

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Harry J. Eckert,

*Appellant,*

v.

Case No. 2013-REM-06-0149

Summit County Board of Health,

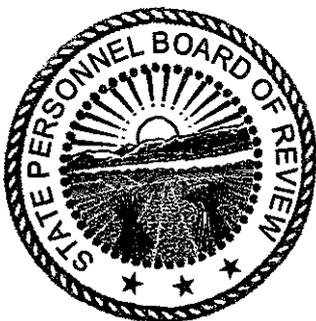
*Appellee,*

**ORDER**

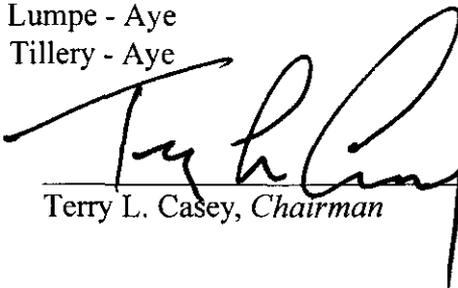
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's **REMOVAL** of Appellant from his Sanitarian position is **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



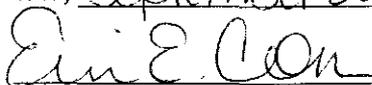
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
Terry L. Casey, *Chairman*

**CERTIFICATION**

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (~~the original~~/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, September 22, 2014.

  
Erin E. Con  
*Clerk*

**NOTE:** Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Harry J. Eckert

Case No. 2013-REM-06-0149

*Appellant*

v.

July 14 , 2014

Summit County Board of Health

James R. Sprague

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came to be heard at record hearing on December 16, 2013 and December 17, 2013. Present at the hearing was Appellant, who was represented by Nancy Grim, Attorney at Law. Appellee, Summit County Public Health (SCPH) (a.k.a. Summit County Combined General Health District [SCCGHD] and Summit County Board of Health), was present through its designee, Samuel Rubens, Assistant Director of Environmental Health, and was represented by Leslie A. Walter, Assistant Prosecuting Attorney.

On June 17, 2013, Appellant timely filed his appeal from his removal from the position of Sanitarian (Environmental Specialist) with Appellee. Appellant's pertinent R.C. 124.34 Order of Removal was signed on June 14, 2013. The Order was also delivered and effective on that same date. Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

Considerable initial work went into this matter. This included several telephone conferences with counsel and a pre-hearing held on August 27, 2013. Additionally, the parties conducted extensive discovery in this matter.

Because of the rather specialized nature of Appellant's work and also because of the limited availability of a number of the witnesses to this matter, on January 24, 2014, the parties were permitted to conduct audio-visually recorded depositions in Summit County; in lieu of having a number of pertinent individuals testify at hearing in Columbus. Respective counsel and the undersigned then conducted a telephone conference on January 30, 2014 to effectuate the submission of these deposition materials, to review with the undersigned any remaining evidentiary issues, and to establish a post hearing briefing schedule. Thereafter, the parties submitted the recordings of those depositions and the certified transcripts of same.

Appellee also requested a transcript of Day One and Day Two of hearing. Due to intervening events beyond the control of the parties or this Board, the production of that transcript was delayed. Those intervening events principally concerned new appeals filed with Court which involved final determinations made by this Board and by another pertinent Board. Pertinent statutes (governing the preparation of an official transcript for such appeals) set forth a relatively short amount of time to complete the production of the pertinent transcript. This is so that the transcript may be filed as part of a complete copy of the record that is timely certified to Court.

Further, by agreement of the parties, Appellee timely filed Appellee's Trial Brief on June 6, 2014, Appellant timely filed the Post-Trial Brief of Appellant on June 26, 2014, and Appellee timely filed Appellee's Reply Brief on July 7, 2014. The record was thereafter closed.

Respective counsel are to be commended for their diligence, professionalism, and outstanding representation of their respective clients.

### **CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT**

**Appellant's R.C. 124.34 Order of Removal** sets forth the following allegations as the basis for Appellant's removal:

**Specifically:** your repeated breach of ethics and other workplace policies which reflect a lack of professionalism in your work with the public as well as the failure to correct the below Behavior/Conduct Infractions that have resulted in disregard for Summit County Policies and Procedures:

- Discourteous Treatment of the Public
- Breach of Conflict of Interest/Ethics Policy
- Discrimination/Harassment

Further, on August 19, 2013, Appellee filed Appellee's response to Appellant's request to make definite and certain.

At hearing, the following witnesses testified:

**Robert Colley** is an employee of Environmental Compliance Testing (ECT), which, among other things, conducts third party testing of gas stations.

**Robert Hasenyager** is Appellee's Director of Environmental Health.

**William Tennant** is an employee of US Tank Alliance, Inc., which conducts third party environmental testing, including of gas station underground storage tanks.

**Rahif Faris** is a managing principal of Waterloo Oil and is the husband of the owner of Waterloo Oil.

**James Reardon** is an employee of ECT.

**Amin Mohammad** is the co-owner of ECT.

**Samuel Rubens** is Appellee's Assistant Director of Environmental Health and served as Appellee's designee in this matter.

**Wallace Chambers** is a Sanitarian Supervisor with Appellee and served as Appellant's immediate supervisor.

At deposition in lieu of live testimony (conducted on January 24, 2014), the following witnesses were deposed:

**Appellant, Harry J. Eckert**, served as a Sanitarian (Environmental Specialist) with Appellee until his removal from that position, which is the subject of the instant appeal. Appellant offered both direct and as if on cross testimony *via* the afore-mentioned digital video format.

**Dr. Zaid Khatib** is a Medical Resident at Akron Childrens' Hospital (Childrens' or Childrens' Hospital) and participated in a ride-along with Appellant as part of Dr. Khatib's Residency Program.

**Raj Kumar** is a gas station owner of Fuel America in Akron and Mr. Kumar's station has been inspected by Appellant.

**Harold Whaples** is employed by Petrocom Corporation, maintains and repairs gas station equipment, and has been present for inspections with Appellant.

Inability to obtain the appearance of **Debbie Hamer**

Further, Appellee attempted to subpoena Debbie Hamer both to record hearing and to video deposition in lieu of live testimony. Ms. Hamer apparently indicated she did not receive service of the subpoena for record hearing. Appellee then served Ms. Hamer with a subpoena for deposition *via* service from an Investigator from the Summit County Prosecuting Attorney's office. That Investigator may be considered to be a law enforcement/investigative officer. On January 23, 2014, Ms. Hamer stated to Assistant Prosecuting Attorney Walter that Ms. Hamer would not be attending the January 24, 2014 planned deposition and that Ms. Hamer had to work. Ms. Hamer, indeed, failed to appear for deposition.

Thereafter, during the post-hearing telephone status conference among respective counsel and the undersigned, Appellee's counsel orally requested the admission of the Affidavit of Ms. Hamer into the record and Appellant's counsel objected to same. Appellee's counsel was then presented with the option to file a mini-brief regarding this request with the requisite opportunity for Appellant's counsel to file a response to Appellee's request for admission. Appellee's counsel appears to have declined that opportunity. Thus, Ms. Lewis' Affidavit must still be considered to constitute hearsay which lacks a requisite circumstantial guarantee of reliability. Accordingly, the undersigned did not consider any statement therein in regard to the truth of any matter directly related to the merits of this appeal.

Inability to obtain the appearance of **Mary Lewis**

Appellee also subpoenaed Mary Lewis to testify at hearing. However, Ms. Lewis did not appear at hearing to give her testimony. Accordingly, since Ms. Lewis' testimony could not be obtained, the undersigned did not consider any information contained within Ms. Lewis' written statement in regard to the truth of any matter directly related to the merits of this appeal.

*[Please note: in order to facilitate ease of identification, the first time any individual is referenced by name in this Report and Recommendation, that individual's name will appear in bold. The only exception to this is for those persons who are identified in the introductory paragraph of the Report and Recommendation.]*

There are several seminal dates that should be noted for this matter. **Appellee alleges that, on each date *bolded below*, Appellant committed wrongdoings, the combination of which led to Appellant's removal from his position of Sanitarian.**

**December 17, 2012:** Appellee alleges that while Appellant was observing a Stage II air quality inspection on the fuel pumps at Waterloo Oil, Appellant was rude, threatened the employment of Mary Lewis, the manager/shift leader of the station, and used the words "foreign-born" to describe the ethnicity of Mr. Rahib Faris, the Managing Principal of the station. Mr. Faris is of Arab descent. Appellee also alleges that Appellant admitted making these statements when confronted with information from this incident that was captured on videotape. (Appellee alleges this information was obtained from initial third party reports and from subsequent complaints received.)

**January 9, 2013:** Appellee alleges that while Appellant was observing a Stage II inspection at a facility owned by **Ahmed Abdulhabib**, Appellant was rude and condescending when observing Mr. Abdulhabib's paperwork and that Appellant embarrassed both Mr. Abdulhabib and a vendor who was present at the site at that time.

On January 14, 2013, Appellee received a complaint about the events that transpired on December 17, 2013 and obtained an Affidavit from both Mr. Faris and Ms. Lewis concerning the events at Waterloo Oil.

On January 15, 2013, Samuel Rubens, Appellee's Assistant Director of Environmental Health, and Wallace Chambers, Sanitarian Supervisor and Appellant's supervisor, met with Appellant regarding the allegations and complaint of Mr. Rahib and Ms. Lewis. Appellee alleges that, at that meeting, Appellant referred to Gas Dispensing Facility (GDF) owners as "30 percenters" and "foreign-born".

**February 20, 2013:** Appellant was supervising a GDF inspection at Giant Oil. Appellant was accompanied by Dr. Zaid Khatib, a Medical Resident at Akron Childrens' Hospital; as part of a field experience that Appellee offers to participants in Childrens' Medical Residency program. Appellee alleges that on this date, Appellant made comments to Dr. Khatib regarding foreign born/foreign appearing GDF owners/managers. Appellee also alleged that Appellant apprised Dr. Khatib that some people would affix a sticker to a gas pump handle when they believed the station was foreign-owned. The sticker was a space alien head with a line or lines through it. Appellee further alleges that Appellant indicated to Dr. Khatib that Appellant was more likely to let little things slide when the GDF owner was not "foreign". (Appellee alleges this information was received from a complaint filed by

**Dr. Joel Davidson**, the Coordinator of Pediatric Rotation for Childrens' Hospital, and from follow-up e mail exchanges with Dr. Khatib.)

Dr. Khatib subsequently indicated in May 2013 e mails to Robert Hasenyager (Appellee's Director of Environmental Health) that Dr. Khatib did not actually see any such alien stickers either in Appellant's possession or otherwise. (Please see Appellee's Exhibits 13 (B), 14, 15 and 16 and Appellant's Exhibit G). Dr. Khatib further indicated, in these e mails, that he did not believe Appellant's comments regarding foreign owners were designed to make Dr. Khatib feel uncomfortable nor did Dr. Khatib think they were directed at Dr. Khatib.

Mr. Hasenyager stated at hearing that the guidelines contained in Appellee's Policy Number 411 ("Harassment, Sexual Harassment and Non-Discrimination") do not appear to require that a recipient must be offended by the employee's behavior. He further explained that the Policy Number 411 guidelines contain a prohibition against an employee engaging in any discrimination against any individual. (Please see pages 8. and 37., below for a further discussion concerning Policy Number 411.)

**Jim Weston**, a representative of BP and Giant Oil, was present at this site on the date and time in question. Mr. Weston offered in a statement that he could not think of anything that Appellant said or did that was unprofessional in manner. However, since Mr. Weston's testimony could not be obtained, the undersigned did not consider anything in his statement that would go to the truth of the matter asserted.

On June 11, 2013, Appellee alleges, Debbie Hamer, an employee of Tank Integrity, informed Appellee that a Tank Integrity employee had indicated to her that during an air quality inspection, Appellant had insisted that at least five pumps and/or hoses had to be replaced, even though the inspected equipment had passed all pertinent tests. Appellee alleges that, as a result, Ms. Hamer contacted Appellant via telephone and when she discussed the situation with Appellant, he became agitated and began yelling when Ms. Hamer would not require the GDF owner to replace this equipment. (Please note: Appellee obtained an Affidavit from Ms. Hamer yet was unable to obtain her testimony either at hearing or at deposition, despite several attempts to obtain that testimony. Accordingly, as noted, above, the undersigned did not consider anything in her statement that would go to the truth of the matter asserted.)

There was also an allegation that Appellant sought a personal relationship with Debbie Hamer; albeit Ms. Hamer and her company are part of what could be referred to as the regulated customer base of Appellee.

Appellee dropped allegations of sexual harassment against Appellant. Further, Appellee did not specifically include a charge (regarding Appellant's alleged natural gas aggregation direct sales invitations) in Appellee's R.C. 124.34 Order of Removal.

Nonetheless, Appellee continues to offer evidence concerning the alleged sales invitations for two reasons. The first stated reason is to rebut Appellee's assertion that Appellant claimed he utilized high ethical standards at work. The second stated reason is to demonstrate what Appellee asserts were Appellant's motives leading to some of the discipline set forth in Appellee's R.C. 124.34 Order of Removal.

Accordingly, for these two purposes, Appellee continues to assert that Appellant's behavior (regarding his natural gas aggregation direct sales invitations) constitutes a breach of professional boundaries and could create a conflict of interest. This, Appellee further alleges, could result in a violation of SCPH **Policy Number 401** (Conflict of Interest/Ethics Policy - Appellee's Exhibit 7.) requiring employees to avoid favoritism, bias, and the appearance of impropriety.

Appellee also alleges that Environmental Compliance Testing employee Robert Colley reported a number of incidents to his employer, Amin Mohammad, wherein Appellant would allegedly use racially insensitive words or phrases. These are alleged to have included words or phrases such as "foreigners", "A-rabs" (using a long "a" with a pronounced emphasis on the first syllable), "towel heads", and the phrase "At least this is a white guy this time."; to indicate a particular focus on the race or ethnicity of the owner, who perhaps had non-compliant equipment.

Mr. Colley is also alleged to have reported that Appellant approached Mr. Colley perhaps four or five times to try to persuade Mr. Colley to join Appellant in a natural gas aggregation effort. Mr. Colley indicated at hearing that Appellant's activities here constituted an effort to attempt to persuade GDF owners to switch natural gas providers. Mr. Colley further testified that Appellant's proposal also included inviting Mr. Colley to try to recruit other individuals to perform this work on behalf of Mr. Colley. This would (according to the proposal) allow Mr. Colley to get a cut or monetary bonus for the success of any of Mr. Colley's proposed direct sales personnel.

Additionally, Mr. Colley reported at least one incident (alleged to have occurred at the Akron Food Mart) whereby Appellant would not allow Mr. Colley to replace defective equipment with other used equipment (which is the owner's right) to see if the used equipment would pass, obviating the need to replace with new and expensive parts. The owner then "agreed" and Mr. Colley changed out the defective parts and the new parts then passed the test.

Mr. Colley asserted Appellant was insistent and short with the owner during this exchange, even bullying and using questionable language. Mr. Colley further asserted that Appellant indicated to Mr. Colley that "A-rabs don't want to replace their stuff." and words to the effect of "We're not going to waste our time today on used nozzles." Mr. Colley indicated that about 90 percent of ECT's business is done with the Arab community. Mr. Colley further indicated that about 90 percent of their GDF client base is comprised of stations that are locally and independently owned.

Mr. Colley further asserted this created an appearance that he and Appellant were partnering up on the GDF owner and that Mr. Colley was pointedly questioned at this time regarding his relationship with Appellant. Mr. Colley stated that he was "put in a spot" as a result of Appellant's actions and that ECT then lost the future business of that owner.

At hearing, testimony reflected that, on January 1, 2011, Summit County Public Health assumed the work of the City of Akron Health Department; as a result of a merger. Testimony also indicated that this work included air quality inspections of gas station fuel dispensing pumps. Appellant, a Registered Sanitarian, had worked for the City of Akron Health Department before coming to SCPH through this merger.

Testimony also reflected that, through a contract between the SCCGHD and the Ohio Environmental Protection Agency (EPA), Appellee oversees several types of inspections on behalf of the EPA for the area encompassed by Medina, Summit, and Portage Counties. This area constitutes the Akron Regional Air Quality Management District (ARAQMD).

Further, Appellee is contractually obligated to follow the prerequisites established by the State of Ohio and by the Federal Government (including compliance with U.S.C. Title VI.). Following these prerequisites helps to ensure that Appellee is not in breach of its contract with EPA which, of course, helps to ensure that Appellee's funding stream is not adversely affected.

Additional documentary and testimonial evidence demonstrated that Appellee has promulgated, revised, and disseminated to its employees **Policy Number 411**, entitled "Harassment, Sexual Harassment and Nondiscrimination" as well as disseminated to its employees a comprehensive publication from the Ohio Ethics Commission entitled "Ethics Is Everybody's Business". The record further reflects that evidence of overt discriminatory acts performed by an employee of a Title VI. funded agency could put the funding of that agency in jeopardy.

Appellee asserts that Appellant has already attended ethics, cultural sensitivity, and sexual harassment trainings. Additionally, Appellee asserts that Appellant has been counseled regarding the need to be culturally sensitive, the need to avoid conflicts of interest, and the need to maintain the appearance of neutrality.

The record reflects that Appellee's employees perform many and varied duties. These duties include observing the inspection of Gas Dispensing Facilities.

Three tests are performed on GDFs, basically on an annual basis or five-year basis, depending on the test. Tests performed include: a pressure decay test on a static pressure tester; an annual air-to-liquid ratio test; and a five-year dynamic pressure test.

In his capacity as one of Appellee's Air Quality Inspectors, Appellant assisted Appellee in overseeing the performance of the fuel dispensing equipment located at GDFs in Appellee's area of regulatory coverage.

William Tennant, an employee of third party environmental testing vendor US Tank Alliance, testified on direct that he has had dealings with Appellant several times during the course of conducting air quality inspections for gas station owners.

Mr. Tennant indicated his job was to conduct all the pertinent tests pursuant to EPA rules and pursuant to mandates of other regulatory entities.

Mr. Tennant further stated that he understood Appellant's role was to oversee all the inspections and make sure the work was done "by the book". He indicated that Appellant would be at sites that Mr. Tennant inspected an average of about five to 10 times a month.

Mr. Tennant averred that Appellant was always right there reviewing the work and seeking to know exactly what was occurring at the time. Mr. Tennant also indicated that Appellant was courteous with station owners/managers, and perhaps spent more time with them than was absolutely necessary. This was to assist the owners/managers to properly complete the pertinent paperwork and to ensure compliance with testing standards, Mr. Tennant offered.

Mr. Tennant testified that Appellant's review of equipment was "top-notch" and that if any change was needed, Appellant would be diligent about noting same. Mr. Tennant stated he did not observe Appellant requiring owners/managers to change out equipment where a change was not necessary. Mr. Tennant stated he never observed Appellant engage in any physical, mental, or oral abuse of station owners or himself.

Mr. Tennant testified on cross that he had no personal knowledge of the following: an inspection that occurred at Waterloo Oil on December 17, 2012; an inspection that occurred in January, 2013 at a gas station in Barberton owned by Amid Abdulhabib; any relationship or lack thereof that may have occurred between Appellant and Debbie Hamer; an inspection that occurred on February 20, 2013 attended by Dr. Zaid Khatib; Appellant's opinion of the inspection business known as ECT; or Appellant's disciplinary history at SCCGHD.

Rahib Faris is the husband of **Sheri Faris**, the owner of Waterloo BP (f.k.a. Waterloo Oil, which is apparently still the official name of the corporation). For the past five years, Mr. Faris has been a Managing Principal of Waterloo. Mr. Faris testified on direct that Mary Lewis previously served as a shift leader for Waterloo. He further noted that she did the ordering during her shift and that Ms. Lewis and Mr. Faris were often present at the business at the same time. He testified that Ms. Lewis is no longer a Manager at Waterloo.

He averred that he met Appellant three times, for inspections each time. One was possibly at the end of 2010 or beginning of 2011. Another was around 2011 for Appellant to come in and inspect with ECT.

Mr. Faris stated that Appellant's conduct at the 2012 inspection (Appellant's and Mr. Faris' third meeting) was unprofessional. He indicated Appellant comes so mad and his dialogue has nothing to do with the job and Appellant seemed very stressed by his job and was not very nice to Mr. Faris, in Mr. Faris' words.

Mr. Faris began his description of the 2012 inspection. The inspection was scheduled for that day and, about 9:00 a.m., Appellant called and indicated that Appellant and the ECT inspector would be on site shortly. Mr. Faris indicated that Mr. Faris did not even need to be present on site because Ms. Lewis had been trained to facilitate the inspection.

Mr. Faris testified that when Mr. Faris arrived perhaps 10 to 15 minutes later, Appellant stated "It's about time you brought your ass here." Mr. Faris stated that he took it as a joke because that is how Appellant jokes, accordingly to Mr. Faris.

While Appellant was inside for a short time getting coffee, Ms. Lewis approached Mr. Faris. According to Mr. Faris, Ms. Lewis seemed concerned regarding Appellant's statements to her.

Mr. Faris identified Appellee's Exhibit 11. as Mr. Faris' account of what happened at Waterloo on December 20, 2012. In accordance with the account, Mr. Faris testified that, after a short conversation with Ms. Lewis inside the station, Mr. Faris approached Appellant.

Accordingly to Mr. Faris, Mr. Faris then stated to Appellant that Appellant had no right to say to employees they were going to get fired and that, if Appellant had a problem with some function of the station, Appellant should address that issue with Mr. Faris directly or in the pertinent paperwork and not in front of the customers or the employees.

Further, according to Mr. Faris, after Appellant questioned Mr. Faris several times about whether Mr. Faris wanted to argue with Appellant, and after Mr. Faris stated several times that he did not want to argue with Appellant, Appellant then told Mr. Faris to follow Appellant to the dumpster and signaled Mr. Faris with his finger. Mr. Faris testified that Appellant then climbed in the dumpster and pulled out a hose.

As stated by Mr. Faris, Appellant then showed Mr. Faris the hose and explained that some stations tape up a hose. Mr. Faris indicated he responded that if Appellant had some part to show Mr. Faris, then Appellant should do so or write it on the papers but don't engage in that discussion in front of the customers or employees. Mr. Faris also testified that, at this point with Appellant, Mr. Faris declared to Appellant words to the effect of: I don't tape up equipment; if something is broken, I fix it, and I do not like to let things run down.

While Appellant and Mr. Faris were talking, Mrs. Sheri Faris, the owner, came over and said to Mr. Faris that she needed to talk to him about something important. Mr. Faris then excused himself and went inside with Sheri Faris, who indicated that Appellant had been saying something against foreigners.

Mr. Faris further averred that he then questioned Appellant regarding this alleged statement and Appellant said it was not true and that Appellant did not say it.

Mr. Faris testified that he then stated to Appellant: OK, let's go inside to see if Ms. Lewis and Mrs. Faris are lying.

(Mr. Faris indicated that there is an audio/video system at Waterloo Oil. The record reflects that this system could have been played back at that time to ascertain the content of Appellant's conversation inside the Waterloo Oil station.)

Accordingly to Mr. Faris, Appellant then put his hand on Mr. Faris' shoulder and said essentially: "Never mind, I'm not going to deal with the girls anymore, I'll deal with you." and Mr. Faris said "OK".

Mr. Faris stated that Appellant walked off for a short time and came back and said that Mr. Faris had a (compliance) problem with a fuel type leak and that it was going to cost Mr. Faris a lot, \$850.00 per the quote from ECT, to which Mr. Faris indicated he responded, "If it's needed, let's do it."

Then, Appellant began conducting additional inspection work. However, according to Mr. Faris, a few minutes later, Appellant came back to Mr. Faris and said we have another problem, essentially with the fuel cap that was rusty (but only on the outside, according to Mr. Faris). Because there was a problem with the cap that needed some repair, the repair was not done that day and Waterloo did not pass the test that day.

Mr. Faris indicated he was concerned because he thought Appellant or others broke the cap. Mr. Faris also called ECT and they did not know what to do, according to Mr. Faris. The repair ended up costing several hundred dollars.

Mr. Faris indicated he was from Jordan and Kuwait and such a situation could not be reported and rectified there. Following a conversation with Steve from ECT and an expression of concern, Mr. Faris decided he could, and also needed to, report this situation.

On cross, Mr. Faris confirmed that he had scheduled the December 2013 test and he knew Appellant was coming. Mr. Faris confirmed that he did call ECT. He added that he thought he had to call ECT and that ECT had been retained for the full term of Mr. Faris' management. He understood the inspection is to occur every year.

Mr. Faris was questioned regarding Appellant's Exhibit E. (page 1.), a June 14, 2011 dated letter from ARAQMD Environmental Specialist Nicole Bradley. Mr. Faris was not sure he received the letter. Mary Lewis and Mrs. Faris maintained the records for Waterloo's EPA inspections, he noted.

The letter refers to an apparent October 25, 2010 inspection. Appellant's Exhibit E. (p. 2.) is another letter from ARAQMD, but Mr. Faris did not remember receiving and does not read these letters. He agreed that inspections should be held within 12 months of the previous examination.

Mr. Faris remembered that Appellant called to remind Mr. Faris to schedule his 2012 inspection.

Mr. Faris reiterated the 2012 inspection was scheduled for 9:00 a.m. and confirmed that Mary Lewis needed to be there for the inspection. He did not tell Ms. Lewis to make the records available for the inspection, he offered.

According to Mr. Faris, Appellant indicated at the inspection that Ms. Lewis had some difficulty obtaining the records. However, Mr. Faris testified at hearing that he obtained them for Appellant within two minutes and showed them to Appellant. He confirmed he understood showing the inspector the records is part of the inspection each year.

Mr. Faris confirmed that Appellant and the ECT employee were both there when Mr. Faris arrived on the day in question. The ECT employee was there, the ECT truck was there, and Appellant was by the door to the station. Mr. Faris did authorize ECT to fix the problem in the ground for \$850.00.

According to Mr. Faris, Appellant said if Mr. Faris did not get this repair, Waterloo would not pass the test. Mr. Faris confirmed that, if one of the tests was not passed, it must be re-scheduled and re-done and he would have to pay the tester for the re-test. Mr. Faris reiterated he usually tells the tester to perform the repair at the annual test; so that passage can be obtained that day.

Mr. Faris testified that Appellant confirmed, during ECT's review of Waterloo's in-ground equipment, a part broke and Mr. Faris was concerned that he should not be held responsible for this break. Both Appellant and the ECT tester indicated the part broke because it was rusted but, Mr. Faris offered at hearing, it was a very thick piece and he doubted the breakage resulted from outside rust on the part.

Mr. Faris stated that he then called Appellant on the phone; to let Appellant know Mr. Faris was not ignoring the test so that Mr. Faris would not get in trouble. LC Metro was ultimately able to perform the repair for several hundred dollars. Thus, he declared, Waterloo did not have to obtain a major and more expensive fix. Waterloo was then able to pass the requisite test, according to Mr. Faris.

**James Reardon** testified on direct that he has served as an employee of ECT since 2007 as an underground storage tank installer. Mr. Reardon noted that, in that capacity, he had had an opportunity to interact with four of Appellee's air quality inspectors. Mr. Reardon averred that he conversed with Appellant once every couple of months.

Mr. Reardon stated that Amin Mohammad is his employer. Mr. Reardon indicated that, when coming back from tests, Mr. Mohammad would ask Mr. Reardon who was the inspector and who was present.

Amin Mohammad is a co-owner of ECT, along with his wife, who is also a co-owner and who oversees the office. Mr. Mohammad confirmed that ECT conducts

environmental compliance testing for the petroleum industry. ECT also has a construction division that performs work on above-ground and in-ground storage tanks, as well as a maintenance division.

He indicated that he oversees a lot of the tests and is sometimes out in the field. Mr. Mohammad declared that he supervises the field techs and is the contact person for his field techs. He averred that he has dealt with the staff of the SCCGHD regarding Stage I and Stage II testing.

Mr. Mohammad offered that he has been doing testing since 1998, including some testing that he has performed since 2004. ECT's client base includes about 900 entities and about 50 Stage II entities in Summit County.

Mr. Mohammad has worked with three Environmental Specialists and has had conversations with Wallace Chambers. Mr. Mohammad met Appellant out in the field once or twice as well as conversed with Appellant over the phone several times, maybe 10 times, he stated.

The phone conversations principally revolved around sites where owners needed some testing or needed some parts replaced and one conversation in which Appellant indicated he wanted Mr. Mohammad to meet Appellant on a Saturday, Mr. Mohammad averred. Appellant did not give a reason for wanting to meet Mr. Mohammad on a Saturday but said he could not talk about it over the phone, Mr. Mohammad testified. Mr. Mohammad affirmed he never met with Appellant on a Saturday.

Robert Colley did bring to Mr. Mohammad's attention some of the things that were done on a site at specific locations, Mr. Mohammad confirmed. This included bringing to Mr. Mohammad's attention Appellant's performance as an inspector and some of the things done on a site at specific locations.

Mr. Mohammad did not turn in a complaint to Appellee. He did have a conversation over the phone with Samuel Rubens and, on another occasion, Mr. Mohammad came down to the ARAQMD headquarters and met with Mr. Rubens and Assistant Prosecuting Attorney Walter and gave his statement.

Mr. Mohammad indicated that James Reardon mentioned a few things. One was regarding a tester named Johnny Carrion that Mr. Mohammad felt seemed odd. He stated he never had any difficulties with any additional SCHED Sanitarians other than Appellant. Mr. Mohammad stated that ECT's communication regarding the scheduling of testing is principally handled by **his wife**, by **Becky**, and on occasion by Mr. Mohammad, himself.

Samuel Rubens stated that he started with ARAQMD in 1994, which was part of the Health Department in the 1940s and merged with the City of Akron in the 1960s. Mr. Rubens began as a Lab Analyst (LA) 1, was promoted to LA 2 and LA 3, and transferred over to SCPH. In May, 2011 he was promoted to Supervisor and in June, 2012 was promoted to Administrator, which is his current position.

As Administrator, he administers the air quality program (*i.e.* ARAQMD) and is also an Environmental Health Assistant Director. He directly supervises three employees, including Wallace Chambers, Appellant's supervisor. Mr. Rubens indirectly supervises 15 encumbered positions and two currently vacant positions.

Mr. Rubens did directly supervise Appellant from September, 2010 until December, 2010 and worked with Appellant since 1997 or 1998.

Mr. Rubens averred that, beginning in March, 2012, Mr. Rubens' held corrective action discussions with Appellant about Appellant's behavior at work. Mr. Rubens stated Appellant was trying to take more control of the gas station program and Mr. Rubens felt it was Mr. Rubens', not Appellant's, responsibility to schedule, pursuant to supervisory prerogative and that, if one person schedules, it avoids multiple bookings and omissions.

Mr. Rubens was directed to Appellee's Exhibit 21., an e mail Mr. Rubens sent to Appellant. Mr. Rubens offered that he had many discussions with Appellant regarding policies and procedures, and not all of these discussions were memorialized in writing.

Mr. Rubens then referenced a January 14, 2013 meeting. This meeting was prompted by a January 14, 2013 complaint initiated by Rahif Faris that Mr. Rubens received from Waterloo Oil.

The complaint was brought to Mr. Rubens' attention; due to Mr. Faris' conversation with another of Appellee's air quality inspectors, **Steve Stakleff**, regarding the afore-mentioned December, 2012 inspection. Mr. Rubens contacted Mr. Faris and Mr. Faris was quite agitated, Mr. Rubens stated.

On January 15, 2013, Mr. Rubens and Wallace Chambers (Appellant's supervisor) met with Appellant to discuss the complaint raised by Mr. Faris.

Mr. Rubens offered that, at the January 15, 2013 meeting with Appellant, Appellant was advised not to use racist language when referring to gas station owners and not to assist testing companies but only to observe the testing. For instance, here, the owner was not yet present and Appellant went into the back to

get parts, which, if they failed, would place liability on the SCHD, Mr. Rubens noted at hearing.

At the January 15, 2013 meeting, Appellant denied calling owners "Arabs", the "30 percenters", or "foreign-owned". Yet, Appellant did use the term "30 percenters" throughout this meeting, Mr. Rubens stated.

Mr. Rubens and Mr. Chambers then instructed Appellant not to have further contact with Waterloo Oil. They further instructed Appellant that, if an issue arose in the future, Appellant was to direct owners to the Office of Compliance Assistance and Pollution Prevention (OCAPP), a component of the Ohio EPA which provides assistance to small business owners concerning the permitting process.

As a result of this situation, Director of Environmental Health Robert Hasenyager suggested that Mr. Rubens and Mr. Wallace designed a survey of six general questions. The survey was to be provided to several pertinent gas retailers, and the survey was either issued on paper or administered in person by Mr. Wallace.

The surveys were rather non-descriptive and those who responded seemed to say that Appellant and Mr. Stakleff were doing a good job in the field. Based on these results and the corrective discussion Mr. Rubens and Mr. Wallace had conducted with Appellant, they felt at this point in time that the situation had been handled.

Mr. Rubens averred that, as part of an agreement Appellee has with Childrens' Hospital to provide its Residents with increased field experience, on February 20, 2012, Appellant hosted a visitor, Dr. Said Khatib, a Medical Resident at Childrens' Hospital, for a ride-along.

As stated by Mr. Rubens, in April, 2012, Dr. Khatib notified Dr. Joel Davidson, who was Dr. Khatib's Hospital Coordinator for Pediatric Rotation, of some issues that arose during Dr. Khatib's ride-along. Those issues were then brought to the attention of **Dr. Marguerite Erme**, Appellee's Medical Director, who forwarded them to Mr. Hasenyager. Mr. Hasenyager then forwarded them to Mr. Rubens in early May, 2013 and also talked to Mr. Rubens about these issues.

Mr. Rubens explained that Mr. Hasenyager then initiated contact with Dr. Khatib to begin an investigation and, based on the content of the complaint, Appellant was placed on paid administrative leave in the beginning of May, 2013.

Mr. Rubens, Mr. Chambers, and Mr. Hasenyager began contacting gas station owners and testing companies and interviewed them regarding their interaction with Appellant and of any negative interactions with Appellant.

Mr. Rubens indicated he spoke with **Sendos Mohammad**, the wife of Amin Mohammad, as well as Mr. Abdul-Mohammad, Robert Colley, and Debbie Hamer of Tank Integrity. They also spoke to **Denise Yohe** from Tanknology and **Kathy Pasternak** from US Tank Alliance, he believes.

ECT, which has the most testing in their area, had the most complaints including of Appellant being racist and inappropriate. The others did not have as much of an issue but had complaints about intensesness, which, he offered, could be perceived as aggressive.

Mr. Rubens had also met with Ahmed Abdulhabib at Harding Oil regarding an inspection on December 19, 2012. Mr. Rubens indicated Mr. Abdulhabib reported that Appellant's behavior was condescending and demeaning, that Appellant treated Mr. Abdulhabib very discourteously, and that Appellant was angry about Mr. Abdulhabib's records.

Further, according to Mr. Rubens, Mr. Abdulhabib felt he could not even get a minute to allow a vendor on site at the time to get Mr. Abdulhabib's signature. [It is noted that Appellee did not offer this testimony for the truth of the matter asserted – and it is not admitted herein to demonstrate same - but to identify a perceived pattern of behavior on the part of Appellant.]

Mr. Rubens identified or noted that he created Appellee's Exhibits 8, 9., 12., 17., and 21. He identified Appellee's Exhibit 9. as a performance document. Mr. Rubens identified Appellee's Exhibits 12. and 17. as notes that he took at a disciplinary conference and then kept, as was his normal practice, he averred.

Mr. Rubens confirmed that Appellee's Exhibit A. is Appellee's disciplinary policy that provides for progressive discipline.

He also confirmed that all air quality work done by Appellee is done pursuant to a contract with the Ohio EPA under the rules promulgated by same. He confirmed that these rules require gas station owners to maintain inspection records for three years. He affirmed that one of the functions of Appellee's inspectors is to witness the tests set forth in these rules and that owners are to notify Appellee of the test. He further agreed that owners have 365 days from the passing date to obtain their next annual test but can do so sooner. He agreed the rules allow the inspectors to examine the equipment, obtain data, *et cetera* and the repairs and re-

test must be done within 30 days unless Mr. Rubens or Mr. Chambers grants an extension.

He identified Appellant's Exhibit C. as constituting the forms used to record the testing results. The tests are actually conducted by testers hired by the owners of the station, he confirmed. He was directed to Appellant's Exhibit D., which is a list of Stage II testers submitted to OCAPP, a component of the Ohio EPA. He declared that it was acceptable for a SCPH employee to pass out the OCAPP list.

He averred that EPA issues the penalties. He also offered that SCPH's Administrative Division keeps and reviews records and that it can forward an enforcement action request.

Mr. Rubens noted that either he or Mr. Chambers initiates such a request yet no one at SCPH can render Ohio EPA fines. He also stated that, after March 2013, Mr. Rubens scheduled testing inspections.

The expected pattern, Mr. Rubens indicated, is for the owner to contact the testing company which will then coordinate with SCPH. It is the responsibility of the Administrative Division to be there to observe the test, *et cetera*.

It is not the responsibility of SCPH to check to see if the station is overdue for an inspection. SCPH does not, therefore, ask its employees to do so, according to Mr. Rubens.

Mr. Rubens was directed to Appellant's Exhibit E. and was questioned as to whether Waterloo Oil's Stage II testing had not been performed several months late by the tester. He was then directed to a subsequent document which appeared to indicate that all deficiencies with Waterloo's testing had been corrected.

Mr. Rubens agreed that the type of defects Appellant identified on the reports in this exhibit and the comments Appellant noted (e.g. hose of #3 getting bad) were appropriate.

Mr. Rubens again offered that, at the January 15, 2013 meeting attended by Appellant, Mr. Rubens, and Mr. Chambers, there was a discussion regarding Mr. Faris' complaint and regarding some things Appellant did that might be misconstrued by gas station owners. Mr. Rubens offered that Appellant was not happy but agreed not to return to Waterloo Oil and Steve Stakleff performed the test.

Mr. Rubens agreed that it was acceptable for an inspector not just to observe the test but to look at records and examine the equipment. He indicated he was not

aware that ECT arrived late. He stated that Appellant should not touch parts and doing so exposes SCPH to liability and he believed Appellant understood.

Mr. Rubens agreed that, during one of Appellant's corrective meetings, Appellant had actually referenced the "30 percenters" in the context that about 30 percent of the district's gas station owners are of "foreign descent" or are "foreign born". He noted that O.A.C. Ch. 3745 mandates that inspection records must be maintained but does not demand that the records be retained in a particular order.

Mr. Rubens opined that, if Mr. Faris' allegation was true, then it merited being labeled as at least a Group I offense.

Mr. Rubens noted that he was never made aware of Steve Stakleff sleeping in an inappropriate manner.

Mr. Rubens was directed to Appellee's Exhibit G., an e mail exchange between Mr. Hasenyager and Dr. Khatib. Mr. Rubens was questioned as to whether Dr. Khatib backed off from some of the details in e mails to Mr. Hasenyager.

Wallace Chambers testified on direct and much of his testimony parallels the testimony of Mr. Rubens.

On cross, Mr. Chambers agreed that Appellant was very helpful when Mr. Chambers was new to Air Quality. He stated that Appellant agreed to have Mr. Chambers come along and was helpful with office work related to gas station inspections. He also found Appellant to be appropriate with gas stations owners and their employees as well as with testers. He further indicated that he never told Appellant that anything Appellant did was inappropriate or incorrect.

Mr. Chambers confirmed that he gave Appellant positive feedback and that Appellant provided owners with a binder to keep their records well organized. He also confirmed that he observed Appellant being appropriate in the way he explained things to the owners and their staff.

At deposition in lieu of live testimony, four witnesses testified.

Testifying via video deposition was Appellant, Harry J. Eckert.

Appellant began his direct testimony by stating he never received any written standard operating procedures to guide him in the details of his work.

Appellant also stated that he discussed his contemplated foray into natural gas marketing with ECT employee Robert Colley, he had minimal conversation with Amin Mohammad, the owner of ECT, and discussed it with Rahif Faris, the owner of Waterloo Oil. Appellant indicated that he wanted to see if there was any interest in the project but that it was never pursued and that he stopped looking into this opportunity probably in the middle or late Summer of 2011.

He also stated that he did not apply a different standard regarding inspections concerning these individuals, nor did he fill out the inspection forms any differently.

Appellant identified Appellant's Exhibit C. as a three-page inspection form that is used during gas station inspections. He identified Appellant's Exhibit D. as an EPA document entitled "Companies Providing Training and Testing For Stage II Vapor Control Systems" (EPA Testing and Training Form).

Appellant stated he carried copies of the EPA Testing and Training Form with him at the inspection. He testified that, if a station owner was not happy with the testing company the owner previously used, Appellant could give the owner this document and show the owner a list of companies that could provide equipment testing, equipment training, or both.

Appellant described the procedure he utilized when conducting a gas station inspection. First, he indicated, he would look at the SCPH records concerning the station to spot any deficiencies that had previously been identified; so that he could be aware of any area of concern for the upcoming inspection and could put that information on the current form to help him expedite his inspection.

Appellant stated that, next, when he initially arrived on site, he would introduce himself and advise those present that he was on site on behalf of SCPH and that he was there for the EPA annual testing and inspection.

He stated he would then ask the individual if he or she had the EPA binder handy so he could check the documentation therein. If the binder was then available, he would check the documentation and note same in the Record Keeping component of Appellant's Exhibit C. If the record keeping was sufficient, he would then go outside and look at the dispensing facilities and note same on his documentation, utilizing the Types of Defects identified in Appellant's Exhibit C.

He would then proceed and conduct a visual check of the underground portion of the storage tanks, he stated. Then, if the testing company was present, he would observe the tester(s) conduct the testing procedures. This included

observing the tester administer the tester's equipment and getting the numerical value to see if the tested equipment passes or fails, he offered.

Appellant delineated two types of tests conducted (*i.e.* the Vapor Recovery test – known as the Pressure Decay Test – and the Air to Liquid Ratio test).

The Pressure Decay Test requires the tester to fill the storage tanks with nitrogen and discern the bleed off rate of the nitrogen over a certain span of time. The Air to Liquid Ratio Test determines a specified percentage of liquid and air in the tank(s).

Appellant also mentioned that he tried to assist the gas station owners who were having some difficulty with their records. Appellant stated he would arrange the owner's unorganized documentation in their folders so that the next inspection of their records would only take perhaps five minutes.

Appellant was then questioned regarding his interaction with Rahif Faris, the Managing Principal of Waterloo Oil and the husband of the owner of Waterloo:

Appellant reviewed pertinent Exhibits and noted that ECT had performed Waterloo's 2011 inspection. Appellant also identified a December 12, 2013 letter he sent to Rahif Faris to summarize the results of testing and whether the equipment passed or failed the test(s). He noted Waterloo missed its October, 2012 annual testing period and that its test in December 2012 was two months late and the re-test conducted in March, 2013 was also late; since it should have occurred within 30 days of the annual (failed) test, according to Appellant.

Appellant then discussed his interaction at Waterloo on **December 17, 2012** when Appellant went to Waterloo to observe a re-test. (*Please see page 5. herein for a summary of Appellee's allegations concerning December 17, 2012.*)

Appellant offered that, on December 17, 2012, he started his inspection as he usually did but the personnel at Waterloo were unable to locate the EPA binder. Those same personnel did not know when the owner would arrive, according to Appellant, so Appellant then went outside to conduct a visual inspection of the dispensers and to await the arrival of the testing personnel. Upon completing the visual inspection and corresponding paperwork, Appellant went over and observed the testing personnel's activities, because the tester(s) had by this time arrived on site.

Appellant stated there was a problem because the storage tanks would not sufficiently pressure up and kept leaking the nitrogen that had been pumped into

them. The testers then attempted to fix the problem, which was listed as the down tube top portion needing to be replaced due to striped threads, he indicated.

Appellant declared that he did not recommend a fix here and the tester went to seek the owner's permission to fix the problem. The owner then arrived, (about one and one-half hours after Appellant and the tester arrived, according to Appellant), the tester apprised the owner that the current equipment was not passing inspection, and the owner authorized making repairs so that the equipment could pass.

Appellant insisted that the tester did not break the equipment and that all the thread was rusted off from the down tube, making it impossible to seal the tank sufficiently to fill it up to get a passing inspection. Thus, Waterloo failed the inspection on that day, he offered.

During the tester's attempt to locate the leak, another problem was discovered when the tester had the front of the dispenser off. According to Appellant, this activity is usually only done with the five-year inspection, but, here, was done to try to find the leak. It was then, according to Appellant, that he noticed that the equipment still had not been fixed. He stated that the equipment problem had been noted by previous inspectors.

Next, Appellant offered testimony regarding the events at Akron Food Mart where the station failed an inspection. *(Please see page 7 herein for a summary of Appellee's allegations regarding Appellant's interaction with Mr. Colley)*. Here, a problem arose with a nozzle.

Appellant was questioned as to Mr. Colley's testimony at hearing that Appellant wanted new nozzles installed without putting on the old nozzles to see if they could pass. Appellant declared that the owner is welcome to have the tester re-install old equipment to save money and if it passes, that is perfectly acceptable.

Appellant denied saying: "Arabs don't want to replace their equipment." or words to that effect, disputing Mr. Colley's testimony on that point. Appellant also distanced himself from an assertion that the above-referenced statement may have any factual accuracy.

Next, Appellant was questioned regarding his interaction with Dr. Zaid Khatib *(Please see pages 5-6 herein for a summary of Appellee's allegations concerning Appellant's February 20, 2013 interaction with Dr. Khatib)*.

Appellant confirmed that Dr. Khatib accompanied Appellant to a re-test performed at a BP apparently franchised by Giant Oil in Burbank, Ohio.

Appellant offered that he started his duties at the station much as he normally would, introducing himself and requesting the pertinent EPA paperwork. He noted that Russ Weston and Tracy Weston, two representatives from BP or Giant Oil, were present at the same time and were putting together the records at the same time he was inspecting them. (We note that the record is contradictory on whether the Westons worked for BP or for Giant but it appears that Giant Oil requested their services essentially to perform troubleshooting and liaison functions.)

Appellant stated that he then explained to Dr. Khatib what Appellant was doing, showed Dr. Khatib the records he was reviewing, and apprised Dr. Khatib regarding what Appellant was seeking and how Appellant sought that information.

Appellant stated that, consistent with his standard operating procedure, he then went out and inspected the dispensers. The day was cold and Dr. Khatib had come with only a light jacket and, so, stayed inside for much of the inspection observing the Westons perform their inspection, according to Appellant.

Appellant declared that, while he was looking at the first dispenser, Tracy Weston came up to him and indicated she wanted to show him something. She then took him over to a dispenser and there was an alien sticker on the green nozzle of the dispenser. According to Appellant, Ms. Weston asked Appellant if he had ever seen one of those, which, he testified, he had not. The sticker is described as looking like an "alien" head like "ET" with a line through it, such as at a highway entrance (*i.e.* "No Entrance").

Appellant stated that Ms. Weston told him that she had seen these on almost all of her BP stations. As stated by Appellant, Ms. Weston further informed Appellant that unknown persons would place these stickers on the pump handles to alert a potential gas purchaser not to buy gas at that station because the station was "foreign owned". These stickers were on several handles at the station that day, Appellant noted.

Appellant indicated that he felt it was important for Dr. Khatib to see the stickers, before Ms. Weston removed them from the pump nozzles. Therefore, Appellant went inside, got Dr. Khatib, and showed him the dispenser on which Appellant was working, as stated by Appellant.

Appellant also "explained almost verbatim" in Appellant's words, the remarks that Ms. Weston had made to Appellant, including that the stickers apparently evidenced owners who were or were perceived to be "Muslims, Indians, or Arabs", (in Appellant's words allegedly quoting Ms. Weston), and that customers were

forewarned so as not to purchase gas from these stations, again as Appellant summarized Ms. Weston's statements.

Appellant testified that he used these same words to describe to Dr. Khatib what Ms. Weston had stated, including the term "foreign owned". Appellant offered that, because of the weather and Dr. Khatib's light jacket, Dr. Khatib stayed in the station or the car for much of Appellant's inspection, observing only a minimal amount of the testing.

Appellant denied that he stated he would let small things slide if the owner was not a foreigner, denied that he applied any different standards to this station because Dr. Khatib was with him, and denied that he applied any different standards because the owner was of a particular national origin.

He noted the station did not pass on February 20, 2013; due to failing both the Pressure Decay Test and the Air to Liquid Ratio Test; one of the dispensers needed a computer board that the testers did not have on site at that time. The station did have a timely re-test and passed same, Appellant averred. He also denied that he applied any different standard to this station on the re-test than he would have applied to any other station on a re-test.

Appellant answered affirmatively when questioned as to whether he observed any other SCPH employees using "... ethnic terms to refer to station owners." He responded that, in early May, 2013, he observed Steve Stakleff (another SCPH Environmental Specialist) using some racial slurs; during a meeting attended by Appellant, Mr. Stakleff, Samuel Rubens, and Wallace Chambers, the supervisor. Appellant indicated that, toward the end of the meeting, Mr. Stakleff indicated "... the rag heads weren't going to go for that because they weren't going to have enough money to decommission their stations and to come into EPA compliance." Appellant testified that he was sure he heard this comment.

Appellant stated neither Mr. Rubens nor Mr. Chambers took action at the meeting following the utterance of the alleged statement and, so, Appellant further stated, he brought this alleged statement to Mr. Rubens' attention almost immediately after the meeting. According to Appellant, Mr. Rubens stated to Appellant that Mr. Rubens had not heard the alleged statement ("And they said they didn't hear that comment.").

Appellant also identified a photograph, Appellant's Exhibit O. [admitted herein], which is purported to show Mr. Stakleff sleeping while on duty. Appellant stated that, to the best of his recollection, he showed this photograph to Mr. Rubens, but got no reaction, according to Appellant.

Appellant confirmed that he recalled Mr. Rubens' testimony to the effect that Mr. Rubens did not discipline any employee other than Appellant during the time Appellant was employed at SCPH.

Appellant also indicated that he would almost daily observe other employees coming to work between five and 10 minutes late.

The record reflects that Appellee did *not* discipline any other pertinent employee, and particularly no other Environmental Specialist, during the pertinent time period at issue herein. Thus, Appellant has offered no comparators whom this Board may consider regarding Appellant's allegation of disparate treatment. (Please see O.A.C. 124-9-11.)

Appellant averred that, during the time he served as a Gas Station Inspector for SCPH, Appellant did not use racial terms to refer to station owners or vendors when Appellant was dealing with the public. He also indicated that the only time he referred to station owners as Arabs, Indians, Muslims, Hindus, or foreign born was when he was quoting Tracy Weston.

Appellant stated he used the term "foreign owned stations" in discussions with supervisors and with Bob Hasenyager. Appellant elaborated that this discussion was in the context of Mr. Hasenyager's concern that some racial discrimination might be occurring.

Appellant further offered that he indicated to Mr. Hasenyager that Appellant had never "... used any racial discrimination at all." He also offered that, when Appellant asked Mr. Hasenyager what Appellant should say if the term "foreign owned" ever came up, Mr. Hasenyager said to just say "station owners". This conversation occurred in May, 2013, according to Appellant.

Appellant confirmed that he participated in cultural diversity classes, but that the classes did not cover the appropriateness of, or alternatives to using the term "foreign owned stations".

Appellant denied applying any different standard to owners of a particular national origin or color, during his inspection work, and offered that he applied the same standard to everybody even if he "... believed the owner was foreign born or appeared foreign". He denied he applied "... any different standard for record keeping for people of particular national origin or color" nor for the inspection of gas-dispensing equipment, where Appellant applied the EPA standards, he stated.

On as if on cross, Appellant acknowledged that SCPH Policy Number 411 states, among other things, "No person or persons responsible to the Board of

Health and its officers and members shall discriminate against any citizen requesting/needng services.” Appellant then stated that he had never discriminated in any way against any citizen.

Appellant agreed that calling someone an Arab or a “towel head” could constitute discrimination. He asserted that utilizing the term “foreign owned” would not constitute discrimination and could refer to a foreign owned entity such as British Petroleum. He also asserted that “the 30 percenters” would probably be individuals who were associated with British Petroleum in some way.

Appellant offered that he had used the term “foreign owned” to refer to independent owners and operators; until Mr. Hasenyager brought it to Appellant’s attention and instructed Appellant simply to call these individuals “station owners”.

He stated that, prior to May, 2013, he had some discussion with Mr. Rubens about 30 percenters, but Appellant never associated that with any ethnicity, it was a just a fraction he used.

After refreshing Appellant’s recollection, Appellant “vividly” recalled a meeting he had with his supervisors in January, 2013 [January 15, 2013] and remembered using the term “30 percenters” during that meeting but denied using the term “foreign born gas station owners” during the meeting, as recounted in the notes from the meeting (Please see Appellee’s Exhibit 12.)

Appellant did agree that there was a discussion at an earlier meeting regarding discriminatory language, specifically concerning Appellant’s use of the terms “30 percenters” and “foreign born gas station owners”. Appellant stated he did deny at that time using the term “foreign born” but did agree he used the term “foreign owned” on a number of occasions, but not during inspections.

Appellant confirmed that he spoke with Rahif Faris, Amin Mohammad, Robert Colley, and, Appellant believed, Debbie Hamer regarding the outside business opportunity of marketing natural gas.

Appellant denied that he was familiar with the SCPH bullying policy. Appellant agreed that it would be inappropriate and unacceptable to yell or scream at someone in the workplace.

Appellant was referred to his previous testimony that Environmental Specialist Steve Stakleff had made inappropriate comments at a meeting, using the terms “rag head” and “Arabs” and that Mr. Stakleff did so twice during the meeting. He confirmed that nothing was done about it at the meeting but conceded that he did not know if anything was ultimately done about it or not.

Appellant agreed that it is unacceptable to use words like “rag heads” and “Arabs”.

When asked as to whether there was no specific format that a gas dispensing facility has to follow with regard to their paperwork when Appellant comes to supervise the testing, Appellant indicated he follows the EPA regulations and guidelines and utilizes the forms at Bates Stamped page 162., record keeping .

Appellant agreed that the EPA Guidelines do not specify a particular order in which a gas station owner must present the documents at an inspection. Appellant offered that, if the owner did not have the pertinent paperwork, Appellant would probably find the owner in default.

Appellant conceded he did not file any grievance in regard to any individuals he perceived as coming in tardy to work.

Appellant next testified regarding his ride-along with Dr. Khatib.

Appellant stated that Appellant drove Dr. Khatib to the station and that Appellant kept the conversation to a minimum.

In regard to Appellant's failure to mention (at his pre-disciplinary conference) the conversation he allegedly had with Tracy Weston regarding stickers on gas pumps, Appellant offered the following testimony:

Appellant:

With regard to Tracy Weston, I'm mentioning to her because the – there was documentation about what was said from Dr. Khatib about alien stickers. And my mentioning of her was what the conversation was between her and I, to forward that notation to Dr. Khatib of what the alien stickers were depicted as.

That's why I believe she was brought up. But I do remember that she – the conversation at the pre-disciplinary hearing, I don't recall that at all, no. But Dr. Khatib's testimony was.

Nancy Walter:

You don't recall putting the statements into some context that you were merely parroting what Ms. Weston was saying?

Appellant:

I don't think that that documentation is in there, no.

(Please see Eckert video deposition transcript at pages 81-82)

Appellant agreed to the accuracy of Pre-Disciplinary Hearing Officer Christine Higham's report regarding Appellant's statement at same concerning outside employment. (Ms. Higham serves as Summit County's Deputy Director of the Department of Human Resources.)

As read into the record by Ms. Walter, Ms. Higham wrote:

Mr. Eckert testified that he has no outside employment, had never been asked to stop any outside employment and that the brief review of a new business opportunity he was looking into was not related to gas station gas.

(Please see *supra*, at page 83)

Upon further questioning by Ms. Grim, Appellant offered that he used his best judgment in regard to the condition of gas station equipment and that it was not his position to force the station owner to replace equipment, even if damaged. He also reiterated that it was the testing company that would make a recommendation regarding replacing equipment if something failed. He confirmed that he did have the authority or responsibility to assess the condition of equipment and make corresponding notes.

Appellant confirmed that he did not have the authority to assess fines.

Appellant averred that he followed the EPA guidelines in accordance with the document he was given regarding the order in which the documents were to fall, which was time efficient, he offered.

He also confirmed that Mr. Chambers had complimented Appellant on Appellant's activities to help the station owners organize their records and that the owners uniformly expressed gratitude for this assistance.

In regard to Dr. Khatib's ride-along with Appellant, Appellant indicated that he did not talk to Dr. Khatib in the car about the alien stickers and that, at that point in time, Appellant did not yet know of them.

In regard to Appellant's testimony concerning Appellant's involvement with an outside business, Appellant reiterated his earlier testimony that this activity occurred later in the summer of 2013. He also offered that, at that time, there was no interest and that it was at this time that Appellant was also looking at the ethics problem, in his words.

Upon further questioning by Ms. Walter, Appellant noted that he did not go to management and say he was exploring the natural gas business opportunity. Appellant indicated he did not feel the need to do so.

When asked why not, he offered:

I don't need to have management micromanage my decision-making in outside business ventures. It's almost like me getting a job at McDonald's and telling me I can't work there because I'm a Sanitarian and inspect them.

(Please see *supra*, at p. 94)

Appellant also indicated that he knew individuals such as Rahif Faris, Amin Mohammad, Robert Colley, and Debbie Hamer because he had known them previously, since the agency performed gas station inspections with the City of Akron and they had been doing them for years; so he knew all these people.

Appellant conceded there was a business relationship with these people to some extent but that he still had personal relationships and felt comfortable talking to them about the business opportunity.

Appellant indicated initially that Mr. Rubens told him numerous times that Appellant did not have the authority to make a gas station owner repair or replace anything while Appellant was on site. He indicated he was present at the sites "to note the deficiencies, write them on my inspection report and submit them."

Appellant then indicated it was not numerous times but that he and Mr. Rubens had had discussions and that Appellant was told he was simply there to witness the inspection.

Appellant did not recall if he called Mr. Faris at home or at the station. He also confirmed that he had a brief discussion with Mr. Mohammad and they were supposed to meet but never did. Appellant offered that he did have a business luncheon with Ms. Hamer, where the opportunity was discussed. He had a general conversation with Robert Colley while they were testing, such as he would have with any general tester.

Upon further questioning from Ms. Grim, Appellant asserted that he did not actually become part of the natural gas marketing program that he looked into early in his employment with SCPH. Appellant also stated that he never retaliated in any way against people who declined to pursue the natural gas marketing program.

Also testifying at video deposition was Zaid Khatib, who indicated that, at the time of deposition, he had been serving as a Resident Physician at Childrens' for one and one-half years.

Dr Khatib stated that, as part of his community health rotation, somewhere between January and March of 2013, he participated in a trip with SCPH. He agreed this trip and observation were part of his clinical education as a Resident.

Dr. Khatib indicated that he met Appellant at a downtown office and they took Appellant's car to a gas station for an inspection. Dr. Khatib stated that he and Appellant talked during the ride, which lasted probably less than one hour, in his estimation.

Dr. Khatib indicated that he and Appellant talked about what Appellant does, sort of a general job description, some of the things that go into Appellant's job, and what Dr. Khatib and Appellant were going to be doing for the day.

Dr. Khatib also stated that Appellant mentioned a side business that Appellant was running and that took a good five to 10 minutes to discuss it, according to Dr. Khatib.

Dr. Khatib also offered that, on the way to the station, Appellant was talking about how they would probably see stickers on the gas pumps.

There were some of these stickers on his clipboard that were either his or that he collected, Dr. Khatib averred, and Appellant showed them to Dr. Khatib and indicated these stickers are frequently found on gas pumps.

Dr. Khatib stated that the sticker basically consisted of a cartoon drawing of an alien head like an extraterrestrial with a red circle and a dash through it. Appellant was also explaining the connotation of this sticker and that it was a general signal that a particular business is foreign owned, Dr. Khatib said.

According to Dr. Khatib, in the car during the drive to the station, while the bulk of the conversation concerned what they were going to be doing and concerned Appellant's job, Appellant sort of mentioned in passing that you might run into these stickers and this is what it means. Dr. Khatib also averred that, at

that point in time, Appellant seemed pretty neutral on the subject of approval of these stickers.

Dr. Khatib offered that, when they arrived, Appellant proceeded with the actual inspection, inside and outside. While inside the shop, Appellant went into the back room and apparently got some sort of reading and there was a little paper that Appellant had gotten, he averred.

Dr. Khatib indicated that, while he could not recall exactly what was said, while they were in the back room, Appellant said something like:

Little things like this, you know, usually we let pass but, you know, these foreign guys, I might not let it slide.

(Please see Khatib video deposition transcript at page 10)

Dr. Khatib explained that, at some point that day, Appellant:

... made another comment about how he was always suspicious that the foreign gas station owners were always trying to pull something on him and that he had to be a lot more suspicious.

(Please see *supra*, at page 10)

Later, Appellant pointed out stickers on the pump that were already placed on the pump when they arrived, Dr. Khatib indicated. He also explained that, after Appellant pointed out the stickers, he stated to Dr. Khatib words to the effect of:

See that. I would never shop at this place or be a customer here.

(Please see *supra*, at page 11)

Dr. Khatib stated that Appellant then finished his inspection and was very thorough in his inspection, then took Dr. Khatib home, and was very pleasant.

The next day or the day following, Dr. Khatib ran into the Residency Rotation Director, Dr. Joel Davidson, who is in charge of the course. Director Davidson asked Dr. Khatib how the ride-along went, Dr. Khatib averred. According to Dr. Khatib, he responded that it was an interesting experience but not exactly the most professional behavior he had observed.

Dr. Khatib explained that he stated to Director Davidson:

Well, it was a little funny, it was kind of like spend the day with a racist.

(Please see *infra*, at page 12.)

Dr. Khatib indicated that Director Davidson seemed shocked but that Dr. Khatib did not follow up on it. Dr. Khatib testified he logically surmised that Director Davidson pursued the matter; otherwise, Dr. Khatib would not have been offering his testimony in the instant matter.

Dr. Khatib confirmed that he met with Samuel Rubens and Assistant Prosecuting Attorney Nancy Walter and that he spoke with Bob Hasenyager on the phone. Dr. Khatib averred that he was asked to relate the events from the day in question and then asked to detail it on paper and send it to Mr. Hasenyager, which Dr. Khatib did.

On cross, Dr. Khatib confirmed that the events in question happened around February, 2013. He recalled that it was very cold that day because, he offered, normally they would go outside to perform much of the inspection but on that day, they were doing their best to stay in the car. He indicated this was the only gas station inspection he had observed.

He stated he was aware of the normal protocol because Appellant indicated normally he would go outside for part of the inspection or essentially told Dr. Khatib that it was okay for Dr. Khatib to sit in the car for part of the inspection, that it was okay to stay put.

Dr. Khatib reiterated that he never saw Appellant place any stickers on any gas pumps and that Appellant showed Dr. Khatib a sticker at a gas pump.

He confirmed that there was a lady who was also present during the inspection and there was also someone else performing some other part of the inspection.

Dr. Khatib was then directed to Appellant's Exhibit G., a series of e mails exchanged between Dr. Khatib and Robert Hasenyager. The e mails run from May 1, 2013 to May 9, 2013.

Dr. Khatib confirmed that the first e mail is dated May 1, 2013 (Bates Stamped page 225), wherein Dr. Khatib wrote: He kept stickers depicting an alien head with a red circle and cross through it, no aliens, which he would place on pump handles to alert others that the business is owned or run by a foreigner." (Please see *supra*, at page 17).

Dr. Khatib confirmed that his second e mail, dated May 3, 2013, stated: "he never placed any himself nor did I specifically see any in his possession." In his May 9, 2013 e mail, Dr. Khatib writes: "I don't think he made the comment with the intention of making me feel uncomfortable nor were they directed at me." and "I cannot definitively state whether he meant that he placed them ... personally or if he was just talking about people in general who did place them. (Please see *supra*, at page 18.)

At his hearing deposition, Dr. Khatib confirmed that Appellant, for sure, explained the purpose for people using those stickers to place them on the pumps but he could not remember if Appellant was talking about himself or, conversely, about other people putting the stickers on the pumps and that the e mail could be read either way. He confirmed that he did not see Appellant put any stickers on the pumps.

Dr. Khatib confirmed that Appellant definitely told him about the stickers, that they are placed to "warn" other people that a particular station is owned by a foreigner, and to give people a message not to go to that station.

Dr. Khatib also stated:

But I know that he expressed approval of it at the station itself when he pointed to the stickers and said, see that, I would never go here and he pointed one out at the station.

(Please see *supra*, at page 21)

Dr. Khatib confirmed that Appellant had made a comment about letting things slide at some stations but not with someone like this.

Dr. Khatib indicated Appellant did not reference any history of problems with the equipment and that he did not remember if he and Appellant looked at any records about the history of the station. He could not remember if, ultimately, this station was a pass or a fail but that, at the end, they were getting papers in order and that it could go either way.

Also testifying at video deposition was Raj Kumar, who is the gas station owner of Fuel America Akron. Mr. Kumar confirmed that his station is subject to air quality inspection by ARAQMD. He indicated that Appellant had inspected his facility three times. (Mr. Kumar also stated that his facility was inspected very close to the date of his video deposition but, obviously, not by Appellant.)

Mr. Kumar averred that he did not have any personal problems or perceive there was anything wrong with Appellant concerning respect. He stated Appellant might come by two to three days before an inspection and indicate that he was passing by, reminded Mr. Kumar of his inspection date, reminded Mr. Kumar to be sure he was there for the inspection, and for Mr. Kumar to replace any equipment that needed to be replaced. Mr. Kumar also indicated that Appellant followed state and federal law, that he is not a relative, and he does what the government required, but not anything extra.

Mr. Kumar recalled that, during one of the three exams Appellant performed at Fuel America Akron (*i.e.* 2011, 2012, and 2013), Appellant notified Mr. Kumar that the rubber cap in front of the nozzle was cracked and that, if it was not replaced, Appellant was not sure the facility would pass. In 2013, Integrity Service was also there for the inspection and, for prior years and for 2014, ECT.

Mr. Kumar stated that his country of origin is India. He stated Appellant did not treat him differently because of Mr. Kumar's national origin. He also indicated that he and his wife have never observed Appellant contradicting the standard that the United States is a county built on immigrants and that we are not supposed to oppose anybody, in Mr. Kumar's words.

Mr. Kumar also offered that Appellant did not treat Mr. Kumar differently because Mr. Kumar used ECT as his testing vendor and that it was Mr. Kumar's choice, not Appellant's, to switch vendors.

On cross, Mr. Kumar confirmed that his only contact with Appellant would have been the times Appellant inspected his facility and that he had no personal relationship with Appellant. Mr. Kumar confirmed that he was not aware of any incident on December 17, 2012 involving Waterloo Oil or an incident on or around June 11, 2013 involving Appellant and Debbie Hamer of Tank Integrity.

He offered that Appellant would stop by a few days before inspection to remind Mr. Kumar and make sure any questionable equipment was fixed by then and a couple of times he just stopped by and said everything's okay.

Also testifying at video deposition was Harold Whaples. Mr. Whaples stated that he is in the petroleum service business and that he is employed by Petrocom Corporation (Petrocom).

Mr. Whaples indicated that he has been employed by Petrocom for four years "on this stretch" and has been involved in the industry for 16 or 17 years. Petrocom, he offered, repairs anything at a gas station basically underground tanks, lines, and dispensers.

Mr. Whaples stated that 90 percent of their work is for Circle K, Max Convenient Stores. They also perform service at Giant Oil stations, but those are not under contract but are performed for time and materials, he offered. He stated that Giant Oil has about 10 stations in his area and that the Giant Oil stations are BP stations.

He indicated that he is present for the air over liquid ratio tests, since they can repair tanks, lines, and dispensers all at once. He noted that, if the customer is Giant Oil, they ask Petrocom to be there at the test and, if there is an issue, Petrocom can fix it on the spot; so as to avoid having to make a return trip and have a second person come out for a re-test and for the EPA to witness the re-test. This saves quite a bit of money, according to Mr. Whaples.

Mr. Whaples confirmed that, in the course of his work, he had observed Appellant doing work as an Air Quality Inspector, perhaps a handful of times. This includes Circle K stations. Additionally, he stated that there was often present an employee of a third party testing company. If it was a BP station for Giant Oil, they use Tank Integrity and most of the Circle K sites use Tanknology. Mr. Whaples averred that he has observed several Air Quality Inspectors performing their inspection duties. This included Appellant and Appellant's predecessor, as well as newer Inspectors.

Mr. Whaples stated that he has observed Appellant making comments to owners to the effect that a hose was getting ready to start cracking and that Appellant would let it go for that year but that it needed to be replaced before the next time the tank is tested. Mr. Whaples indicated that, in his opinion, Appellant utilized reasonably accurate assessments of the condition of the equipment.

He offered that he has observed Appellant examining the station at 316 East Market Street when Mr. Whaples was already inside. Mr. Whaples averred that he told the owner that Appellant was going to say that two particular hoses need to be changed and the owner said basically let's wait until he says that before we change them. Then, according to Mr. Whaples, the first thing Appellant basically said when he walked in the store was in agreement with Mr. Whaples' assessment that these same two hoses were borderline and just starting to crack and that Appellant was not going to get the owner on them that year but expected them to be replaced by next year.

Mr. Whaples agreed that a large percentage of Giant Oil stations are owned by individuals of non-U.S. origin. Mr. Whaples stated that Appellant was just as much a stickler with Circle K as with a BP (Giant Oil leased stations with BP branding). A lot of people did not like it when Appellant showed up because he is a

stickler, according to Mr. Whaples, and Appellant would not allow the use of numbers that did not reflect true readings.

On cross, Mr. Whaples offered that he had observed Appellant's activities probably 12 times over a two-year period at Giant Oil; however not at independently-owned stations, since they do not usually pay Petrocom to stand there and watch the tests. Thus, his experience with the independent owners is more limited.

Mr. Whaples stated that he was not aware of an incident that may have occurred on or about December 17, 2012 at Waterloo Oil. He stated he had no personal knowledge but had heard about what happened during a ride-along with Appellant and Dr. Khatib on or around February 20, 2013. He confirmed that he knows Debbie Hamer of Tank Integrity but was not aware of something that may have happened in or around June, 2012.

On re-direct, Mr. Whaples confirmed that a large percentage of the individuals who run the Giant Oil BP stations (basically leasing them from Giant Oil) are "Indian" or "Arab". He confirmed that he had seen alien stickers placed on gas pumps at Giant Oil in Burbank, which was where it was first brought to his attention. This was by Tracy (Weston), Russ' (Weston's) wife, who explained that the stickers mean that "... it is somebody that owns it is other than American, whether it be Indian or Arab or whatever." (Please see Whaples video deposition transcript at page 20).

Mr. Whaples indicated that Appellant never told Mr. Whaples that Appellant placed the alien stickers on the pumps and that he never saw Appellant place the stickers on the pumps. Mr. Whaples averred that he had not seen Appellant or talked to Appellant about the alien stickers, since his conversation with Tracy Weston occurred after Appellant was removed.

### **FURTHER FINDINGS**

Based upon the testimony presented and evidence admitted at hearing and at video deposition in lieu of live testimony and upon the post hearing briefs submitted by the parties, I make the following Findings:

First, I note that I incorporate, herein, any finding set forth, above whether express or implied.

Next, I find that Appellant received training in various areas governing his behavior with the public and with Appellee's regulated community.

This included Appellant receiving initial and updated versions of Appellee's Policy Number 411 entitled "Harassment, Sexual Harassment and Non-Discrimination" and having a working knowledge of Policy Number 401 regarding Conflict of Interest/Ethics.

Appellant did state that he never received any specific written instructions on how to do his job.

Nevertheless, the record supports a finding that Appellant appeared to be quite competent concerning the purely technical aspects of performing his job duties.

Unfortunately, the record also demonstrates that Appellant was unable to replicate that same degree of competency; when interacting with his supervisor, agency management, the members of Appellee's regulated constituent base, or those whose business interests intersected with Appellee's operations.

#### Conflict of Interest/Ethics

I find that Appellant admitted that he approached at least three individuals who had business interactions with or were regulated by Appellee. At least two of these attempted business invitations (and perhaps all three) occurred after Appellant became employed by SCPH.

The record reflects that Appellant has received training regarding conflicts of interest, including receiving a copy of a pertinent Ohio Ethics Commission training document. While Appellant's admitted contacts and attempts were not extensive, they represent a pattern whereby Appellant may have overstepped the boundary between agency and constituent. Accordingly, Appellant may have also committed **ethics violations** that also violate SCPH Policy Number 401.

It is noted that these contacts and invitations were infrequent, were of short duration, and were never acted upon either by Appellant or by those whom Appellant contacted. Nonetheless, Appellee may credibly use these contacts *for the limited purpose of seeking to rebut certain of Appellant's assertions regarding his work ethics.*

#### Discourteous Treatment of the Public

I also find that Appellant committed **discourteous treatment of the public** regarding his interaction with at least two individuals: Rahib Faris and Dr. Zaid Khatib. While Appellant's behavior with these two individuals may have also

violated other provisions, here I find that Appellant's behavior was rude, insensitive, and offensive.

It is true that Appellant did exhibit some friendliness with or toward Mr. Faris and Dr. Khatib. Yet, this cannot overcome Appellant's extensive inappropriate interaction with these two individuals. Appellant's interaction here seems especially troubling; since Mr. Faris is a member of Appellee's regulated community and Dr. Khatib is a participant in Appellee's formal outreach/education program with Akron Childrens' Hospital.

#### Discriminatory Behavior

I further find that Appellant exhibited **discriminatory behavior** toward or with Zaid Khatib.

By a preponderance of the evidence, the record supports a finding that Appellant engaged in discriminatory behavior regarding his interaction with Dr. Khatib during their ride-along and outreach activity. Appellant made comments to Dr. Khatib regarding Appellant's self-confessed personal purchasing preferences and also regarding Appellant's self-confessed affirmative attitude toward inconsistent enforcement of air quality regulations.

Both Appellant's preferences and attitude appeared to be directly motivated by his identification of the gas vendor as a person who either was or, conversely, was not, born in the United States and whose birthplace was situated in a specific geographical area.

It is also noted that Appellant's interaction with Dr. Khatib followed the January 15, 2013 corrective meeting in which Appellant participated. At this corrective meeting, Appellant was informed that the birth country of a gas vendor or owner was irrelevant to Appellant's work. Moreover, another take-away of that meeting for Appellant should have been that it would be problematic, in future, for Appellant to focus on the nationality or former nationality of a member of Appellee's regulated community.

Accordingly, by the time Appellant met with Dr. Khatib, Appellant should have been sensitive to the need to keep both his air quality inspections and his asserted personal opinions on a neutral plane.

#### Other Allegations

The record is also replete with what are essentially hearsay references regarding Appellee's allegations that Appellant engaged in other discriminatory

behavior. However, as troubling as these appear to be, inferences, supposition, and unsubstantiated hearsay cannot support a finding at this Board.

#### Alleged Disparate Treatment as Mitigation

Appellant has asserted that Appellee has treated Appellant disparately in comparison to other employees who are similarly situated to him. Appellant has raised three instances where he asserts this is the case.

Appellant asserts Sanitarian Steve Stakleff was involved in one or greater incidents, wherein Mr. Stakleff utilized racially insensitive or racist language at a staff meeting and at other times. Appellant alleges that he brought this to management's attention. Appellant was unaware as to whether anything was done regarding his allegations.

Appellant also asserts that Steve Stakleff was sleeping on the job and that Appellant took a photograph allegedly showing same. Appellant was aware of no discipline forthcoming for this alleged infraction.

Finally, Appellant stated that numerous times he had witnessed employees coming to work from five to 10 minutes late. Appellant testified that he filed no grievance regarding these alleged observations of employees coming late to work.

Assuming for the sake of argument that Appellant's asserted facts are correct regarding the factual background of each of these allegations, Appellant has not demonstrated that any of the employees to whom he points as comparators received discipline.

O.A.C. 124-9-11 provides an Appellant with the opportunity to present evidence to demonstrate that the Appellant is being treated disparately (more harshly) than similarly situated employees or that work rules are being selectively (more harshly) applied to the Appellant than to others to whom those rules apply.

Here, Appellant did provide sworn, but otherwise unsubstantiated, testimony that Steve Stakleff, another of Appellee's Sanitarians, used racially insensitive or racist language on one or greater occasions. Appellant did not provide proof that Appellee acted on Appellant's alleged reporting and therefore he provided no proof on what discipline, if any, Mr. Stakleff may have received. Appellant did not call Mr. Stakleff to the stand at hearing or at video deposition in lieu of hearing testimony.

Appellant did provide a picture but did not provide sufficient proof that Mr. Stakleff was sleeping on the job, that Appellee was aware of this alleged behavior, and that Appellee acted on same.

Finally, Appellant provided sworn, but vague, generalized, and unsubstantiated testimony that a number of Appellee's employees came to work from five to 10 minutes late. Appellant did not demonstrate that Appellee was aware of this alleged behavior or that, if Appellee was, whether any discipline resulted therefrom.

At bottom, Appellant could not demonstrate by a preponderance of the evidence that any of these alleged acts or omissions occurred. Neither could Appellant show discipline from any of these alleged acts or omissions; thus, Appellant lacked any comparators to utilize for his disparate treatment claims.

### CONCLUSIONS OF LAW

This case presents this Board with the question of whether this Board should affirm the removal of an employee, who engaged in discourteous treatment of the public and discriminatory behavior, but who had minimal if any cognizable discipline prior to his removal? Based on the testimony presented and evidence admitted at hearing and at video deposition in lieu of live testimony as well as on the post hearing briefs submitted by the parties, this Board should answer this question in the affirmative and, so, should affirm Appellant's removal.

Appellee demonstrated by a preponderance of the evidence that Appellant committed sufficient acts and omissions to justify his removal.

Appellant's acts and omissions include at least two instances of discourteous treatment of the public, involving Appellant's interaction with Rahib Faris and with Zaid Khatib. Mr. Faris is a member of Appellee's regulated community. Dr. Khatib is a participant in a formal outreach program that Appellee conducted with Akron Childrens' Hospital.

Discourteous treatment of the public constitutes an R.C. 124.34 disciplinable offense.

Appellant's acts and omissions also include several acts of discrimination that Appellant committed during his interaction with Zaid Khatib.

Discriminatory behavior here constitutes insubordination, malfeasance, and a violation of the appointing authority's policies (*i.e.* Policy Number 411), all of which constitute R.C. 124.34 disciplinable offenses.

Possible Mitigating Factors

Appellant did appear to demonstrate that he possessed and utilized the necessary technical skills to fulfill the duties of his position and that he was diligent in fulfilling those duties; when not otherwise engaged in discourteous or discriminatory behavior.

Further, Appellee failed to prove several of its allegations against Appellant.

As well, Appellant had little if any cognizable discipline prior to his removal. This was especially true prior to Appellant's January 15, 2013 corrective session conducted by Samuel Rubens and Wallace Chambers, which likely would fail to qualify as discipline for purposes of O.A.C. 124-9-04 (B).

(Conversely, Appellant failed to demonstrate that Appellee engaged in disparate treatment concerning its treatment of Appellant *vis a vis* its treatment of Sanitarian Steve Stakleff or *vis a vis* its treatment of other of Appellee's employees.)

Yet, in the end, Appellant's technical proficiency and his lack of cognizable prior discipline are wholly inadequate to blunt the magnitude of Appellant's offenses demonstrated in the instant record.

It is unfortunate that Appellant's failure to successfully interact with Appellee's client base is so inapposite to Appellant's apparent ability to successfully perform the technical aspects of his position. Indeed, testimony appears to support a finding that, if Appellant had been able to successfully control his apparent prejudices and successfully effectuate Appellee's policies and training, then Appellant might well have ended up being a positive contributor to the success of Appellee's air quality inspection operation.

**RECOMMENDATION**

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's **REMOVAL** of Appellant from his Sanitarian position, pursuant to R.C. 124.03 and R.C. 124.34.

  
James R. Sprague  
Administrative Law Judge