Circuit affirmed the dismissal of this lawsuit.

(5) In September of 1992, Complainant filed a third OFCCP Complaint with the Department of Labor against Ashland ("Opthof V") in which he alleged discrimination on the basis of disability and veteran status. (Docket No. C920201.). . . . On April 20, 1993, the Department of Labor found that there was insufficient evidence to conclude that Ashland had violated its obligations of non-discrimination and affirmative action.

(6) In November of 1992, Complainant filed a federal lawsuit in the Eastern District of Pennsylvania ("Opthof VI") in which he alleged that Ashland and its employees had engaged in a conspiracy to violate his rights under 42 U.S.C. §1985(3). (Civil Action No. 92-CV-6588.). . . . By Order entered January 26, 1993, the Court dismissed this lawsuit.

(7) In March of 1993, Complainant filed a lawsuit in the Court of Common Pleas, Northampton County, Pennsylvania ("Opthof VII") in which he alleged that Ashland and its employees had breached the PHRC agreement. Defendants removed this lawsuit to federal court. (Civil Action No. 93-CV-2420.). . . . By Order entered October 26, 1993, the Court dismissed this lawsuit and ordered Rule 11 sanctions against Complainant's attorney, Arthur Jackson. Complainant appealed the dismissal of this lawsuit to the Third Circuit (Docket No. 93-2209) which is currently pending. (RX 61)

6. On September 30, 1992, Complainant notified Michael Pregent, the Easton Plant Manager, of his concerns pertaining to hazardous wastes at the Easton plant advising further that he intended to notify the Pennsylvania Department of Environmental Resources and the Environmental Protection Agency of the situation. (CX 63). On October 9, 1992, Complainant called the Company hotline 1-800-ASHLAND again raising these concerns. He reported his allegations to the DER on the same day. (Opthof 154-155).

7. Up to September 1992, Mr. Opthof had never received a marginal performance rating in any of the categories in which he was rated in his annual performance appraisal. (Opthof 66-67). In that appraisal dated September 16, 1992, he was given an overall performance rating between effective and very effective. (CX 15 p. 5). In September 1993, Mr. Opthof's performance appraisal rated him unsatisfactory and his employment was terminated on October 7, 1993. (RX 48; CX 161; Pregent 1638-1639).

The Respondent

8. Ashland Chemical, Inc., is a wholly-owned subsidiary of Ashland Oil, Inc. (CX 216). The Electronics Chemical Division of Ashland Chemical supplies high purity chemicals,

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acids, or solvents and other materials to the semi-conductor manufacturing industry. Ashland Chemical's corporate headquarters is in Dublin, Ohio. (Nagle 1923-1925). The Electronics Chemical Division has three manufacturing facilities in Easton, Pennsylvania, Dallas, Texas, and Newark, California. (Pregent 1341).

9. Ashland's Easton facility is classified as a hazardous waste generator and has no permit to store hazardous waste for longer than 90 days. (Pregent 1702; CX 20).

Complainant's Chain of Command

10. Dennis Nagle is manufacturing manager of the Electronics Chemical Division of

Ashland Chemical Company. (Nagle 1923). He reports to the vice president and general manager of the division. Mr. Nagle, who is based in Dublin, Ohio, is responsible for operating the Division's three manufacturing plants including Easton, Pennsylvania. He was employed by Ashland in March of 1991. (Nagle 1924, 1926).

11. Michael Pregent was employed as operations manager at Ashland's Easton plant in January 1992. As operations manager he was responsible for the manufacturing operations within the facility. Subsequently he was appointed to be the Easton plant manager in February 1992. (Pregent 1339-1340, 1595). He reports to Dennis Nagle. (CX 198).

12. Robert DePascale is operations manager at Ashland's Easton facility. In that capacity, he oversees the manufacturing and general operations of the plant. He is the number two person at the facility. (DePascale 1185-1186; Pregent 1370). He supervised Mr. Opthof briefly for the period of about a month. (DePascale 1190-1191).

13. R. E. Hunter is the Vice President and General Manager of the Electronics Chemical Division. He is Dennis Nagle's immediate supervisor. (Nagle 1983).

Complainant's Relationship With His Supervisor in 1991-1993

14. As already noted, Mr. Opthof engaged in extensive collateral litigation with his employer from January 1992 on. (*See* Finding 5, *supra*.)

15. In February 1992, Complainant approached the manufacturing manager concerning the Easton plant manager position. Dennis Nagle advised Mr. Opthof that he was not qualified for the job. (Nagle 1934-1938; RX 8). In that connection, according to Nagle, Complainant informed him that he had an understanding of his rights under affirmative action and that he was out to collect. (Nagle 1938; RX 8).

16. At that time, Mr. Nagle was also concerned that Mr.Opthof was falling behind in his programs and not providing solutions to such problems. Mr. Nagle, as a result, felt there were concerns about Complainant's leadership as maintenance manager and as part of the management team of Ashland at that site. (Nagle 1936).

17. On March 5, 1992, Michael Pregent expressed the following criticisms of Complainant's management style:

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TO: D. NAGLE

FROM: M. PREGENT

SUBJECT: MAINTENANCE AND L. OPTHOF'S PERFORMANCE

Larry was out of town for three days this week and as a result missed a meeting with the union. The grievance meeting was held with Finelli/O'Hare/Nemeth and Pregent/DePascale on 3/3/92.

During his absence, Bob DePascale was responsible for the daily operation of the maintenance department.

Larry's absence brought a few more things to light regarding his performance.

Daily operation appears to be very disorganized, which leaves much room for productivity improvements. People could be juggling quite a few projects at a time. A person might come in two hours early and work on a "project" for that time (since it is capital), then switch to something else since it's now regular time and "should" be regular maintenance. When he comes back to the project, he wastes time trying to remember where he was and where he's going.

During grievance meeting, there was much complaining about the way things are handled in maintenance. For instance, LO apparently told (in Dec) maintenance people that all OT was ending and more recently that "all" projects are going to be farmed out to outside contractors. Neither of these is true. In fact, I specifically told LO that some projects are going to be done by maintenance due to their "expertise".

Union has threatened to file grievances and take them to arbitration once we start using outside contractors. In my opinion, this negative attitude is a direct result of the way the shop is being (mis)managed. LO is very insecure and always thinks people are out to get him.

LO does a decent job at projects but cannot deal with people in a fashion that is needed for us to make the kind of progress we must make now and in the future.

(RX 11)

18. The next time Mr. Nagle met with Complainant was in May of 1992. James Sterling of Ashland's personnel office was also present. Mr. Opthof requested permission to tape record the meeting which was denied. According to Nagle he had never had a request of this nature before. (Nagle 1939-1940). At that meeting Nagle again stated that he did not feel Opthof was qualified for the plant manager's position. At this meeting Sterling and Nagle offered to put Complainant on a developmental plan so he could be considered for future openings should they occur. (Nagle 1941). Sterling and Nagle, in conjunction with the developmental plan, offered Mr.

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Opthof use of the profiler.[2] Complainant was not receptive to use of the profiler which was to precede a development plan for Complainant offered to him on May 5, 1992. (Nagle 1942-1943, 1945). Nagle felt the meeting was unsuccessful since Opthof had an inflated view of his capabilities and was not open to suggestions of remediation. (Nagle 1945).

19. The next meeting of Complainant with Nagle was at the offices of the Pennsylvania Human Rights Commission (PHRC) to address additional grievances of the Complainant. (Nagle 1946-1948). At the end of the meeting an agreement was signed. Pursuant to that agreement Complainant was offered the job as plant engineer to accommodate his disability with a job involving less walking, viz., plant engineer. (Nagle 1949). In order to develop Complainant's supervisory skills, he was to have the opportunity of supervising an employee. (Nagle 1949-1951; CX 160). In addition, Complainant was offered the use of the profiler. Thereafter an action plan to resolve Complainant's weaknesses was to be formulated. (CX 160; Nagle 1951). Complainant's resume was also to be distributed to 10 divisions in the company. (Nagle 1951). Finally, it was agreed that Opthof and his supervisor, Michael Pregent, were to collaborate on a new job description for the position of plant engineer. (Nagle 1952).

20. In addition, there was agreement to research Opthof's job change in 1986 to determine whether he was entitled to a promotion which he did not get. (Nagle 1952-1953).

21. Nagle left the July meeting feeling that they would be able to resolve matters on the basis of the agreement. However, on his return to his office, he learned that Complainant, in June of 1992, had filed a lawsuit in federal court alleging negligence and fraud surrounding his 1986 job change. Complainant, at the July PHRC meeting, had failed to advise of the pending lawsuit. Nagle felt this displayed a lack of candor on Complainant's part. (Nagle 1954-1955, 1959).

22. The implementation of the PHRC agreement was left to Michael Pregent, the plant manager, and James Sterling, the Human Resources Specialist. (Nagle 1963).

23. In September 1992, Michael Pregent gave Complainant a rough handwritten draft of a job description. (RX 17; Pregent 1431-1432). There was disagreement about the proposed job description between Pregent and Opthof. (Pregent 1434). The main source of disagreement on the job description was the reporting relationship of the maintenance department. (Pregent 1586). Opthof wanted the maintenance department to report to him and Pregent did not. (Pregent 1587).

24. Among the job objectives listed in the proposed job description for Opthof was the coordination of hazardous waste. (Nagle 2045). On September 16, 1992, Pregent thought Opthof capable of coordinating hazardous waste because as plant engineer in the early eighties one of his duties was to coordinate compliance problems with various levels of government, he was already doing the quarterly hazardous waste reports and "technically [he was] a reasonably detailed person. (Pregent 1753-1755).[3]

The Hazardous Waste Situation at Ashland-Easton

25. In April 1989, Margaret Opthof, wife of the Complainant, had written a

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memorandum to Gil Drab, then the manufacturing manager, while she was employed by Ashland as a temporary employee writing memoranda on in-house procedures. In that memorandum, she expressed a concern about the legality of keeping non-reworkable non-marketable wastes unlabeled in order to skirt the 90-day limit on the accumulation of hazardous waste. (CX 16; Opthof 133-134; M. Opthof 677).

26. In 1990, the plant manager at that time, Darrell String, had an estimate of $20,000 for disposal of hazardous waste drums. R. E. Hunter, the Vice President of the Electronics Chemical Division found this figure too expensive and directed String to find some other way to dispose of the material. (Tichich 581). Respondent's internal audit confirms that no money was budgeted for 1990 to dispose of waste. (CX 20 p. 23).

27. An internal audit of Respondent dated July 29, 1991, the so-called Hogan report, addressed to R. E. Hunter, found in relevant part as follows:

CONTROLS OVER THE ACCUMULATION AND DISPOSAL OF WASTE MATERIAL

Procedures have not been established to control the accumulation of

chemical waste, such as line flush, "heels" (partial drums of material), off-specification material, etc., to ensure that chemical wastes are properly managed and disposed of within the time limits specified by Federal Regulations; certain material which had been classified as hazardous waste had not been properly labeled and identified at the time of the audit.

The Easton Plant is registered as a hazardous waste "generator" but does not have a permit for the storage of hazardous wastes. A generator is only allowed to store hazardous waste for 90 days before disposition.

At the time of our review, we identified over 1,400 drums of various chemical materials and wastes which had been accumulating in the plant. . . .

* * * *

We believe that the Easton Plant needs to adopt improved procedures for the control and management of plant-generated waste. We do not dispute plant personnel's contention that significant quantities of the acid heels may be reworked and sold, but the quantities on hand at the time of the audit indicate that recycling efforts have not kept pace with the accumulation of this material. Material which was known to be hazardous waste (generated as result of the spill) had not been properly identified and labeled in its entirety.

There are regulatory limitations on the accumulation of chemical wastes. Containers which are used to store or ship hazardous wastes must be labeled individually as hazardous waste and the beginning accumulation date is supposed to be noted on each container when waste is initially placed in the container. Hazardous waste can be stored on site for no longer than 90 days by a generator,

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unless the facility has a Treatment, Storage, Disposal (TSD) permit (which the Easton Plant does not have).

We recommend that the Easton Plant take action to ensure that all wastes are properly identified, labeled and disposed of in accordance with various regulatory requirements. A high priority should be assigned to disposing of the material which is currently on site (either by reworking and selling the material, or commercial disposal) and procedures should be implemented to better manage these accumulations in the future.

(CX 8 pp 6, 8)

28. The disposition of hazardous waste is expensive. (Pregent 1727-1728).

29. Dennis Nagle had been given the objective of eliminating the drum pile in the pole barn at the Easton facility in September 1991. In fact he did not get the job done in a year and his performance review in September 1992 reiterated the objective. This was to be accomplished by November 30, 1992. Nagle communicated this requirement to Michael Pregent and gave him a time limit to accomplish the objective. (Nagle 2008-2010).

30. RX 72 is Nagle's performance appraisal dated September 13, 1993. In that document Nagle was given the objective of completely resolving the Easton surplus materials issue. (Nagle 2012-2013).

31. Pregent began working on the inventory of the pole barn when he was operations manager in January of 1992. After he became plant manager in February 1992, Nagle specifically asked him to manage the pole barn inventory. (Pregent 1595). In 1992, the decision as to which of these materials could be sold or were to be declared waste was Pregent's decision. (Pregent 1611).

32. A handwritten document dated March 21, 1992 by Michael Pregent noted in relevant part "Hunter requested (told) me to remove surplus off books and non-reworkable from the Pole Barn Inv. list." (CX 179; DePascale 1267).

33. In March of 1992, the division allocated a financial reserve of $100,000 for the purpose of hazardous and non-hazardous waste disposal. (Nagle 2013).

34. Complainant received the performance objective of "coordinate hazardous waste management and reduce number of people involved" on September 16, 1992.[4] The majority of the plant's waste materials were stored in the "pole barn". (Opthof 86-87). Complainant thereupon inspected the pole barn estimating there were roughly 1,000 drums there and that of these 90% were not correctly labeled. According to Mr. Opthof the drums contained hazardous materials, of these, some were old and showed signs of leaking. (Opthof 105, 112-114).[5] Complainant, on the basis of his inquiries, was convinced that the surplus chemicals in question had to have a viable market for resale or Ashland had to classify the material as hazardous waste and get rid of it in 90 days. (Opthof 110-111). As a result of his inspection, Mr. Opthof was concerned about the poor condition of the drums, possible leakage and the fact that the pole barn was not a secured area. (Opthof 114). The findings in the Hogan report were consistent with the findings of Complainant based on his inspection. (Opthof 114, 120-121).

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35. On September 30, 1992, Opthof wrote as follows to Michael Pregent, the plant manager:

> On September 16th, 1992 you gave me responsibility of coordinating management of hazardous waste. In my preliminary investigation of this matter it has come to my attention that a large quantity of the drums stored in the drum barn are hazardous waste under RCRA regulations. Under RCRA regulations, these hazardous waste drums should have been disposed of long ago because the Easton facility is classified as a hazardous waste generator and has no permit to store them longer than 90 days. As verification of this, I reference the Hogan audit of July 29, 1991. I also request to see the July 1992 audit to review their determination of the matter.
>
> As a remedy for this situation I intend to notify the DER and EPA of the situation and ask them to recommend a course of action so that the Easton facility can again be in compliance with the law.
>
> If you are in disagreement with this plan of action please notify me, in writing, by Friday, October 9th, 1992 of an alternate course of action that will immediately bring the Easton facility into compliance with the law.
>
> (CX 63)

36. Pregent subsequently called the DER explaining Ashland had a "disgruntled employee" who might be calling them about the storage of hazardous waste at the Easton facility. (Pregent 1616).

37. On October 9, 1992 Complainant called the 1-800 Ashland hotline raising his concerns about the accumulation of hazardous waste at the Easton facility. (CX 69). Opthof also reported his allegations concerning hazardous waste to the DER on the same date. (Opthof 155).

38. Complainant, in his October 9, 1992, letter advised Pregent that he had contacted the DER. (Pregent 1622). Subsequently the DER conducted an on site inspection at the Easton facility. (Pregent 1622). Thereafter, Ashland received a notice of violation from the DER. (Pregent 1623). Pregent replied to that notice. (Pregent 1623; RX 27).

39. On Saturday, October 10, 1992, Opthof observed a team of 5-6 Ashland employees moving drums out of the pole barn and labeling them with hazardous waste stickers. (Opthof 148-149). Opthof noted that the date codes on some of the drums were all going back as far as 1985. (Opthof 151). The work continued and Opthof noted that in addition to putting on the hazardous waste labels the employees painted over some of the date codes. (Opthof 151).

40. On October 13, 1992, Ashland's General Counsel and Vice-President of Administration responded to Complainant's Hotline call in relevant part as follows:

> . . . You are apparently concerned that the plant is in violation of Resource Conservation and Recovery Act regulations relating to "speculative accumulation" and the ninety day storage limit for generators of hazardous waste.

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> Please be advised that the Law and Environmental Health & Safety Departments are aware of this matter. We have reviewed the facts and issues you have raised with division and plant management.
>
> You may not be aware that much of the material in this area has been sold "as is" and thus is material which by definition is not a waste and accordingly not regulated. Another substantial component of the material has in fact been reworked or sold for reworking, which again exempts it from regulation. Some of the material does not meet the definition of a "hazardous waste," and is therefore also not regulated. The plant is in the process of making arrangements to dispose of this material properly.
>
> *Finally, I am advised that the plant has recently made the determination that some of this material, although it has been regularly recycled or reworked in the past, can no longer be feasibly recycled or reworked. Such material is in the process of being labeled and characterized for disposal.*
>
> The local Bethlehem office of the Pennsylvania DER is aware of our activities regarding these drums, and the plant has voluntarily committed to provide the agency with weekly progress reports. The Easton plant manager has also extended an invitation to DER personnel to come to the plant to review these matters and our waste management practices. These communications were made prior to your Hotline call.
>
> Based on the advice I have received, I am satisfied that the plant's activities and plans with respect to these materials are consistent with good waste minimization practices and the requirements of RCRA. . . .
> (CX 69) (*Emphasis supplied*)

41. On October 8, 1992 Michael Pregent had written a letter to Complainant taking essentially the same position. (CX 65; Opthof 140-141).

42. As already noted, DER conducted a field inspection of Respondent's Easton facility. The person interviewed on-site was Complainant. (Ducceschi 802, 815-816). DER's subsequent notice of violation to the Ashland-Easton facility was dated October 27, 1992. That notice of violation was still in effect at the time of the hearing herein. (Ducceschi 797-798). The DER notice in pertinent part listed the following violations:

1. Shipping containers were not marked and labeled according to U.S. DOT, in violation of 25 Pa. Code §262.30. The drums stored in the pole barn were not properly labeled and identified.

2. Waste was accumulated on site in excess of ninety (90) days, in violation of 25 Pa. Code §262.34.

3. Containers were not properly managed, in violation of 25 Pa. Code

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§265.171. Two drums were in deteriorated condition and should be overpacked prior to shipping. Also, the drums in the pole barn were not separated into groups and a 5 foot isle space was not present around each group of drums.

4. Containers were not clearly marked with accumulation dates and visible for inspection, in violation of 25 Pa. Code §262.34

The notice stated further:

> The Department is concerned that such a large quantity of drums (900 est.) was allowed to accumulate at the facility. More so, it is apparent that Ashland Chemical Corp. did not have in place a system for disposal/reuse of the material and, consequently, these drums have been stored at the facility for many years. It is the Department's understanding that the hazardous waste contained in the drums have been generated from, at least, three sources:
>
> A. Acid or raw materials purchased from vendors;
>
> B. Off-spec acid manufactured by Ashland Chemical Corp; and
>
> C. Spent acid and solvents utilized for line flushing.
>
> Within thirty (30) days of receipt of this letter, the contents of the drums located in the pole barn should be transported to a facility permitted to dispose of such waste or to a facility that will reuse/reclaim the material. Within five (5) days of transporting the waste to the referenced facilities, Ashland should submit to the Department written documentation that the facilities have accepted the material for disposal/reuse or reclaim.
>
> (CX 76)

43. The notice concluded with a request for information from Ashland. It further stated that the notice of violation was not to be construed as final action by the DER. (Pregent 1623).

44. On November 2, 1992, Complainant met with DER officials in their Bethlehem office furnishing additional information with respect to his hazardous waste concerns. (Opthof 171-173; Strickland 781).

45. On November 16, 1992, and December 3, 1992, Ashland responded to the DER Notice's request for information. (RX 27, RX 28). On January 29, 1993, DER advised that the response to the Notice of Violation was satisfactory and asked for further information. Ashland responded on February 8, 1993. (RX 29). Thereafter, there was apparently no further communication between DER and Ashland on this topic. (RX 30; Pregent 1636).

46. As far as DER is concerned, the matter is not closed. This case had been referred to the Pennsylvania Attorney General for a possible criminal proceeding. (Ducceschi 818). The referral to the Attorney General's Office has not yet been resolved and this matter is presently

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on hold at DER until the Attorney General's Office completes its investigation. (Ducceschi 818; Strickland 786-789).

47. Complainant's concerns raised with management and the DER made the issue of disposing of waste chemicals an urgent question for Respondent. More pounds of waste were shipped out in the fourth quarter of 1992 than had been shipped out in all previous quarters going back to 1988. (Opthof 220).

48. According to Pregent, the effect of Opthof going to DER was that they ended up declaring some things as waste which Pregent had been attempting to sell to customers. It was more expeditious to declare such material waste and get rid of it than to sell it. (Pregent 1609-1610).

49. According to Nagle, the fact that Opthof had called DER had no impact on how Complainant was treated. Nagle stated that since this was a protected activity, he did not view it negatively and that it was the employee's right to do that. (Nagle 2017-2018). Nagle also denies that Opthof's call to DER affected his consideration of Complainant. (Nagle 2018). Nagle stated there was no difference in the way Opthof was treated before September 30, 1992 and afterward. (Nagle 2018-2019).

50. Nagle states the hazardous waste objective was removed from Opthof's job description in March of 1993 because he no longer trusted Opthof. (Nagle 2045-2047, 2052). Nagle denies distrusting Complainant because he went to DER saying he had every right to do that. (Nagle 2047-2048).

51. Nagle gave the following explanation for removing the proposed performance objective of waste management from Complainant's draft job description in a pretrial deposition:

> Q Do you know what process was used to determine that Mr. Opthof should not have that responsibility [the coordination of waste management]?
>
> MR. MCCARTHY: Recognizing he never had it is what he has testified to.
>
> A. By the time March of 1993 rolled around, we no longer trusted Mr. Opthof's motives regarding what he would do in important areas. The management of waste or potential waste is an important enough area that we didn't want to give it to somebody that we did not trust to act in the best interest of the company. He had been involved in litigation up to -- at that time, we simply didn't trust him with the job.
>
> (CX 215)

52. Michael Pregent, at his performance appraisal meeting on September 22, 1993, noted in connection with his goal of reducing the waste and release inventory by December 15, 1992 and formalizing the waste minimization program that the removal of some of the pole barn inventory as hazardous waste negatively impacted that objective. (Pregent 1845; RX 66 p. 2).

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53. Pregent, in the time period September 1992 to September 1993, told Dennis Nagle that Opthof's memoranda in the September-October 1992 time frame concerning Complainant's contact with DER led him to question his sincerity. (CX 208 p. 6). Pregent felt that Complainant, on the basis of his experience on the site, had been well acquainted with the conditions he complained of for sometime. Nagle agreed with that assessment. (CX 208 pp. 6-7).

54. Some employees at Easton felt threatened by Complainant's bringing up of the hazardous waste issue. (DePascale 1256, 1327-1329; *See also* Bowyer 634-635). Robert DePascale, the second in command at the plant, at one point told Opthof there had been enough conversation about the drums in the pole barn. DePascale felt that Opthof's concern was obsessive and there was no need to continually analyze the subject. (DePascale 1331).

55. There was a work place rumor that Opthof was being crucified for raising environmental concerns. (Stout 1175).

Work Place Assessment of Complainant

56. A former manufacturing manager of the Division and a predecessor of Dennis Nagle assessed Opthof as follows:

> His reputation was that he was a good engineer, made things work, made [sic] a little bit short of miracle worker. But he would take projects and put them together and make them work, make the plant work. And he was very knowledgeable about the plant. It was our largest plant and a fairly complex operation.
>
> (Tichich 593)

57. Robert DePascale, the plant's second in command, considered Opthof to be a competent engineer at technical tasks and he did not observe a decline in Opthof's ability to complete the nuts and bolts of a task in the relevant period. (DePascale 1247-1248).

58. Michael Pregent, the current plant manager, conceded that Complainant technically had good capabilities. (Pregent 1756). He evidently considered Complainant's technical work on projects generally effective. Even on the appraisal he prepared on September 2, 1993, for purposes of terminating Opthof he rated 11 out of 12 of Complainant's projects as performed effectively. The exception was the tank wagon sample station project rated between marginal and effective. He also, in the same document, rated Opthof as very effective with respect to job knowledge. (CX 161).[6]

59. Pregent rated Complainant generally unsatisfactory on the aspects of the work requiring interaction with others such as communicating skills and work relationships. (CX 161). In this connection, Pregent asserted that Complainant's contacts with employees created a negative
impact. (Pregent 1361, 1742).

60. One of Opthof's subordinates, on the other hand, felt that Opthof was a supervisor who got work out of his men, that he knew how to not push them, but stayed on top of them and

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made sure they were all working and kept on top of their jobs. According to this employee, if there was a problem on the job Opthof was always there to direct or assist in any way he could. This individual noted no difference in the performance of Complainant in the period 1986-1993). (Bowyer 629-632). On occasion, according to this witness, Opthof and senior employees had confrontations when there were differences of opinion as to how the work should be done. (Bowyer 638).[7]

61. James Charles Stout, an "A operator" at the Easton plant and an assistant shop steward, had a different view. (Stout 1072, 1074). In Mr. Stout's view Complainant did not appreciate suggestions from workers at the plant. Sometimes such matters ended up as grievances. (Stout 1084-1085, 1088-1089).[8] This witness felt that Opthof was defensive and arrogant, and that he was belligerent. (Stout 1115-1116, 1122). In the opinion of this witness, however, Opthof was more belligerent when Darrell String was in charge of the plant than subsequently. (Stout 1152-1153). According to Stout, Opthof did not get into name calling contests or scream or yell. (Stout 1167). Stout recalled one incident where Complainant made a derogatory comment about a union settlement in front of the employees in the period 1987-1990. (Stout 1110, 1154).

62. The record shows that Opthof was in fact not devoid of human relation skills. On May 17, 1991 he wrote a memorandum to R. Roskilly thanking him for his help in designing and installing a piping systems on the new drumming line which "reflects the quality of your workmanship" concluding with the hope that in the future they would again have the opportunity to work on another large project. (CX 200). On a copy of that memorandum is a note from R. E. Hunter, Vice President of the Division: "Larry: Your series of recognition letters to Easton personnel is greatly appreciated as it follows our guiding principles. Thanks for a great job done." (CX 200).

The Controversy Over Complainant's Written Communications to His Superiors

63. Mr. Opthof's practice of communicating with his superiors in writing followed by certified copies with demands for replies in writing led to considerable friction. His supervisors complained this indicated a relationship lacking in trust and candor. Complainant's communications pertaining to his job description and the ongoing negotiations led to that view. Opthof's supervisors assert they did not so much object to the fact that the communications were in writing, but to the tone which appeared to be disrespectful and mistrustful and an inappropriate way for a subordinate to act toward their boss. (Nagle 1964-1965, 1969).

64. On April 15, 1993, Mr. Nagle directed Complainant to communicate verbally with his superiors as follows:

TO: L. J. Opthof

FROM: D. J. Nagle

RE: *JOB DESCRIPTION*

[PAGE 15]
This is in reply to your letter to Mike Pregent dated April 5, 1993. In your memo, you acknowledge the job description and performance objectives given to you on March 17, 1993. You state, for the record, that you do not agree with the job description.

Let me make clear that the job description and performance objectives given to you on March 17, 1993 are the documents against which your performance will be evaluated. The job description and performance objectives are not subject for further debate or negotiation. Any future attempt to modify or complain about the job description or performance objectives will be interpreted by me as insubordination which will subject you to disciplinary action up to and including termination.

In your memo of April 5th, you mention other job related issues that you presented to Mike Pregent and me in your previous memos. I have not responded to you in writing--and I will not. You have been told by Mike Pregent that it is not customary for issues of this nature to be handled by mail with return receipt. It is my expectation that you will discuss these issues in person with your supervisor like all other employees.

> Therefore, in addition to the performance objectives given to you by Mike Pregent on March 17th, you are further directed to have face-to-face verbal discussions with your supervisor on job related matters in the future. This is in the interest of developing your verbal communication skills. These skills are needed by anyone who aspires to be a supervisor.
>
> (RX 44)

The Performance Appraisal Process and Complainant's Ratings Thereunder

65. From his starting date at Ashland through his 1992 performance appraisal, Opthof had received no rating of unacceptable or marginally acceptable in any category. (Opthof 65-66).

66. Complainant's overall performance ratings for the years 1986-1991 were as follows: 1986, "very effective" (CX 9); 1987, "very effective" (CX 10); 1988, "very effective" (CX 11); 1989, between "effective" and "very effective" (CX 12); 1990, between "effective" and "very effective" (CX 13); 1991, "very effective" (CX 14; Opthof 73-74).

67. In September 1992, Complainant received his annual performance review from Michael Pregent. (CX 15; Opthof 75, 87). Under Part A, "Review of Last Year's Accomplishments," of his 1992 appraisal by Mr. Pregent, he received grades consistent with those of previous years--all within the range of "effective" and "very effective," no ratings of "marginal" or "unacceptable." (Opthof 76; CX 15). Under Part B, "Review of Factors Contributing to Performance," of his 1992 appraisal by Mr. Pregent, Mr. Opthof received grades consistent with those of previous years, with no "margin" or "unacceptable" ratings. (Opthof 76-77); CX 15). Complainant's 1992 overall performance rating, consistent with previous years, was between "effective" and "very effective." (Opthof 79-80).

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68. Complainant did not sign his 1992 performance appraisal because he felt some of the ratings should have been higher and he disagreed with some of the comments in the appraisal. (Opthof 80).

69. Mr. Opthof was rated unacceptable in September 1993 and thereafter terminated. (*See* Findings 74-81, *infra*.).

The Karen Carter Incident

70. Karen Carter is a process safety coordinator employed by Respondent. On August 19, 1993, she was conducting a plant engineer seminar in Ashland's Ohio headquarters. Complainant was one of those in attendance. (Carter 715, 719, 722). Ms. Carter complained that Opthof's questions directed to her were hostile and created tension "you could have cut with a knife." (Carter 725. She described the exchange with Complainant as heated. (Carter 746-747). This was unnerving to Carter who felt that her presentation could be derailed. (Carter 726).

71. Carter was apparently disturbed because Complainant was asking for more specific guidance on process safety than she was willing or able to give. (*See generally* CX 213).[9]

72. After the presentation, while seated at lunch with other plant engineers, Ms. Carter was approached by Opthof who stated "you know, I belong to Green Peace, and we all know this CMA Responsible Care stuff is [expletive deleted].[10] You all are willing to spend all this money on Responsible Care and it's nothing more than an advertising campaign but you are not willing to fix the real problems." (Carter 729; CX 213). Carter was concerned that this statement undercut her, in the presence of the other plant engineers. She noted she had done nothing to draw Opthof to her table or to indicate to Opthof that she wanted to continue the discussion. (Carter 730).

73. Ms. Carter, who was upset by the incident, reported it to her supervisor who instructed her to contact Andy Allen of the law department. (Carter 732-733). She left a voice mail for Dennis Nagle recounting the incident and what Complainant thought about Responsible Care. (Carter 733). The following week on August 26, 1993 she took the matter up with Michael Pregent. (Carter 734, 739).

Complainant's Termination

74. The manufacturing manager's reaction to the Karen Carter episode was that Opthof's behavior was an embarrassment for the entire division and reflected badly on the Easton plant. (Nagle 1973).[11] On the basis of that incident, according to Nagle, it was time to determine whether he wanted to keep Complainant. The Karen Carter incident, Nagle states was the straw that broke the camel's back or the triggering event with respect to Opthof's termination. On September 2, 1993, on Nagle's visit to Easton, he and Pregent jointly decided to terminate Complainant. (Nagle 1976, 1986, 2068, 2084; *See also* Pregent 1347-

1349;[12] 1806).

75. Pregent and Nagle decided that since this was the time of the annual performance appraisal, they would use it as the vehicle to terminate Opthof. (Nagle 1977). At the September

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2 meeting, it was decided that Pregent would prepare the performance appraisal. In fact, Pregent drafted the appraisal and Nagle reviewed it at their next meeting on September 15, 1993. (Nagle 1977-1978; Pregent 1349). The performance appraisal drafted by Pregent and reviewed by Nagle rated Complainant as unsatisfactory. (CX 161; Nagle 1981-1982). Nagle took this document to corporate headquarters and delivered it to the law department, in view of Complainant's other litigation pending at that point. Thereafter the final draft of the performance appraisal was delivered to Nagle by a member of the law department. (RX 48; Nagle 1982-1983).

76. The standard performance appraisal procedures were not employed in September 1993 because Nagle and Pregent at that point were not interested in Opthof's self assessment. They used the performance appraisal simply to record their appraisal of Complainant and the recommended termination. It was not a real performance review. (Nagle 2085-2086).

77. There are significant discrepancies between the initial performance appraisal of September 2, 1993 drafted by Mr. Pregent and the September 22, 1993 performance appraisal revised after discussion with Respondent's legal staff. All such revisions were to the disadvantage of the Complainant. As already noted in the original appraisal, Complainant's performance in 12 specific projects was rated as effective in 11 of the 12 projects and on one project he was rated between effective and marginal. (CX 161 pp. 1, 2). After that appraisal was reviewed by Ashland's legal department, Complainant was downgraded in five of the project categories by being given a marginal rating on three projects and ratings between marginal and effective on two others. (CX 161; RX 48).

78. The second performance review also downgraded Complainant in other categories. In implementing Responsible Care he was downgraded from between marginal and unacceptable to unacceptable, his rating in administration was lowered from effective to marginal, the category of forecasting and planning was changed from effective to marginal, and, finally, the selection and development category was revised from "omit" to "marginal". (CX 161; RX 48). Certain of the comments in the original draft of September 2, 1993 were also changed or omitted. For example, the allegation that Complainant "repeatedly files groundless charges resulting in wasted management efforts" was deleted. (CX 161 p. 2; Pregent 1428-1429; RX 48). In addition, the references to Complainant's filing charges against Ashland and having his lawyer mail a letter to Ashland, and that Complainant requested that certain responses be in writing were deleted. Two allegations were added to the second draft to raise the level of criticism of Complainant's performance on projects under Part A of the review. Complainant was in the second draft charged with having an "inability to effectively plan installation with operators". Complainant's rating in the category of "Forecasting and Planning" was changed from effective to marginal. (CX 161; RX 48).

79. Complainant had no input on his final performance review, RX 48, before it was finalized. (Pregent 1849).

80. Dennis Nagle, in a memorandum dated September 28, 1993, recommended Complainant's discharge. The recommendation was approved by R. E. Hunter, Vice President, Electronics Chemical Division, and D. J. D'Antoni, President of Ashland Chemical. (RX 70). Opthof was notified of his termination on October 7, 1993. (RX 49).

81. Nagle summarized his reasons for terminating Complainant as follows:

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> Well, I considered my cumulative assessment of him, going all the way back from early contacts, his lack of leadership, his lack of taking a role in solving plant problems, his denial of my assessment of his managerial weaknesses, his denial of my attempts to remediate it. I took into account his intolerable conduct at the meeting in Dublin with Karen Carter. I took all of the input from Mike Pregent on his project work. I considered whether or not, you know, my decision to terminate would be consistent with other decisions I had made.
>
> (Nagle 1990)

Medical Evidence

Edwin N. Carter, Ph.D.

82. Edwin N. Carter, Ph.D., is a clinical psychologist with a specialty in neuropsychology practicing in the northern Virginia area. (CX 182; Carter 1467). Dr. Carter examined Complainant on March 15, 1994.

83. According to Dr. Carter, the personality testing revealed that Complainant suffered from substantial levels of free floating anxiety related to concerns about his career and financial security or lack thereof. In the opinion of Dr. Carter, Complainant's anxiety levels are sufficient to cause some constant psychological pain and to interfere with his ability to think and reason. In his view, the quality of Mr. Opthof's life has been compromised to some degree permanently

because of the debilitating effect of the anxiety. Dr. Carter concluded that the stress from which Complainant suffers is having an extremely detrimental effect upon his family and has robbed him of his interests in many activities which he used to find enjoyable and is producing sleep difficulties for him. According to Dr. Carter, the trauma associated with the harassment he received on the job at Ashland has strained relations very seriously with Complainant's wife and upset his children. (CX 182). In the opinion of Dr. Carter, Complainant's firing and the harassment, he experienced prior to the firing, resulted in a significant shock to him and he suffers from a post-traumatic stress disorder (PTSD) as a result of this traumatizing experience. Dr. Carter found that like most PTSD victims, Complainant has begun to lose faith in the system, is showing distrust in those around him, and feels unprotected and vulnerable.

84. According to Dr. Carter, Opthof needs intensive psychotherapy to deal with his problems. In the opinion of Dr. Carter, the evidence is that prior to fall of 1992, Complainant was quite happy, well adjusted, financially secure and happy with his private life, but that since that time, his life has literally fallen apart. Accordingly, Complainant needs extensive psychotherapy and has taken steps to get help. Even with a good response from treatment, in the view of Dr. Carter, Complainant's quality of life cannot return to normal. (CX 182).

85. Dr. Carter does not believe that Complainant suffers from a depressive disorder at this point. (Carter 1485). In Dr. Carter's view, Mr. Opthof is only mildly depressed. (Carter 1485).

86. According to Dr. Carter, Complainant, for nine years, got decent evaluations from

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Ashland and then within the period of basically a year or so began to get all of this negative information about himself. In Dr. Carter's view, this destroys an individual's self concept. (Carter 1498).

87. Dr. Carter disagrees that Complainant has a passive-aggressive disorder although he does believe that at times Complainant has demonstrated certain passive-aggressive behaviors. (Carter 1502). According to Dr. Carter, errors of omission are examples of passive-aggressive traits. (Carter 1503). He also disagrees with Dr. Gregorius' conclusion that Complainant has a narcissistic personality. (Carter 1505).

88. In the opinion of Dr. Carter, Complainant's collateral litigation is not a factor in the difficulties that he has had since his termination. (Carter 1511).

89. In making his assessments, Dr. Carter relied solely upon the information provided by Complainant, for example, he did not interview his family. (Carter 1521). Nor did he discuss the effect of the litigation on Opthof in his interview with the Complainant. (Carter 1542-1543). In fact, none of these lawsuits were discussed specifically in Dr. Carter's discussion with Complainant. (Carter 1549). Nevertheless, Dr. Carter felt that the loss of this litigation would not significantly effect the Complainant. (Carter 1550).

90. Dr. Carter conceded that to some degree the loss of the cases in Complainant's collateral litigation may have resulted in Mr. Opthof's disappointment in the system. (Carter 1542).

91. According to Dr. Carter, Complainant attributed the onset of his unhappiness to events taking place roughly in the fall of 1992. (Carter 1558).

Hans H. Gregorius, M.D.

92. Hans H. Gregorius, M.D., is a psychiatrist with a practice in New Jersey. He examined Complainant on March 31, 1994. (RX 68-69).

93. Dr. Gregorius concluded on the basis of his examination of the Complainant and his review of the medical records that Mr. Opthof's suffers from a passive-aggressive personality disorder. In this connection, Dr. Gregorius concluded that:

> [Complainant] is an individual who displays a pervasive pattern of passive resistance to demands for adequate occupational performance and is an individual with traits that reflect procrastination, irritability or argumentativeness when asked to do something he does not want to do, works deliberately slowly or performs poorly on a job or task that he really did not want to do, protests without justification that others make unreasonable demands, avoids obligations perhaps by claiming to have forgotten, believes that he is doing a much better job than others think he is doing, and probably resents useful suggestions concerning how he could be more productive. Also, his maladaptive behavior invariably results in a worklike setting in obstructing the efforts of others by failing to do his share of the work and is a person who is likely to feel unreasonably criticized and

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> scorns people in positions of authority.
>
> (RX 69 pp. 3-4)

94. Furthermore, he concluded that Mr. Opthof exhibited personality traits of a narcissistic personality with a pervasive pattern of grandiosity, lack of empathy and hypersensitivity to the evaluation of others. (RX 69). In the opinion of Dr. Gregorius,

Complainant also displayed paranoid personality traits. (RX 69).

95. It is Dr. Gregorius' opinion that Mr. Opthof has had this personality pattern since early adulthood and that it was neither aggravated or proximally caused by his termination at Ashland Chemical, nor exacerbated or worsened by it. (RX 69).

96. According to Dr. Gregorius, there is no evidence of a post-traumatic stress disorder, anxiety disorder, etc. Based on the historical, data Dr. Gregorius concluded that Complainant probably experienced an adjustment disorder when terminated. Dr. Gregorius feels that Mr. Opthof appears to be doing well and his complaints are purely subjective and that his behavior reflects primarily concern for himself. (RX 69).

97. Dr. Gregorius concluded that it is impossible that Complainant's employment termination caused his personality disorder and the other traits that afflict him. (Gregorius 1891). Nor in Dr. Gregorius' opinion did the firing have an aggravating effect on his mental status. (Gregorius 1892).

DISCUSSION

Lawrence J. Opthof, the Complainant, was employed variously as a plant engineer or maintenance supervisor by the Electronics Chemical Division of Ashland Chemical Company in the period 1983-1993 at its Easton, Pennsylvania, plant. He is an honorably discharged veteran of the Vietnam war with a 50% disability rating arising out of wounds sustained in that conflict. (Finding 1). He has a B.S. in management from Rutgers University. (Finding 2). Although Complainant took chemical and electrical engineering courses, he misstated on his employment application that he has a minor in engineering from Rutgers. (Finding 3). Mr. Opthof's salary at the time of his termination was $55,000 a year and his benefit package equivalent to an additional 31%. (Finding 4).

Beginning in January 1992, Complainant, over some fourteen months, initiated seven collateral law suits and administrative proceedings against his employer alleging various discriminations including proceedings based on his veteran status and his disability. (Finding 5).

On September 30, 1992, Complainant notified his supervisor, Michael Pregent, the Easton Plant Manager, of his concerns relating to storage and speculative accumulation of hazardous waste at the Easton Plant. He also advised his supervisor of his intent to contact state and federal environmental agencies concerning this matter. On October 9, 1992, he reported these allegations on the Ashland Hot Line and on the same day repeated them to the Pennsylvania Department of Environmental Resources. (Finding 6).

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Complainant had never received less than effective overall performance ratings prior to September 1992. On September 19, 1992, Michael Pregent gave him an overall performance appraisal rating between effective and very effective. However, in September 1993, Mr. Opthof's performance appraisal rated him unsatisfactory and he was terminated shortly thereafter. (Finding 7).

Complainant alleges that his discharge was in retaliation for his protected activity in raising environmental concerns. Respondent, Ashland, concedes that Opthof's articulation of such concerns within the Company and with the State environmental agency is protected. Respondent denies, however, that Complainant has demonstrated illegal discrimination, i.e., a causative link between the protected activity and his discharge.

Ashland asserts that it has demonstrated that Mr. Opthof was discharged for unsatisfactory performance, a valid nondiscriminatory reason, and that accordingly he has failed to establish a *prima facie* case. During the course of this proceeding, Respondent obtained evidence concerning the misstatement of Complainant's educational qualifications on his job application as well as the prohibited retention of allegedly confidential documents. Ashland, invoking the so-called after-acquired evidence rule, contends Mr. Opthof would have been discharged on that basis even absent the exercise of protected activity. Respondent urges accordingly that any recovery by Complainant should be sharply limited or barred altogether, if he prevails on the merits.

As already noted, Respondent does not deny that Complainant had engaged in protected activity or that its officials were aware of that fact. That leaves the following issues remaining for resolution:

1. Has Complainant shown a causative link between his termination and his exercise of protected activity?

2. Did Respondent discharge Complainant for a valid nondiscriminatory reason, i.e., unsatisfactory performance or was this a pretext?

3. If Complainant established a *prima facie* case of illegal discrimination has it been rebutted?

4. Does the evidence, as a whole, establish that he was terminated for both discriminatory and valid business reasons?

5. If issue 4 is answered in the affirmative, has Respondent met its burden of showing that Complainant would have been terminated for unsatisfactory performance even absent the exercise of protected activity?

6. If Complainant prevails on the merits, should his relief be limited or barred entirely on the basis of the after acquired evidence rule?

Generally, in order to establish a *prima facie* case under the applicable employee protection statutes, a complainant must show that he engaged in protected activity of which the respondent employer was aware and that the employer took some adverse action against him.

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Complainant must, moreover, present evidence sufficient to at least raise an inference that the protected activity was a likely motive for the adverse action. *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2 Secretary's Decision and Final Order (April 25, 1983) slip. op. at 5-9.

If the employee establishes a *prima facie* case, employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate nondiscriminatory reasons. *Id.* If the employer successfully rebuts the *prima facie* case, the employee still has an opportunity to demonstrate that the reasons proffered by the employer were not the true reasons for the employment decision. In that event, the trier of fact must decide whether or not a discriminatory reason was a more likely motivation or whether the employer's proffered explanation was worthy of credence or not. *Id.*

Finally, if the trier of fact decides that the employer was motivated both by illegal and legitimate reasons, then the dual motive test comes into play. The dual motive test only applies if the Complainant establishes a *prima facie* case and there is evidence of both legitimate and improper motive for the adverse action against Complainant. *Lopez v. West Texas Utilities*, 86-ERA-25, Secretary's Final Decision and Order, July 26, 1988; 2 DOL Decisions No. 4 at 240. In short, where illegal retaliation is at least a motivating factor and where Employer had legitimate business reasons to terminate Complainant, the test for dual motive discharge applies. *Mackowiak v. University of Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). In those cases, the Employer has the burden of showing that it would have discharged Complainant even if the protected activity had not occurred. *Id.* at 1163-1164.

The presence or absence of retaliatory motive is a legal conclusion and provable by circumstantial evidence, even if there is evidence to the contrary by witnesses perceiving lack of improper motive. *Id.*

The record shows that Respondent was aware of the problem of surplus chemicals and related hazardous waste problems at the Easton plant since at least July 29, 1991, the date of an internal audit, the so-called Hogan Report.[13] That report specifically criticized the Easton facility among other things for the failure to establish procedures to control the accumulation of hazardous wastes. The report also noted the need for ensuring that all wastes are properly identified, labeled and disposed of, noting further that a generator of hazardous waste is only allowed to store hazardous waste for 90 days. (Finding 27).

On September 16, 1992, Complainant received from Michael Pregent a proposed job description with an objective of coordinating hazardous waste. Thereafter, Complainant inspected the surplus chemicals stored in Easton's pole barn and found improper storage and improper accumulation of hazardous waste. (Finding 34).

As already noted, Complainant advised his plant manager on September 30, 1992, of his intention to notify the State and Federal environmental agencies of his concerns. (Finding 35). Mr. Pregent, in a preemptive strike, called the Department of Environmental Resources, (DER) the State agency, advising that it would be contacted by a "disgruntled" employee. Subsequently, on October 9, 1993, Mr. Opthof reiterated his concerns on the Ashland Hot Line and to the DER. (Findings 36, 37).

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The DER thereafter conducted an onsite inspection of the Easton facility which resulted in a notice of violation by the Agency dated October 27, 1992. That Notice was still pending at the time of hearing. The findings therein were consistent with Mr. Opthof's concerns. (Findings 38, 42, 46).

In March 1993, after Pregent and Complainant had failed to reach agreement on his job description, Mr. Opthof was given a final job description with the hazardous waste coordination objective deleted. Although on September 16, 1992, Complainant was viewed by management as well suited to that function, by March 1993, this duty was removed from his final job description because management no longer trusted his motives "regarding what he would do in important areas" and that "we did not trust him to act in the best interest of the Company." (CX 215; Finding 50). In this connection, Dennis Nagle, Respondent's manufacturing manager, cited as the reason for such lack of trust that Complainant had been engaged in litigation with the Company. (Finding 51). However, it should be noted that by September 1992, when the

hazardous waste coordination function was written into his prospective job description, Complainant had already filed some 4-5 lawsuits or administrative complaints against Ashland. Accordingly, Nagle's denial that the hazardous waste function removal was unrelated to Complainant's protected activity is not persuasive. Under the circumstances, the record compels the opposing inference.

Pregent also told his superior Dennis Nagle that Complainant's memoranda in the September-October 1992 time frame concerning Complainant's contacts with the DER led him to question Opthof's sincerity, since Mr. Opthof must have been aware of the hazardous waste situation for some time in light of the hazardous waste reports filed by Complainant. (Finding 53).

Complainant's concerns raised with management and the DER made the issue of disposing of waste chemicals an urgent question for Respondent. More pounds of waste were shipped out in the fourth quarter of 1992 than had been shipped out in all previous quarters going back to 1988. (Opthof 220). According to Pregent, the effect of Opthof going to the DER was that Ashland ended up declaring some materials as waste which Pregent had been attempting to sell to customers. It was more expeditious to declare such material waste and get rid of it than to sell it. (Pregent 1609-1610). In short, Complainant's DER contact forced the pace of hazardous waste disposition by Respondent.[14] (Findings 47, 48).

Disposition of hazardous waste is expensive. (Pregent 1727). On his performance appraisal dated September 22, 1993, Michael Pregent noted the negative impact on one of his performance objectives, namely, the reduction of pole barn material as hazardous waste. (Findings 28, 29). He explained:

> Q And I am just looking at the one where you have a three rating on that page. And there is something written there, "Negative impact of removal of pole barn inventory."
>
> A For that number, there was a goal by 12/15/92 to have a 10-percent reduction in the waste and release inventory. And the negative impact meant that we didn't have a reduction in waste removal,

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> because we have ended up disposing of some of the materials from the pole barn as hazardous waste. So we didn't get a 10-percent reduction.
>
> (Pregent 1845; RX 66)

The record compels the inference that Mr. Pregent resented the accelerated pace of hazardous waste disposition as a result of the DER inquiry as negatively impacting on his job performance objectives of reducing waste removal. In addition, some employees at the Easton plant felt threatened by Complainant's raising of the hazardous waste issue.

On September 2, 1993, Messrs. Pregent and Nagle agreed to terminate Complainant on the basis of his annual performance appraisal. On the same date, Mr. Pregent drafted a performance appraisal with an overall rating of unsatisfactory. On September 15, Nagle and Pregent met again and went over Pregent's September 2 draft, which Mr. Nagle then took to corporate headquarters for review by the in-house legal staff. The performance appraisal as redrafted by Mr. Pregent after that review again gave him an overall rating of unsatisfactory, downgrading him substantially, however, in various individual categories from the initial appraisal
on September 2. (Findings 74-78).

During the pretrial phase of this proceeding, Respondent failed to disclose the critical September 2 meeting between Nagle and Pregent. In response to a direct question on the interrogatories requesting disclosure of every meeting pertaining to Complainant's termination, only the September 15 meeting was disclosed. In that context the failure to disclose the September 2 meeting in Nagle's and Pregent's affidavits and depositions was equally misleading. Only Messrs. Nagle and Pregent could have provided the information for the interrogatory response. It is improbable that the failure to disclose the September 2 meeting by these two individuals in the interrogatory, two affidavits and two depositions was accidental or fortuitous. It detracts from their credibility when testifying concerning their motives for discharging Complainant. The record permits the inference that production of the initial draft of the performance appraisal with its September 2 date compelled these witnesses to change their chronology of these events at trial.

In short, the record shows that Complainant raised environmental concerns which are protected and not frivolous. Nagle's and Pregent's admissions compel the inference that there was hostility on their part arising out of Complainant's protected activity. Pregent's call to the DER described him as a "disgruntled employee". On September 16, 1992, he was considered qualified to handle coordination of hazardous waste. In March of 1993 he was not considered trustworthy enough to handle these matters. Clearly, his collateral litigation cannot be the sole source of that distrust as Nagle testified. He had already filed four to five such proceedings by September 1992 and this activity was not considered a bar to hazardous waste responsibility on his part at that time prior to his raising these concerns. The hazardous waste function, it must be inferred for the foregoing reasons was deleted from his job description on account of Complainant's environmental concerns. Animus to Complainant because of his protected activity must be ascribed to Nagle and Pregent. Mr. Pregent further felt that Complainant was insincere because he had not expressed his environmental concerns earlier. However, it was

logical for Complainant to express these concerns when he felt that his prospective job description gave him that responsibility. The accusation of insincerity for raising the concerns also documents Respondent's animus arising out of the protected activity.

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Finally, Respondent's officials were reluctant to characterize the surplus materials as hazardous waste and dispose of it as such because hazardous waste disposition is more expensive than reworking or selling such materials. Complainant's concerns raised with the DER forced Respondent to accelerate the characterization and disposition of its surplus chemicals as hazardous waste. This interfered with Michael Pregent's objective of reducing the waste inventory, a fact he noted in September 1993, the same month that steps were taken to terminate Mr. Opthof. Pregent recorded his resentment of that fact essentially contemporaneously with Complainant's termination.

In summary, the fact that Complainant's exercise of protected activity was a motivating factor in his discharge may be inferred from the following factors already noted. The individuals responsible for his termination resented Complainant's protected activity. Their denials that his protected activity was a motivating factor in the discharge are unpersuasive for the reasons already stated. Complainant's contacts with the DER sharply accelerated the pace at which surplus chemicals were characterized and disposed of as hazardous waste when Respondent would have preferred a more leisurely approach to permit reworking or sale of the materials in question.

The Rebuttal

Establishing the *prima facie* case "in effect creates a presumption that the employer unlawfully discriminated against the employee". Respondent then has the burden of producing evidence to rebut the *prima facie* case, namely, that the adverse action was taken for a legitimate nondiscriminatory reason. At that point, the presumption drops from the case. Complainant must then demonstrate that the proffered reason was not the true reason for the employment decision and that retaliation for protected activity was the motivating factor. Complainant retains the ultimate burden of demonstrating that he was a victim of improper discrimination. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Respondent asserts that Mr. Opthof was terminated for nondiscriminatory business reasons, namely, unsatisfactory work performance. Specifically, Ashland asserts he failed to take a leadership role and responsibility for his assignments, that his influence at staff meetings and in the workplace was negative, and that he had poor relations with hourly employees and union members at the plant contrary to company policy. In that connection his supervisors rated Complainant as having poor communication skills. In addition, his supervisors criticized Complainant for failing to adequately supervise an engineer assigned to him. The triggering event leading to Complainant's termination, according to Ashland, was an incident where Complainant's negative behavior allegedly threatened to disrupt the environmental presentation of Karen Carter at Respondent's headquarters in August of 1993. Respondent asserts in addition that Complainant's denigration on this occasion of the Responsible Care Program espoused by the company also influenced the decision to terminate him. This behavior, his supervisors contend, embarrassed the Electronic Chemical Division and its Easton facility.

The record shows that the relationship between Complainant and the manufacturing manager of the division and the Easton plant manager had been deteriorating at least since the

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early part of 1992. Prior to his September 1992 performance rating, Complainant had already filed four to five lawsuits or administrative proceedings against his employer alleging various forms of discrimination. (Findings 70-73).

On March 5, 1992, Michael Pregent, in a memorandum to Dennis Nagle, criticized Complainant at considerable length for disorganization, and for misinforming maintenance employees that overtime was ending for them and that all projects would be contracted out to outsiders. According to the memorandum, this resulted in union threats to file grievances. Mr. Pregent, in the same memorandum, complained that "this negative attitude is a direct result of the way the shop is being (mis)managed. LO is very insecure and always thinks people are out to get him." The memo concluded that "LO does a decent job of projects but cannot deal with people in a fashion that is needed for us to make the kind of progress we must make now and in the future." (RX 11). Similarly, Dennis Nagle, in February of 1992, had already decided that Complainant was not successfully performing as maintenance manager, that he was falling behind and not providing solutions to work-related programs. (Finding 17).

In the intervening period up to the performance appraisal of September 1992, the relationship between Complainant and his superiors continued to deteriorate as a result of Opthof's collateral litigation and the fallout from the Pennsylvania Human Relations settlement in July of 1992 which in fact was not successfully implemented. (Finding 19). It is arguable that Complainant did not cooperate in its implementation. (RX 61; Sterling 883-884).

The record is also clear that management was well aware of Complainant's propensity on occasion to utter injudicious or intemperate remarks prior to the September 1992 performance evaluation.[15] Nevertheless, Michael Pregent, in September of 1992, gave Complainant an

overall rating of between effective and very effective. (Finding 67). Complainant received that rating prior to his exercise of protected activity although management's negative perception of him was by that time already firmly in place. Michael Pregent explained this rating stating he was relatively new to the plant manager position and distracted by other problems. The explanation is not credible in light of his March 5, 1992 memorandum. That document basically outlines and foreshadows the negative assessment resulting in Complainant's termination in September of 1993 after the exercise of protected activity. (*Compare* Pregent 1436-1437 and RX 11). It is similarly clear that Dennis Nagle, the Division's manufacturing manager, by virtue of personal contacts with Complainant and Pregent's memorandum to him in March of 1992, was similarly aware of Opthof's negatives well prior to the September 1993 assessment. It should further be noted that Opthof's termination in September of 1993 was essentially contemporaneous with Pregent's performance appraisal in that month where he complained that he did not meet his goal of a reduction in the waste inventory because Respondent ended up disposing of some of the materials from the Easton facility pole barn as hazardous waste instead of selling or reworking the material. This failure to reduce hazardous waste material was of necessity linked to Complainant's contact with the DER and the resultant pressure for more expeditious action. As a result, it is evident that Respondent's management at the time of his discharge still had animus to Complainant because of his exercise of protected activity. As already noted, Nagle's and Pregent's denial that Complainant's environmental concerns played a part in this termination are not persuasive in light of their failure to disclose the crucial September 2, 1993 meeting at which it was decided to terminate Mr. Opthof. That failure diminishes the overall credibility of their testimony as far as motivation is concerned.

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The Karen Carter incident cannot be considered the sole triggering event for Complainant's discharge as Ashland asserts. Opthof's behavior during the course of that meeting was not qualitatively different as far as can be determined on the basis of this record from other occasions where he had uttered injudicious and/or inappropriate remarks and where such conduct had resulted in no penalty.[16] (E.g. *See* footnote 14).

Finally, Respondent's criticisms of Complainant's performance on projects assigned to him does not ring true in light of the discrepancies between the September 2, 1993 draft of the performance appraisal and the final version dated September 22, 1993. In the initial draft, he was graded effective in 11 out of 12 projects. In the final draft, written with an eye towards litigation, he was downgraded in five of the projects by a marginal rating on three projects and ratings between marginal and effective in two others. (Findings 75, 77).

The record, after weighing the evidence, in short, compels the inference that Complainant's discharge was motivated in part by his expression of environmental concerns within the company and to the DER. Managerial dissatisfaction with Opthof and pervasive friction between him and his supervisors also contributed to his firing. Much of that friction, to which Complainant contributed, was unrelated to his exercise of protected activity within the scope of this proceeding. Since retaliation and valid business considerations both played a part in the adverse action, the dual motive test applies.

As already noted, once the plaintiff has shown that protected activity played a role in the employer's decision, the burden shifts to the employer to persuade the trier of fact that it would have discharged the plaintiff even if the protected activity had not occurred. *See Mackowiak*, *supra*.

In this instance, the record does not permit a finding that Employer would have discharged Complainant for unsatisfactory performance alone even absent the protected activity. The record shows expressions of hostility to Complainant because of the protected activity, and the toleration of Complainant's negatives, as management perceived them, for a substantial period of time prior to the September 1992 performance evaluation rating him between effective and very effective. The combination of these factors preclude a finding that Mr. Opthof would have been discharged for unsatisfactory performance even absent the expression of his environmental concerns. Here the influence of the legal and illegal motives are so intertwined that it is impossible to sort out their relative contribution to Mr. Opthof's discharge. It is fair that the employer bear the risk, "[where] the influence of legal and illegal motives cannot be separated, because the risk was created by his own wrongdoing. *Mackowiak*, 735 F.2d at 1164; *National Labor Relations Board v. Transportation Management*, 462 U.S. 393 (1983).

Relief

After Acquired Evidence of the Misstatement on Complainant's Job Application Form

Complainant misstated on his job application that he had a minor in engineering from Rutgers when in fact he had not. Mr. Opthof had in fact taken some chemical and electrical

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engineering courses at other institutions. This qualification was a prerequisite for the job.[17] The misstatement came to light during the course of discovery in this proceeding at Mr. Opthof's deposition. Ironically, the record shows that Mr. Opthof's technical competence as an engineer was generally acknowledged.

Nevertheless, his employment application had the following certification:

I certify that all statements I have made in this application are true and agree that

> any misrepresentation or omissions of fact requested may be sufficient to cause for cancellation of my application or immediate dismissal from the company if I have been employed. . . .
>
> (CX 5) (*Emphasis supplied*)

Accordingly, once Respondent discovered this misstatement, it could, on the basis of this certification, summarily dismiss Complainant for the misrepresentation under consideration. The issue to be resolve in light of the after acquired evidence rule, accordingly, is whether relief should be banned entirely or limited on the ground that because of the misstatement Complainant would have been discharged for that reason.[18] The issue, accordingly, is how the after acquired evidence of the employee's wrong doing bears on the specific remedy to be ordered in the particular case. In this case neither reinstatement or front pay would be appropriate. *See McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995).

The employee protection provisions of the environmental statutes in question have a common and a public purpose of eliminating retaliation for the exercise of protected activity in the workplace. Accordingly, after acquired evidence of wrongdoing should not in every instance operate to bar all relief for an earlier violation of the statute. *See McKennon*, *supra*. In addition, all relief should not be barred in the instant case since private suits under the environmental statutes in question serve important public purposes. The employee's misconduct, nevertheless, is relevant to the question of remedy. Accordingly, it is necessary to balance the legitimate interests of the parties in light of the Complainant's wrongdoing, keeping in mind that suits such as this further the objectives of the employee protection provisions of the relevant environmental statutes. A proper balance is struck where remedial relief in the form of back pay is limited to the period from the adverse personnel action to the time when the employee's misconduct was discovered. Reinstatement in this case would be pointless since the employer could have and would in the future, upon the basis of the misstatement, have terminated Complainant upon lawful grounds. *See generally*, *McKennon*.

Compensatory Damages

Complainant seeks compensatory damages on the order of $50,000 for emotional distress and loss of professional reputation. According to Dr. Carter, a clinical psychologist, Complainant's discharge and harassment on the job resulted in a significant shock to him and "he suffers from a Post Traumatic Stress Disorder as a result of this traumatizing experience." (CX 182 p. 4). Dr. Carter believes that as a result Complainant will need psychotherapy and some family counseling to deal with those effects. (Carter 1480). In Dr. Carter's view, Complainant's collateral litigation had no or little effect on his psychological state. (Carter 1511-1513).[19] The Complainant himself testified that his termination had caused him emotional distress and caused

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him marital and family difficulties.

Dr. Carter's diagnosis of Post-Traumatic Stress Syndrome is questionable. (*See* Gregorius 1875-1876). However, that does not end the inquiry. In weighing conflicts in medical evidence such as between Drs. Carter and Gregorius, the trier of fact may rely on the common sense of the situation and the medical evidence should be viewed in the context of the relevant sequence of events. *See Atlantic Marine, Inc. v. Bruce*, 14 B.R.B.S. 63, 65 (5th Cir. 1981). In cases such as this, the causation issue is not solely medical "but compounded of inextricably intertwined elements of fact, medical opinion and inference." *See Todd Shipyard Corp. v. Dovan*, 300 F.2d 741, 742 (5th Cir. 1962). Dr. Carter's opinion, as corroborated by Complainant, that the workplace situation and the firing caused Mr. Opthof significant anxiety and emotional stress is corroborated by the relevant sequence of events. (Finding 83). Mr. Opthof's testimony of pervasive anxiety due to economic insecurity after the firing is credible. In short, Complainant's emotional distress may be related in significant part to his termination. To ascribe such distress solely to a personality disorder divorced from Complainant's exercise of protected activity and his discharge flies in the face of the workplace realities as documented by this record.[20] Emotional stress and anxiety leading to significant marital and family problems are compensable when arising out of workplace retaliation prohibited by the relevant statutes.

Ordinarily, such evidence warrants the granting of substantial compensatory damages. This, however, is a mixed motive case. There is no way to allocate with any degree of precision the portion of Complainant's emotional distress resulting from Respondent's illegal motives as opposed to valid business considerations which also influenced the decision to discharge Complainant. Under the circumstances, since the factors, legal and illegal, are so intertwined that they cannot be sorted out, some award should be made. Having violated the law, Respondent bears the risk that the causative factor cannot be separated with confidence. Some compensatory damages should be awarded. The award, however, will be modest. The chronic friction between Complainant and his supervisors for which Mr. Opthof is in part responsible, pre-existing the protected activity, clearly contributed to the adverse action against him and the level of stress at work. Foremost among these are Complainant's collateral litigation, some seven court and administrative proceedings filed in the period January 1992 to March 1993.[21] By and large this flurry of litigation was unsuccessful, with one appeal pending at the time of the hearing herein. (RX 61). The record shows that Complainant on occasion was a difficult employee. Some of the remarks he made to Ashland's officials well before his protected activity were inappropriate and tactless. There is, moreover, a question as to whether he attempted to

implement the Pennsylvania Human Relations settlement agreement in good faith.[22] Under the circumstances, the award should be limited to $500.00.[23]

There is insufficient evidence in this record to assess with any degree of confidence the effect on Complainant's professional reputation from the discriminatory firing and the resultant economic impact.

RECOMMENDED ORDER

Ashland Chemical Company is ordered to reimburse Lawrence J. Opthof with back pay from October 7, 1993, to the date when Respondent discovered in the course of discovery that

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Complainant had misstated his educational qualifications in his employment application.

IT IS FURTHER ORDERED that Ashland Chemical Company pay Lawrence J. Opthof $500.00 as compensatory damages.

THEODOR P. VON BRAND
Administrative Law Judge

TpvB/jbm

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1] The Clean Air Act, 42 U.S.C. § 7622, the Safe Drinking Water Act, 42 U.S.C. § 300j-9, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Water Pollution Control Act, 33 U.S.C. § 1367, the Superfund law, 42 U.S.C. § 9610, and the Toxic Substances Control Act, 15 U.S.C. § 2622.

[2] The profiler is a document to be filled out by an employee's peers and subordinates so the subjects of the profiler can get feedback on how others see their management skills. (Nagle 1941-1942).

[3] On October 8, 1992, responding to Complainant's September 30 letter, Mr. Pregent advised Complainant as follows:

> I would also like to take this opportunity to correct an apparent misconception you have. Contrary to the opening assertion in your memorandum, I did not give you the "responsibility of coordinating management of hazardous waste" on September 16, 1992. Instead, as we had agreed, I gave you a series of suggested activities that might be included in your new "Plant Engineer" job description. You were to review my suggestions and get back to me with any additions, modifications, or deletions. As of today, I have not heard from you. Therefore, your new job description, including any portion referencing any coordination of hazardous waste management, is not yet in effect.
>
> (CX 65)

[4] According to James Sterling, the Human Resources Manger for Ashland Chemical, the job objectives would be in effect during the negotiations on a final job description. (Sterling 1042).

[5] Pregent stated that in a September 22, 1992 meeting he told Complainant he did not have the hazardous waste responsibility at that time and that the document in question was not an official job description. (Pregent 1619).

[6] His rating on projects in CX 161 prior to consultation with counsel is more persuasive than the rating on projects in CX 48 on September 22, 1993 revised for purposes of litigation.

[7] According to Mr. Bowyer the majority of Complainant's problems were with a Mr. Roskilly who in his estimate is a hard person to be diplomatic with; Roskilly, in this witness's view, did not conform well with supervision. (Bowyer 647).

[8] Mr. Stout's testimony to a considerable degree related to events in the period 1989-1992.

(*See* Stout 1089, 1099).

[9] Ms. Carter's contemporaneous account of the incident stated in relevant part as follows:

> This memo is being prepared at your request to document the exchanges that occurred between myself and L. Opthof at the plant engineers seminar on September 19, 1993. During my presentations and ensuing discussions on process safety information, pre-startup safety review and other process safety elements *Mr. Opthof* (who I did not know or recognize till after our encounter) *repeatedly asked questions of what his facility was required to do under the OSHA Process Safety Regulations and the CMA Process Safety Code*.
>
> I explained to Mr. Opthof that his site (Easton) had transferred the only process that could have resulted in OSHA applicability to the Dallas facility (Ammonia). I explained that the Easton facility was therefore only implementing CMA's Process Safety Code. He inquired as to which processes were covered under CMA. I replied that CMA does not have a chemical list or set of criteria that dictate which chemicals and processes must be included in the program. He was very frustrated by my response - noticeably so. He asked "How am I ever going to get my division to approve AFEs to get process safety related work accomplished if EH&S cannot state clearly where we have to do process safety." I explained that CMA's intent is that we implement the Process Safety Code for chemicals and processes which post risk or have some degree of hazard. I further stated that Senior Management had clearly instructed the Process Safety Committee not to issue mandates but only provide guidelines for CMA implementation. He grew more frustrated as we discussed. I went on to explain that division management approves of the flexibility. There were other engineers that expressed frustration after Larry raised the issue of differentiating CMA processes from other OSHA processes.
>
> I related that CMA recognizes that the public is not entirely satisfied and wants ways to verify that companies are fully implementing what to date has been voluntary. I told them that CMA was moving to a five year mandatory implementation and possible third party audits.
>
> After this discussion concluded, I turned to J. Schnaith and asked who was this individual that was being so demanding. It literally held up the seminar for this exchange. When Jay told me it was L. Opthof I immediately remembered his law suit with the company and how he was probably pushing me for commitment which could lead to violations that he could use against Easton. When I repeatedly failed to provide him with mandates that he could use, he became loud and frustrated. (Larry in the past tried to get me to put in writing that Easton needed to perform a hazard analysis even though the division was moving the process to Dallas. I refused since the regulation clearly allowed these reviews to be conducted as late as 5/26/94 and the division had concrete plans to discontinue the process.)
>
> (CX 213)

[10] Robert DePascale used the same expletive in a handwritten memorandum dated May 18, 1993 to Messrs. Hall and Cimino copied among others to Opthof and Pregent. (CX 111). There were no apparent repercussions, except for a verbal reprimand.

[11] RX 47 is Nagle's summary of his voice mail from Karen Carter. (Nagle 1975).

[12] The testimony of Nagle and Pregent during the course of the hearing concerning their meetings and the timing of their decision is at odds with the information they provided and the testimony they gave in the pretrial and discovery phase of this case. Interrogatory 3 requested that Respondent identify each conversation of Respondent's representatives, agents, etc. relating in any way to Complainant's termination. The interrogatory response dated January 27, 1994, identifies only the September 15 meeting in Pregent's office prior to the termination and omits entirely the crucial September 2, 1993 meeting also in Pregent's office. (CX 199). That interrogatory response of necessity must have been based on information given by Pregent and Nagle. The February 10, 1994 affidavits of Nagle and Pregent similarly omit the September 2 meeting from this chronology referring only to a telephone discussion presumably prior to September 15. (CX 197-198). Michael Pregent's deposition testimony on January 24, 1994 similarly gives no indication that the September 2, 1993 meeting took place. (CX 208, 210 p. 2; Appendix A). Dennis Nagle's deposition testimony on January 25, 1994 also failed to disclose the September 2 meeting in response to questions put to him. (CX 212 pp. 3-4; *See also* Appendix B).

Nagle at the hearing testified:

> Q And was there a point where a decision was reached regarding what you were going to do about Mr. Opthof?
>
> A Yes. *On September 2nd* I made another routine visit into the Easton plant, and I talked with Mr. Pregent about this incident and about Larry's whole performance, and *we agreed at that time to terminate Mr. Opthof.*
>
> (*Emphasis supplied*)

(Nagle 1976)

The failure to disclose the September 2 meeting in the interrogatory response was deceptive. In the light of the above testimony at Tr. 1976, identifying in the affidavits and depositions September 15 as the date of the termination decision without also disclosing the September 2 meeting was of necessity misleading.

[13] Mrs. Opthof's memorandum to Gil Drab, the then plant manager, had covered essentially the same issues on April 10, 1989. (CX 16; M. Opthof 679).

[14] *See* Ashland's General Counsel's letter of October 13, 1992 stating in relevant part:

> Finally, I am advised that the plant has recently made the determination that some of this material, although it has been regularly recycled or reworked in the past, can no longer be feasibly recycled or reworked. Such material is in the process of being labeled and characterized for disposal.
>
> (CX 69)

[15] According to Nagle, Complainant in February of 1992 told him that he understood his rights under affirmative action and was out to collect. (Finding 15). Complainant in his first contact with James Sterling, Ashland Chemical's Human Resources manager, stated to him "Oh, so you're going to be another one of those people who sit in Dublin on their . . . and do nothing." (Sterling 837). Sometime in the period 1987-1990, Complainant embarrassed a union official by stating in front of employees with respect to the union contract, "I can't believe you took that contract." (Stout 1110, 1154).

[16] It may be noted that the expletive which Complainant utilized in the Karen Carter incident was the same expletive used by Robert DePascale, the second in command of the Easton plant, in a memorandum for which he received no more than verbal censure.

[17] Complainant asserts that the individual hiring him in 1983, Ashland's then manufacturing manager, was aware of this circumstance and agreed to hire him anyway. The testimony is not persuasive support for the proposition that the misstatement was unimportant since the misstatement on the application was made *after* the manufacturing manager offered the job to him. (Opthof 51-52). If this misstatement were in fact of no importance, there would have been no need to make it once the job offer was made.

[18] Employer bears the burden on this point. The burden has been met. The educational qualification in question is a central job requirement. That factor, considered in combination with the certification on the job application, supports the inference that Respondent would have terminated Complainant upon discovery of the false statement.

[19] This finding is not persuasive in light of the other evidence. Clearly, this litigation contributed to managerial distrust and consequent workplace friction. *See* note 22, *infra*.

[20] Dr. Gregorius' opinion reflects a workplace assessment of Complainant partly, at least, in conflict with the record. Complainant was not a procrastinator who shirked work. Accordingly, for that reason Dr. Gregorius' opinion should be discounted as resting in part on erroneous premise. (*See* e.g., testimony of Kevin Bowyer Tr. 627 *et seq*.).

[21] The five proceedings Complainant filed in the period January 1992-September 1992, were wholly unrelated to the protected activity which is the subject of this proceeding.

[22] He negotiated that settlement while unbeknownst to Ashland's officials he had filed another lawsuit. (Nagle 1954, 1959). This incident of necessity increased workplace tensions.

[23] In view of this disposition, there is no need to reach Respondent's argument that the taking of confidential documents by Complainant's wife and his subsequent acquisition of such documents bars relief. In any event, her testimony that the then-plant manager John Catlec told her he did not care what she did with certain documents left in the former plant manager's office is unrebutted. In the case of the memorandum written by her, she felt it appropriate to keep a copy because she was the author. In short, no clear cut case has been made that under these facts a firing offense occurred, or that the after acquired evidence rule applies to this situation. (M. Opthof 689, 696-697, 709).

[APPENDIX PAGE 1]

Appendix A

Q So you were reviewing -- you called Mr. Opthof in a meeting to

review his performance appraisal with him?

A That's correct.

Q And had you made the decision to terminate him prior to calling him into that meeting?

A Yes, we had.

Q You said we. Who is the we?

A Dennis Nagle and myself.

Q And when was that decision made?

A September 15th.

* * * *

Q Let me backtrack. You indicated that you made the decision on September 15th. That's when you and Mr. Nagle sat down?

A We sat down and did Larry's performance appraisal. At the culmination of doing it, the decision was to terminate Larry.

Q And you indicated September 15th. Why that date?

A It's the date that Dennis was at the

[APPENDIX PAGE 2]

facility. We met, talked about it, wrote it, it was reviewed with counsel, I rewrote it and submitted it.
(Pregent Deposition CX 210 pp. 2-4) *Appendix B*

Q Was there more -- on September 15, had you planned to meet with Mr. Pregent and discuss Mr. Opthof or was it did you happen to be at the plant?

A No. I planned that discussion with Mr. Pregent.

Q And when did you plan the discussion?

A Sometime before September 15th. I don't know the date.

Q An approximation?

A Probably within a week or two before I actually made the trip.

Q And did you have a phone conversation with Mr. Pregent concerning what would take place on September 15?

A Most likely we talked about needing to meet to discuss Mr. Opthof's performance.

Q And was there -- what else was said before September 15 -- before the meeting? *Was there anything more specific said other than we need to get together and discuss Mr. Opthof's performance?*

MR. MCCARTHY: Objection. You're referring to the content of the phone call or --

MR. KOHN *The phone call, any communication you had with Mr. Pregent prior to September 15.*

MR. MCCARTHY: On the subject of the September 15th meeting?

MR. KOHN: Correct.

[APPENDIX PAGE 3]

A *If I understand what the question is, you're asking did I discuss with Mr. Pregent other than the phone call that I referred to our getting together on September 15th to talk about Mr. Opthof. The answer is no.*
(*Emphasis supplied*) (CX 212 pp. 3-4)