

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JAMES POTTS,

Petitioner,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PCB16-31

RECEIVED
CLERK'S OFFICE
JUL 31 2015
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: John Therriault, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 1927
Springfield, Illinois 62794-9276




ORIGINAL

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Petition to Review and for Appeal of Director's Order Revoking Operator's Certification of James Potts, a copy of which is attached herewith served upon you.

JAMES POTTS, Petitioner/Appellant,

By:


Anthony B. Cameron
His Attorney

ANTHONY B. CAMERON - 0374555
Attorney for Petitioner/Appellant
529 Hampshire, Suite 511
Quincy, IL 62301
Telephone: (217) 228-8669
Telefax: (217) 228-2225
Email: dacamara@adams.net
Our File No. 13-1104B

CERTIFICATE OF SERVICE

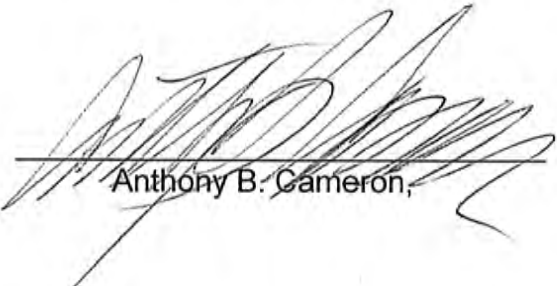
I hereby certify that on July 29, 2015, the original and three copies of the foregoing was placed in the U.S. mail, postage prepaid, addressed to the following:

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James R. Thompson Center
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Anthony B. Cameron,

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Pollution Control Board

PCB 2016-31

numerous errors, including, without limitation to, the admission of evidence inadmissible under the best evidence rule, the absence of any witness testimony of any *actus reus*; the failure of two governmental bodies, to accord two process rights in regard to property interests in conducting a purported investigation; the failure to inventory the contents of a certain motor vehicle then in the possession of Petitioner/Appellant, the failure to produce documents about the existence of a certain device owned by the subject water system;

6. For all the reasons heretofore set out in counsel's arguments in the proceedings before the Environmental Protection Agency and well documented in prior submissions, your Petitioner/Appellant presents unto this Honorable Board that:

- (a) The finding of the Director and his delegatee, the Administrative Law Judge and her delegatee, were arbitrary, unreasonable and against the manifest weight of the evidence;
- (b) The evidence presented at hearing was insufficient to sustain to even a preponderance the EPA's burden;
- (c) The combined governmental method of investigation manifestly abridged and traversed the constitutional rights and is in Petitioner/Appellant's property interests into both his license and position of employment;

7. Critical evidentiary rulings on objections were each so manifestly wrong that the determination of the Director cannot stand;

8. Taken as a whole, the aggregate sum of the errors made by the Administrative Law Judge on evidentiary matters deprived your Petitioner/Appellant of a fair hearing;

9. Your Petitioner is a longstanding operator of good repute, notwithstanding all the foregoing, even if the finding of the Director and her delegatee are correct that violations had occurred, the sanction proposed is extreme and unfounded in the context of the totality of evidence presented herein;

WHEREFORE, your Petitioner/Appellant prays as follows:.

A. That the EPA present unto this Honorable Board the complete record of the instant cause;

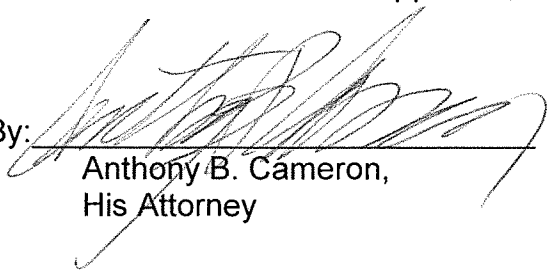
B. That each party be given the opportunity to brief the claims of error and misapplication in detail;

C. That this Board reverse outright, reverse and remand or modify to a lesser sanction the order of the Director, set forth here as Exhibit 1;

D. Such other and further relief as may be just, lawful and appropriate in the premises.

JAMES POTTS, Petitioner/Appellant,

By:


Anthony B. Cameron,
His Attorney

ANTHONY B. CAMERON - 0374555
Attorney for Petitioner/Appellant
529 Hampshire, Suite 511

Quincy, IL 62301
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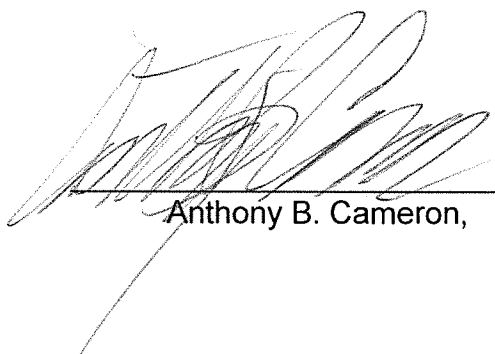
CERTIFICATE OF SERVICE

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Springfield, Illinois 62794-9276



Anthony B. Cameron,

**ENVIRONMENTAL PROTECTION AGENCY
STATE OF ILLINOIS**

FILED
With the Docket Clerk

JUN 23 2015

Illinois Environmental
Protection Agency

IN THE MATTER OF:)	
)	
SUSPENSION OR REVOCATION)	
OF PWS OPERATOR CERTIFICATION)	DLC No. 299-13
)	
JAMES POTTS,)	Public Water Operator
ID NO. 194068252)	Certificate of Competency
)	

FINAL DECISION

I, LISA BONNETT, Director of the Illinois Environmental Protection Agency, having received and reviewed the Hearing Officer's Proposal for Decision of March 11, 2015 as well as the Respondent's Objections And Exceptions to Proposed Finding received April 7, 2015, do hereby adopt as my Final Decision the aforementioned Proposal for Decision with modifications as set forth below pursuant to 35 Ill. Adm. Code 168.325 and 681.725:

STATEMENT OF THE NATURE OF THE PROCEEDINGS

In this action, the Complainant, Illinois Environmental Protection Agency ("Illinois EPA"), alleged the Class A Water Supply Operator Certification held by the Respondent, James Potts, should be revoked because he entered and initialed daily results in December 2012 and January 2013 monthly operating reports without completing the necessary laboratory testing to complete the reports.¹ The Respondent denied the allegations.²

Final hearing in this matter was held on May 21 and 22, 2014 at the Adams County Courthouse in Quincy, Illinois. Illinois EPA was represented by Assistant Counsels Rex L. Gradeless and Joanne Olson, while the Respondent was represented by Anthony B. Cameron.

The Complainant called seven witnesses and presented 20 exhibits, of which 19 were admitted into evidence. The Respondent called one witness and presented no exhibits. The Complainant then called two rebuttal witnesses.

Following the close of the Complainant's case in chief, the Respondent moved for directed findings.³ Argument was heard on the motion, which was taken under advisement.⁴

The parties agreed to conduct their closing arguments by written brief. On July 18, 2014, Illinois EPA's Closing Brief in Support of Complaint for Sanctions was filed. On August 8,

¹ Complaint for Sanctions.

² Answer of Respondent to Complaint for Sanctions.

³ R. 371:4-5.

⁴ R. 371:4-373:24.

2014, Respondent's Closing Brief was filed. On August 29, 2014, Illinois EPA's Reply Brief in Response to Respondent's Closing Brief was filed.

On March 11, 2015, the Hearing Officer issued his Proposal for Decision.

On April 2, 2015, the Respondent served his Objections And Exceptions to Proposed Finding, which was received by the Office of the Director on April 7, 2015.

STATUTES AND REGULATIONS AT ISSUE

In its Complaint for Sanctions filed October 1, 2013, Illinois EPA sought sanctions against the Respondent pursuant to Section 10(d) of the Public Water Supply Operations Act, 415 ILCS 45/0.01 *et seq.* ("the Act"), as well as 35 Ill. Adm. Code 680.702.

Section 10(d)⁵ of the Act provides as follows:

§ 10. The Agency shall exercise the following functions, powers, and duties with respect to community water supply operator certification::

...

(d) The Agency may suspend, revoke, or refuse to issue any certificate of competency for any one or any combination of the following causes:

- (1) the practice of any fraud or deceit in obtaining or attempting to obtain, renew, or restore a certificate of competency;
- (2) any gross negligence, incompetency, misconduct, or falsification of reports in the operation of a water supply;
- (3) being declared to be a person under legal disability by a court of competent jurisdiction and not thereafter having been lawfully declared to be a person not under legal disability or to have recovered; or
- (4) failure to comply with any of the Rules pertaining to the operation of a water supply.

Section 680.702⁶, which has subsequently been repealed⁷, provided as follows:

a) Any person may initiate the procedure for sanction by filing a written complaint with the Agency. The complaint shall state the name and address of the complainant, the name of the operator and all information that supports the complaint. If the Agency determines that the complaint is duplicitous or frivolous, it shall notify the person filing the complaint, but shall take no further action.

b) If the Agency determines that a sanction procedure is warranted, either on the basis of a valid complaint or on its own motion, it shall notify the operator by certified mail.

⁵ 415 ILCS 45/10(d).

⁶ 35 Ill. Adm. Code 680.702.

⁷ 35 Ill. Adm. Code 680.702 was replaced by 35 Ill. Adm. Code 681.710.

c) Such notice shall specify the cause for which sanctions is sought and shall meet the requirements of the Agency's Procedures for Contested Case Hearings, 35 Ill. Adm. Code 168.

Section 681.720⁸ provides as follows:

Section 681.720 Advisory Board

- a) The hearing officer shall provide a copy of the hearing transcript to the Advisory Board. The Agency shall pay the cost of providing transcripts.
- b) The Advisory Board shall recommend on the basis of the hearing transcript whether a sanction is appropriate and, if a sanction is appropriate, the suspension or revocation period.
- c) The Advisory Board recommendation shall be submitted in writing to the Docket Clerk within 30 days after receipt of transcripts and shall include a statement of reasons for the Advisory Board's actions.
- d) The Agency may issue a decision without the Advisory Board's recommendation if the Advisory Board fails to submit its recommendation within 30 days after its receipt of the hearing transcript.

Section 681.730⁹ provides as follows:

Section 681.730 Sanctions

- a) The decision between revocation and suspension shall be based on the following:
 - 1) The severity of the violations that led to the sanction, including, but not limited to:
 - A) The frequency or duration of the violations; and
 - B) The impact on the public water supply's ability to provide water that is assuredly safe in quality, clean, adequate in quantity, and of satisfactory mineral characteristics for ordinary domestic consumption;
 - 2) The recalcitrance of the operator in preventing the recurrence of the violations; and
 - 3) Any other mitigating or aggravating factors.

⁸ 35 Ill. Adm. Code 681.720.

⁹ 35 Ill. Adm. Code 681.730.

- b) If a Certificate of Competency is suspended, it shall be considered void for a period of time determined by the Director not to exceed 1½ years. The Director shall set the suspension period according to the factors listed in subsection (a). Experience obtained during the period of suspension shall not be credited towards meeting the requirements of Section 681.500 of this Part. At the end of this period, the suspended certificate shall be considered valid until its expiration.
- c) If a Certificate of Competency is revoked, the operator cannot reapply for a new Certificate of Competency for a period of not less than 1½ years but not more than four years, as determined by the Director. The Director shall set the revocation period according to the factors listed in subsection (a).
- d) After a Certificate of Competency is revoked, an operator cannot be granted a new certificate until after the period set pursuant to subsection (c) has elapsed. In order to obtain a new certificate, the operator must successfully complete a written examination for the class of certificate, sought and meet the requirements of Subpart E. Experience gained prior to revocation shall be credited towards meeting the requirements described in Section 681.500 of this Part. However, any experience obtained during the period set pursuant to subsection (c) will not be credited towards certification.

EXHIBITS ADMITTED IN EVIDENCE

Complainant's Exhibits

Exhibit No.	Description
C-1A	Color photograph of Mt. Sterling water treatment plant laboratory
C-1B	Color photograph of spectrophotometer, reagents, and calculator
C-1C	Color photograph of glassware, pH meter, and sample tap
C-1D	Color photograph of sample tap, pH meter, and turbidity monitor
C-1E	Color photograph of plant stairway to sample tap for raw water
C-1F	Color photograph of DR/2000 spectrophotometer and vials
C-1G	Color photograph of sink with gooseneck tap and pH meter
C-1H	Color photograph of turbidity meter with cleaning products
C-1I	Color photograph of DR/2000 spectrophotometer
C-1J	Color photograph of beakers, bottle, pH meter, and sample tap
C-2A	Monthly Operation And Chemical Feeding Report December 2012
C-2B	Monthly Coagulation And Lime Softening Report December 2012
C-2C	Monthly Operation And Chemical Feeding Report January 2013
C-2D	Monthly Coagulation And Lime Softening Report January 2013
C-3	Case Review Form memo
C-4	Notebook paper with diagram

C-5	WD My Passport Ultra hard drive
C-6	Staples Relay 16GB flash drive
C-8	Notes of Joseph Heberlein while watching videos

Respondent's Exhibits

None.

FINDINGS OF FACT

1. The Respondent, James Potts, was employed by the Clayton Camp Point Water Commission from 1994 until 2013.¹⁰ He became a certified operator in 2001.¹¹ The Respondent is certified as a Class A operator, which is the top class.¹²

2. As a certified operator, "you're responsible for everything in the treatment and operations of that plant," the Respondent testified.¹³ The Respondent said that raw water is water coming in from the wells into the treatment plant, and finished water is what leaves the plant.¹⁴ Water is tested before and after treatment.¹⁵ The Respondent testified that his job duties included getting readings at the plant and doing lab work.¹⁶ The Respondent was required to test the running water every day.¹⁷ He took samples daily.¹⁸ The Respondent would test for iron, manganese, pH, temperature, turbidity, fluoride, and chlorine.¹⁹ The Respondent identified Complainant's Exhibit C-1A as depicting the lab he worked at.²⁰ The Respondent identified it as the lab where he conducted testing every day because "[y]ou had water running every day."²¹

3. John McMahon is employed as the manager of the Clayton Camp Point Water Commission.²² His duties are broad, ranging from financial paperwork, loans, to fixing water breaks—"whatever's required."²³ McMahon possesses a Class A water operator's license.²⁴ He also is a licensed master plumber.²⁵

4. The Commission's Quincy plant is a Class C facility, with chemical feed but no filtration, whereas the Mt. Sterling plant is a Class B facility that removes iron and manganese

¹⁰ R. 17:24-18:1; 80:7-20; 88:15-89-4.

¹¹ R. 18:3-5.

¹² R. 19:8-17.

¹³ R. 18:7-11.

¹⁴ R. 18:22-19:4.

¹⁵ R. 19:5-7.

¹⁶ R. 19:21-20:2.

¹⁷ R. 26:13-16.

¹⁸ R. 47:6-8.

¹⁹ R. 26:17-23.

²⁰ R. 24:2-12.

²¹ R. 26:3-12.

²² R. 179:1-6.

²³ R. 179:7-12.

²⁴ R. 179:13-22.

²⁵ R. 179:23-180:1.

and uses filtration.²⁶ The water is treated and filtered to get the iron and manganese levels down and out.²⁷

5. The water source for the Mt. Sterling plant is a well field in the bottoms area where the La Moine River goes into the Illinois River.²⁸ Six separate wells pump into two 12-inch mains that converge shortly before they get to the Mt. Sterling plant and feed into it with blended water.²⁹ The wells are approximately 14 miles away from the plant, with the well field itself about a mile wide.³⁰ The Commission normally does not run all six wells at once.³¹ With two wells running, roughly 500 gallons a minute are pumped into the two mains.³² It takes 18 to 20 hours from when water enters the main for it to get to the plant.³³ McMahon said that both raw and finished water testing is done in the lab in the treatment plant.³⁴

6. McMahon testified that a digital video recording device was installed at the Mt. Sterling facility in early 2011, replacing an older system.³⁵ The new digital recording device or system records video to a digital video recorder, or DVR, in a locked cabinet.³⁶ McMahon and Joe Heberlein have keys to the cabinet.³⁷

7. There are four cameras at the plant: one in the lab, one out on the loading dock that catches the loading dock door, one that catches the front door and atrium area, and another on the front of the building that catches the driveway coming in off the highway and where the driveway splits around the building.³⁸ The camera in the lab is stationary and mounted up in the ceiling tile.³⁹ The system records 24 hours a day for 16 days.⁴⁰ McMahon said the system records the date and time, which was correct in December 2012 and January 2013.⁴¹

8. The Commission has never had any problems or issues with the latest recording device, the DVR system.⁴² McMahon said that, in checking the DVR surveillance system, he has never noticed any irregularities in the recording.⁴³ The surveillance system was in proper working order in 2012 and 2013.⁴⁴ The Commission checks the recording system randomly but

²⁶ R. 180:2-15.

²⁷ R. 180:16-18.

²⁸ R. 180:22-181:4.

²⁹ R. 181:4-10, 182:4-15, 187:1-4.

³⁰ R. 181:18-182:3.

³¹ R. 184:22-24.

³² R. 189:6-10.

³³ R. 184:24-185:6.

³⁴ R. 191:4-11.

³⁵ R. 197:17-198:3.

³⁶ R. 198:7-11; 200:16-19; 293:12-14.

³⁷ R. 198:14-17.

³⁸ R. 200:3-15; *also* 292:17-293:2.

³⁹ R. 201:23-202:8.

⁴⁰ R. 201:19-22.

⁴¹ R. 202:9-15.

⁴² R. 199:4-7, 201:17-18.

⁴³ R. 199:20-23.

⁴⁴ R. 199:24-200:2.

at least monthly to make sure the cameras are working, it has recorded, and that everything is in proper working order.⁴⁵

9. Employed since 2001 by the Clayton Camp Point Water Commission, Joseph Heberlein is Assistant Manager and Water Operator.⁴⁶ Heberlein is familiar with the security system at the Mt. Sterling plant, with part of his job duties including the review of security footage.⁴⁷ Heberlein reviewed security footage at the Mt. Sterling plant in early January 2013.⁴⁸ Heberlein began watching the footage for routine purposes to make sure the cameras were working and everything was recording right, but when he noticed that paperwork was being filled out without any water being turned on or tests done, it prompted him to watch more.⁴⁹

10. Heberlein noticed the Respondent did not appear to have done the lab tests in the lab on the first day he reviewed.⁵⁰ Heberlein watched several days of footage to confirm that there never were tests done when the paperwork was filled out.⁵¹ Heberlein viewed the security video footage for December 26, 27, 28, and 31, 2012 as well as for January 2 and 3, 2013.⁵² Heberlein only observed the Respondent run the lab tests on December 31, 2012.⁵³ Heberlein subsequently took this information to his boss, John McMahon, in early January 2013.⁵⁴ Heberlein informed McMahon that the surveillance system showed the Respondent had filled out operating reports without samples having been taken or testing or lab work done.⁵⁵

11. McMahon subsequently reviewed the surveillance recording, which took several days.⁵⁶ After reviewing the video, McMahon knew the Respondent had not done the testing, as he could see that no water had been drawn and no tests were run, which take about a half-hour to complete.⁵⁷ Nonetheless, McMahon observed the Respondent on the video filling out the daily operating reports with no lab being done.⁵⁸

12. McMahon reported to the Commission board of directors the fact that the daily sheets had been filled in and that the monthly report sent to Illinois EPA had all the categories filled in without any lab work being done, samples taken, or reagents applied.⁵⁹ The board subsequently instructed McMahon to contact its attorney to begin the termination process and to self-report to Illinois EPA, which McMahon did.⁶⁰ The Commission ultimately reported the situation to Illinois EPA, which led the Commission to receive a violation notice and enter into a

⁴⁵ R. 199:8-19.

⁴⁶ R. 262:10-13; 263:6-8.

⁴⁷ R. 292:11-16.

⁴⁸ R. 293:5-21.

⁴⁹ R. 293:22-294:11; 340:16-18; 348:9-15.

⁵⁰ R. 340:19-22.

⁵¹ R. 294:4-11; 341:10-13.

⁵² R. 302:13-21.

⁵³ R. 318:3-6.

⁵⁴ R. 202:22-203:11; 294:12-21.

⁵⁵ R. 203:6-11.

⁵⁶ R. 203:12-20; 204:6-8.

⁵⁷ R. 217:10-19.

⁵⁸ R. 217:20-218:1.

⁵⁹ R. 212:3-16.

⁶⁰ R. 212:22-213:4.

Compliance Commitment Agreement.⁶¹ McMahon sent a letter to the Respondent telling him he was terminated.⁶²

13. The Respondent learned he was terminated from the Commission when he received a termination letter in the mail in April 2013.⁶³

14. The Respondent does not dispute that the video taken during his work shifts on December 26, 27, 28, 2012, and January 2, and 3, 2013 does not show him doing the tests in the lab that are at issue.⁶⁴ However, the Respondent contends he never falsified any data on those or any other days.⁶⁵ Instead, the Respondent claims he conducted the tests outside of the lab in the well field and at or near a fire hydrant.

15. The Respondent claimed the only instances in which he took raw water samples at the wells were December 26, 27, and 28, 2012 and “[t]he days that you’re claiming I didn’t do my lab.”⁶⁶

16. On December 26, for example, the Respondent said he conducted the testing in his company truck.⁶⁷ The Respondent said he did not recall which well he went to that morning to get a sample, but he went to whichever one was running, and well four was one of them.⁶⁸ The Respondent did not recall whether it was cold or if he had a coat on.⁶⁹ The Respondent said he took his raw water sample for that day from the master pit’s vault at the wall, and that there is a vault with a meter in it and a sample tap.⁷⁰ The Respondent said he took one sample from two wells, mixed them together, then conducted his testing.⁷¹ The Respondent said he blended the samples two or three times inside his truck.⁷² The Respondent said he tested the water out at the wells by putting it in a little bottle, pouring a little powder pillow in it, setting the bottling in a portable spectrometer⁷³, and waiting for the reading.⁷⁴ The Respondent testified he had a variety of testing equipment in his truck, including beakers, half a dozen sample bottles, and distilled water.⁷⁵ The Respondent said he had a pocket pH meter that was portable for field work.⁷⁶

⁶¹ R. 203:23-204:3.

⁶² R. 220:14-17.

⁶³ R. 80:7-20; 383:18-19.

⁶⁴ R. 413:13-414:3.

⁶⁵ R. 416:16-20.

⁶⁶ R. 48:17-22.

⁶⁷ R. 42:21-43:2.

⁶⁸ R. 43: 16-24.

⁶⁹ R. 48:13-16.

⁷⁰ R. 45:18-24.

⁷¹ R. 46:1-9, 19-23.

⁷² R. 49:24-50:3.

⁷³ R. 346:21-347:1 (Spectrometer and a spectrophotometer are the same things.)

⁷⁴ R. 50:21-51:1.

⁷⁵ R. 61:16-18; 63:18-64:5.

⁷⁶ R. 50:16.

17. The Respondent said he followed the same process for the other days at issue: December 27th and 28th and January 2nd and 3rd.⁷⁷ The Respondent conducted what he perceived to be finished water testing at a fire hydrant.⁷⁸

18. The Respondent claimed that he was able to conduct the testing away from the treatment plant lab (and its video surveillance camera) and in the field thanks to a portable spectrometer owned by the Commission. Other witnesses, though, refuted that the Commission ever owned such a device.

19. The Respondent said he conducted his field testing with a portable spectrometer.⁷⁹ He said it was a Hach 890.⁸⁰

20. McMahon testified the Commission owns two DR/2000 spectrometers, one at Mt. Sterling and the other at the Quincy plant, but they are not portable units.⁸¹ He said the Commission does not own nor has it ever purchased a DR/890.⁸² McMahon did not give the Respondent a DR/890 and there was not a DR/890 lying around in the lab.⁸³ "I've never seen a DR/890 anywhere," McMahon testified.⁸⁴ The Commission has trucks, and the operators have equipment in them.⁸⁵ The operators are not equipped with a DR/890 in the truck, and McMahon did not find a DR/890 in the Respondent's truck.⁸⁶ Herberlein said the Commission did not own a portable spectrometer.⁸⁷

21. David Schenk is a certified operator who has been employed by the Clayton Camp Point Water Commission for more than 25 years.⁸⁸ He primarily works at the Commission's Quincy plant, where his duties include working on and reading meters, making sure the chemicals are acceptable, checking the water, and testing for chlorine and fluoride.⁸⁹ However, Schenk has worked at both the Commission's Quincy and Mt. Sterling plants.⁹⁰ He goes over when someone is missing or goes on vacation.⁹¹ Schenk conducted the daily testing at the Mt. Sterling plant the morning of his testimony.⁹² He conducted the tests in the lab there.⁹³

⁷⁷ R. 49:6-10.

⁷⁸ R. 403:12-15.

⁷⁹ R. 58:21-59:4.

⁸⁰ R. 62:19-63:2.

⁸¹ R. 215:7-14.

⁸² R. 215:15-18.

⁸³ R. 215:23-216:6.

⁸⁴ R. 216:6-7.

⁸⁵ R. 216:22-217:3.

⁸⁶ R. 217:4-9.

⁸⁷ R. 337:6-10.

⁸⁸ R. 350:14-21.

⁸⁹ R. 351:1-13.

⁹⁰ R. 357:21-23.

⁹¹ R. 358:1-3.

⁹² R. 358:3-11.

⁹³ R. 358:14-16.

22. Schenk testified that the spectrometer photographed at the Mt. Sterling plant is the same as that at the Quincy plant.⁹⁴ He does not use any other spectrometers in his duties as an operator.⁹⁵ Schenk said he has never seen a mobile spectrometer at the lab in Mt. Sterling.⁹⁶ He does not carry a spectrometer in his truck because “[w]e don’t check water in the field. We do everything in the lab.”⁹⁷

23. Edward Dimler is employed as a technical specialist by the Rochester Midland Corporation, a specialty chemical manufacturer.⁹⁸ His job duties include establishing business with municipalities and industry to prevent scale and corrosion in water systems, boilers, cooling towers, industrial wastewater, and drinking water.⁹⁹ Dimler established a relationship selling chemicals for drinking water clarification to the Clayton Camp Point Water Commission in 1992 or 1993.¹⁰⁰ Dimler knew the Respondent from that business relationship dating back to when the Respondent began working at the Clayton Camp Point Water Commission around 2000.¹⁰¹ Dimler would visit Mt. Sterling at least quarterly, spending usually an afternoon or morning there.¹⁰²

24. Dimler testified he brought an instrument called a Hach DR/890 with him on two visits, one three years ago and the other two years ago.¹⁰³ Dimler owned the DR/890.¹⁰⁴ Dimler also testified he had used it on several occasions to run comparisons with other equipment at the Mt. Sterling facility.¹⁰⁵

25. Dimler testified that, toward the end of April 2014, the Respondent called him about the instant case.¹⁰⁶ It was the first time the Respondent had called him about it.¹⁰⁷ When he called him, Dimler was aware the Respondent had not worked at the Commission since January 2013.¹⁰⁸ One of the first questions the Respondent asked Dimler was what the portable meter or instrument was called that Dimler brought in with him, and Dimler answered “It was a DR/890.”¹⁰⁹ The Respondent then said to Dimler, “Remember, I have one as well?”¹¹⁰ Dimler responded, “I’m sorry, Jim, I don’t remember that you had one.”¹¹¹ The Respondent said, “I kept it over on the counter by the chlorine meter.”¹¹² Dimler said he did not recall seeing one.¹¹³

⁹⁴ R. 351:20-352:6.

⁹⁵ R. 352:7-9.

⁹⁶ R. 358:17-20.

⁹⁷ R. 352:15-20.

⁹⁸ R. 159:4-15.

⁹⁹ R. 159:16-21.

¹⁰⁰ See R. 159:22-160:9.

¹⁰¹ R. 163:13-164:4.

¹⁰² R. 165:23-24; 166:11-14.

¹⁰³ R. 167:8-14; *also* R. 168:5-14.

¹⁰⁴ R. 172:21-23.

¹⁰⁵ R. 165:23-166:4.

¹⁰⁶ R. 164:10-22; 177:5-12.

¹⁰⁷ R. 164:23-165:1.

¹⁰⁸ R. 177:5-16.

¹⁰⁹ R. 165:4-6.

¹¹⁰ R. 165:6-7, 19-22; 173:17-22; 174:10-13.

¹¹¹ R. 165:7-8.

¹¹² R. 165:8-9.

¹¹³ R. 165:9-10, 169:2-5, 174:2-3.

Dimler testified that the Respondent said it would help him out if Dimler remembered seeing it.¹¹⁴ Dimler did not know whether the Commission owned a DR/890.¹¹⁵ Dimler testified that, although they might have had one, Dimler had never seen a DR/890 at the Mt. Sterling plant.¹¹⁶

26. The Respondent testified that reagents were powder pillows that go in the bottles that go into the spectrometer to give a reading.¹¹⁷ The Respondent said he used the reagents from the desktop spectrometer with the mobile spectrometer.¹¹⁸ Heberlein subsequently testified that he was familiar with the DR/2000 spectrometer, using it almost every day.¹¹⁹ He said it used a water sample size of 25 mils.¹²⁰ Dimler, by contrast, did not know the sample size of the DR/2000, but said the sample size for the portable DR/890 was 10 mil, or milliliters.¹²¹ Heberlein said that, for the DR/2000, reagent in packs premeasured for 25 mil samples are used.¹²² The reagent packs at the Mt. Sterling plant are designed for 25 milliliter samples.¹²³ Heberlein said that, for a 10 milliliter sample, a different amount of reagent would be used.¹²⁴

27. The Respondent subsequently testified that the first reagent pillows he used for the portable spectrometer in his truck were the larger size.¹²⁵ The Respondent testified he used about half a 25 mil packet, just kind of eyeballing it.¹²⁶ However, the Respondent said he eventually looked around back in the lab and found 10 mil packets, so he had both the 25 mil and 10 mil in his truck.¹²⁷ He testified that, on the five days, the Respondent did not use any of the larger reagent pillows in whole.¹²⁸

28. As noted above, the Respondent testified that he tested raw water by taking a sample from two wells and repeatedly mixing or blending them together in his truck before conducting his testing.¹²⁹

29. Heberlein said raw water is sampled as it comes into the plant from a tap at a sink at the bottom of stairs.¹³⁰ McMahon testified that no one has ever taken raw water samples for daily testing out of the wells; that is always taken at the raw water tap on the landing in the water treatment plant.¹³¹ Schenk never has gone out to the wells to take daily samples because "it all gets done at the plant."¹³²

¹¹⁴ R. 169:6-9.

¹¹⁵ R. 172:15-20.

¹¹⁶ R. 165:13-18, 169:9-10, 170:24-171:4; 171:20-172:14.

¹¹⁷ R. 27:9-13.

¹¹⁸ R. 61:24-62:8.

¹¹⁹ R. 279:21-24.

¹²⁰ R. 280:1-3.

¹²¹ R. 168:12-21.

¹²² R. 281:8-15.

¹²³ R. 286:6-9.

¹²⁴ R. 281:16-283:12.

¹²⁵ R. 446:8-17.

¹²⁶ R. 434:21-436:2.

¹²⁷ R. 436:8-17.

¹²⁸ R. 446:21-24.

¹²⁹ R. 46:1-9, 19-23; 49:24-50:3.

¹³⁰ R. 272:22-273:6.

¹³¹ R. 214:21-215:1.

¹³² R. 352:21-353:04.

30. McMahon said that taking a sample from one well would not be representative of the blended water that was being treated, as that water is blended from two mains and is 18 to 20 hours old.¹³³ Even if one were to take samples from each and every well, blend them all together, and then take a sample, McMahon said that would not be representative of what was being treated at that time because that would be fresh water compared to the water that had been in the mains for 18 or 20 hours before getting to the plant.¹³⁴ Heberlein said he would not conduct daily testing from the well fields because it is not the water that is at the plant, which is blended water from several different wells.¹³⁵ Testing samples combined from operating wells would be poor technique, as it would not be a representative sample of the water being treated at the plant.¹³⁶

31. Schenk has never gone out to the Quincy facility's three wells, grabbed a sample from each, mixed them up, and then run his daily samples.¹³⁷ Schenk has never gotten raw water from wells for testing of values from a spectrometer.¹³⁸ If an operator were to go out to the wells, grab samples from a couple of them, combine them, then test them for iron and manganese, that would be poor technique, not recommended, and Schenk would not do it.¹³⁹

32. The Respondent had not seen anything saying that he was to test at the well sites, and he did not test daily at the well sites.¹⁴⁰ No one instructed the Respondent to do the testing at the well field.¹⁴¹ "I did it myself."¹⁴²

33. The Respondent also contended that he conducted testing on finished water by drawing a sample from a fire hydrant.¹⁴³ The Respondent testified that no one instructed him to sample water from a fire hydrant.¹⁴⁴ The only days that he did so were the days in question; the Respondent tested the water in the lab on all other days.¹⁴⁵

34. McMahon testified that, as with raw water testing, finished water testing is done in the lab in the treatment plant.¹⁴⁶ In the course of obtaining a license and through the Illinois EPA operator's handbook, McMahon said that one would know that finished water samples are to be taken from a tap in the plant.¹⁴⁷ "Once it leaves the plant, it's actually distribution water, not finished water," he said.¹⁴⁸ Once water enters the distribution system, it has left the quality

¹³³ R. 187:5-17.

¹³⁴ R. 188:3-10.

¹³⁵ R. 332:15-23.

¹³⁶ R. 222:23-223:13.

¹³⁷ R. 353:8-16.

¹³⁸ R. 363:1-5.

¹³⁹ R. 364:24-365:17.

¹⁴⁰ R. 47:9-15.

¹⁴¹ R. 52:19-21.

¹⁴² R. 52:21.

¹⁴³ R. 403:12-15.

¹⁴⁴ R. 57:10-16.

¹⁴⁵ R. 57:17-22.

¹⁴⁶ R. 191:4-11.

¹⁴⁷ R. 224:24-225:8.

¹⁴⁸ R. 226:11-12.

control within the plant and you are testing distribution rather than finished water.¹⁴⁹ McMahon said that finished water is taken from the gooseneck faucet in the water treatment plant lab.¹⁵⁰ McMahon said the Respondent has been using this finished water tap since he began his employment at the Commission.¹⁵¹ Heberlein concurred that finished water is taken from a gooseneck tap in the lab that is the designated area for taking samples before the water goes out to distribution.¹⁵²

35. McMahon testified that the Commission opens the hydrants in the fall to flush them as part of routine maintenance to make sure they work and see how water quality is.¹⁵³ It does not flush them in the winter due to the risk from freezing, because if it does not drain back properly, the hydrant can freeze and become inoperable.¹⁵⁴ The only time Schenk has opened fire hydrants has been to flush a line.¹⁵⁵ Schenk has never gone out to a dead-end line for his daily samples, as "[t]here's no reason to ... everything's done at the plant."¹⁵⁶ A dead-end line is on the distribution system.¹⁵⁷ Daily testing of treated water is conducted before it gets to distribution.¹⁵⁸

36. Heberlein has never performed the daily tests of water samples that are recorded in the monthly operating report in his truck, in the well field, or any place other than the lab.¹⁵⁹ That is because daily tests are required to be done at the taps at the plant.¹⁶⁰

37. McMahon said testing water out of fire hydrants would be improper due to contamination in there.¹⁶¹ A test of water out of a hydrant would not be an accurate test of the water being produced at the plant.¹⁶²

38. McMahon never instructed the Respondent to sample raw water out at the wells or finished water out at fire hydrants.¹⁶³ The Respondent never indicated that he conducted the testing on December 26, 27, and 28, 2012 and January 2 and 3, 2013 in his truck until the day of the hearing.¹⁶⁴ The Respondent provided no remarks in the daily operating reports that he conducted the testing in the truck.¹⁶⁵

¹⁴⁹ R. 237:24-238:4.

¹⁵⁰ R. 215:2-6.

¹⁵¹ R. 238:17-20.

¹⁵² R. 272:8-21; 273:22-274:2.

¹⁵³ R. 190:7-17.

¹⁵⁴ R. 190:18-191:3.

¹⁵⁵ R. 355:3-11.

¹⁵⁶ R. 355:22-356:3.

¹⁵⁷ R. 356:4-8.

¹⁵⁸ R. 356:16-18.

¹⁵⁹ R. 338:16-339:1.

¹⁶⁰ R. 339:1-4.

¹⁶¹ R. 214:9-15.

¹⁶² R. 252:23-253:15.

¹⁶³ R. 213:5-214:8.

¹⁶⁴ R. 239:4-17.

¹⁶⁵ R. 239:18-21.

39. McMahon said it would not be normal for an operator to do daily testing in his truck.¹⁶⁶ Anytime he has conducted testing on water for entry into the monthly report, Schenk has conducted it in a lab.¹⁶⁷ It is Schenk's understanding that daily lab testing should be done in the laboratory: "We do everything at the lab, yes."¹⁶⁸

40. The Respondent testified that he decided to conduct the testing someplace other than the lab because he was trying to figure out what was eating up the chlorine in the finished water, and the raw water coming into the plant had coloration and odor.¹⁶⁹ The Respondent claimed he had operators from other towns call him saying their chlorine was dropping.¹⁷⁰ The Respondent said he conducted the testing in the field because he was "[j]ust trying to find out what that unknown substance was in the water, hoping to catch it at the well field to what it was."¹⁷¹

41. The Respondent testified that the purpose of having the portable device in his truck was to check for chlorine leaks out on lines and check fluoride levels so when he received calls from other water companies about their fluoride being low or they had seen a leak, the Respondent could see whether it was the Commission's water or not.¹⁷² The Respondent did not discuss his concerns with anyone at the Commission at that time "because I was gathering data."¹⁷³ McMahon testified that, if calls reporting low chlorine residual were received, they would test in the area of the calls and not in the well fields, as no chlorine is applied at the well fields.¹⁷⁴ The Respondent said he never got a clue as to what the chlorine problem was.¹⁷⁵ The Respondent conceded that conducting his testing in the field was "a little sloppy to do it that way," but that was he was looking for an unknown value, which is why he used a portable.¹⁷⁶

42. The testimony of McMahon, Heberlein, Schenk, and Dimler regarding water testing procedures, reagent pillows, and the portable spectrometer or DR/890 was consistent, credible, and persuasive. The Respondent's testimony concerning the same was not. Whenever confronted with a fact that thwarted his previous version of events, the Respondent alleged a new version which itself would either be undermined by subsequent facts or would be highly implausible.

43. The Respondent's contention that he juggled an array of equipment between the wells, a fire hydrant, and his truck to conduct tests that could be easily performed in a lab from samples drawn from readily accessible taps strained credulity and appeared little more than an attempt to avoid the video surveillance evidence showing he did not conduct the tests. The Respondent's explanation that he conducted the field testing to get to the bottom of a chlorine issue was undercut by McMahon's testimony as well as the fact that the Respondent did not

¹⁶⁶ R. 240:1-3.

¹⁶⁷ R. 361:3-7.

¹⁶⁸ R. 353:17-20.

¹⁶⁹ R. 395:14-23; 397:12-17.

¹⁷⁰ R. 424:8-11.

¹⁷¹ R. 399:21-400:2.

¹⁷² R. 393:4-15.

¹⁷³ R. 401:6-9.

¹⁷⁴ R. 455:20-456:5.

¹⁷⁵ R. 414:23-415:2.

¹⁷⁶ R. 408:22-409:1.

document or share such a deviation from normal testing protocols for this purpose with anyone at the Commission.

44. Dimler's testimony was particularly disturbing, as it strongly suggested the Respondent solicited Dimler to fabricate a story to help him out, even though he did so without asking Dimler outright to lie. The Respondent claimed a former Commission employee had purchased various lab equipment on behalf of the Commission that included a DR/890 portable spectrometer and that the Commission withheld a bill of sale that would prove it, but the Respondent supported his claim with no credible evidence. The Respondent's testimony concerning the portable spectrometer or DR/890, including its existence and ownership and the Respondent's purported use of it, lacked all credibility, as did his proffered reasoning for conducting daily water testing in the well fields and at a fire hydrant.

45. The Complainant proved by a preponderance of the evidence that the Respondent did not conduct the daily testing he was required to perform as a certified operator on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013.

46. The Respondent further contended that he wrote down the results of his tests in the field on a piece of paper, but that he did not need to consult it (as evidenced by the video recording) when he wrote down those results in the Commission's records each day.

47. The Respondent testified that his job duties included getting readings at the plant and doing lab work.¹⁷⁷ He would pick up a clipboard in the lab, go around and get all the readings, return, and set it right back where it was.¹⁷⁸ When he would conduct his lab work, the Respondent said he recorded the results on what he called "the EPA sheet."¹⁷⁹

48. The Respondent identified Complainant's Exhibits C-2A through D as EPA documents for writing lab tests down and chemicals used.¹⁸⁰ He said that if a particular daily entry contained his initials, that meant the Respondent had conducted the testing for that day.¹⁸¹ The Respondent identified his initials on documents for January 2013.¹⁸² Both the December 2012 and January 2013 documents included numbers obtained from spectrometer readings as well as from a pH meter.¹⁸³

49. After the Respondent claimed he conducted his tests in the truck, the Respondent said he recorded them on sheets back at the lab.¹⁸⁴ The Respondent said he memorized the results of the lab work he conducted in the field.¹⁸⁵ When the video showed him entering values onto the monthly sheet, the Respondent said he had them memorized from after his testing.¹⁸⁶ In addition

¹⁷⁷ R. 19:21-20:2.

¹⁷⁸ R. 20:24-21:3, 21:17-24.

¹⁷⁹ R. 33:10-14.

¹⁸⁰ R. 34:1-12.

¹⁸¹ R. 36:6-24.

¹⁸² R. 37:24-38:9.

¹⁸³ R. 39:5-40:20.

¹⁸⁴ R. 70:18-71:3.

¹⁸⁵ R. 71:4-10; 73:9-11.

¹⁸⁶ R. 414:4-22.

to remembering the test results, the Respondent also would write them down on a little piece of paper for reference.¹⁸⁷ When he returned to the lab and entered the findings in the EPA report, the Respondent said he would put the paper in his pocket, and at some point it got thrown away.¹⁸⁸ The Respondent said he never had to reach into his pocket to record any of the results, as he just remembered them all.¹⁸⁹ The Respondent said he never had to refer to the paper he prepared in the field to write his values down.¹⁹⁰

50. Heberlein testified he did not observe the Respondent take anything out of his pocket or consult anything before writing upon the monthly operating report.¹⁹¹ However, when he viewed video of the Respondent running the lab tests on December 31, 2012, Heberlein observed that, after conducting each test, the Respondent wrote the results down.¹⁹²

51. The Respondent's claim that he conducted the daily testing for the five days in question outside the view of the Mt. Sterling lab camera and in the field lacks credibility. However, the Respondent undermined whatever credibility he might have had left with his contention that he was able to conduct the various tests in the field and then memorize the results for entry in the Commission's records at a later time without consulting a note or other record, the act of which would otherwise have been observed on the security footage. The Respondent did not demonstrate such a remarkable memory elsewhere in his testimony.

52. The Complainant proved by a preponderance of the evidence that the data the Respondent entered in the Commission's records for the results of the daily testing he was required to conduct as a certified operator were fabricated by the Respondent for the dates of December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013.

53. John Bartolomucci works as a field engineer in the Complainant's Division of Public Water Supplies, where he has worked since August 1999.¹⁹³ His job duties include inspecting and conducting engineering evaluations at water treatment plants.¹⁹⁴ About four community water supplies are inspected each month, with each individual plant being evaluated about every three years.¹⁹⁵ Bartolomucci is familiar with the Clayton Camp Point Water Commission, as he conducts inspections of the Commission's facilities, including both the Mt. Sterling and Quincy plants.¹⁹⁶ He conducted the last two or three Mt. Sterling plant inspections.¹⁹⁷

54. Prior to a site visit, Bartolomucci reviews a facility's monthly operating reports since the last inspection, particularly the reports from the past year, which are used to calculate

¹⁸⁷ R. 83:1-15; 95:17-20.

¹⁸⁸ R. 83:16-22.

¹⁸⁹ R. 95:21-96:1.

¹⁹⁰ R. 407:2-5.

¹⁹¹ R. 316:21-317:4.

¹⁹² R. 318:3-6, 321:23-322:9.

¹⁹³ R. 104:15-105:5.

¹⁹⁴ R. 105:6-10.

¹⁹⁵ R. 105:11-15.

¹⁹⁶ R. 106:5-107:1.

¹⁹⁷ R. 107:02-05.

average usages.¹⁹⁸ Bartolomucci relies on data in monthly operating reports when conducting inspections.¹⁹⁹ For example, Bartolomucci will review a year of such reports and, based upon what is reported, determine the average daily water pumpage and maximum pumpage.²⁰⁰ Bartolomucci looks at the results recorded on monthly operating reports of testing done on water samples.²⁰¹ He reviews reported comparison test numbers as well as calculations, such as the milligrams per liter of chemicals added to the water based upon the amount of solution fed, the gallons of water treated, and the concentration of the solution.²⁰² In the past, Bartolomucci reviewed monthly operating reports for the Mt. Sterling plan when preparing for inspections at the Clayton Camp Point Water Commission.²⁰³

55. Bartolomucci testified that the required daily testing is designed to alert a facility if its water is unsafe.²⁰⁴ Daily testing of water samples is important to verify the quality of the water.²⁰⁵ He said that it is important that the data in the monthly operating report is true so that you can trust it.²⁰⁶ "I mean, in order to verify it, it has to be accurate," Bartolomucci testified.²⁰⁷ If water is not tested daily, a community water supply risks that its water does not meet water quality standards and is unsafe to drink.²⁰⁸ There could be bacteria in the water, and it is possible that a community water supply could cause somebody to become ill by the water that it distributes.²⁰⁹ One reason it is important to test daily is to ensure that chemicals being added are not overfed.²¹⁰ Community water supplies have classifications based upon their treatment, with some adding chemicals and some not.²¹¹ The Mt. Sterling plant adds chemicals.²¹²

56. Any failure to accurately record values in a facility of the Commission's type could implicate public health.²¹³ Any falsification of material data on daily entries for a monthly report, particularly if sustained, implicates public health.²¹⁴ If someone is willfully entering false data, that person probably is not trustworthy enough to maintain operator status.²¹⁵

57. The Complainant proved by a preponderance of the evidence that the Respondent entered fabricated data into the Commission's records for the results of the daily testing he was required to conduct as a certified operator, and that the Respondent entered this false information

¹⁹⁸ R. 107:20-108:11.

¹⁹⁹ R. 108:

²⁰⁰ R. 108:15-22.

²⁰¹ R. 108:23-109:02.

²⁰² R. 109:2-17.

²⁰³ R. 110:17-21.

²⁰⁴ R. 115:5-8.

²⁰⁵ R. 113:24-114:2.

²⁰⁶ R. 114:3-6.

²⁰⁷ R. 114:6-7.

²⁰⁸ R. 114:08-18.

²⁰⁹ R. 114:19-115:4.

²¹⁰ R. 116:12-15.

²¹¹ R. 115:18-116:8.

²¹² R. 116:9-11.

²¹³ R. 117:4-8.

²¹⁴ R. 117:9-13.

²¹⁵ R. 117:14-18.

into reports required to be submitted to Illinois EPA on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013.

58. Michael Crumly testified that he had worked for the Complainant, Illinois EPA, for 26 years.²¹⁶ Crumly had been the manager of the Drinking Water Compliance Assurance Section, with duties that included overseeing the implementation of state and federal rules and regulations and managing day-to-day compliance activities.²¹⁷ Crumly's job duties included evaluating systems for compliance with the law.²¹⁸

59. Crumly explained that community water supplies must monitor periodically for different contaminants.²¹⁹ Crumly said community water supplies conduct daily tests in the field and many sample at their water plans to ensure treatment is working appropriately.²²⁰ Samples collected by community water supplies for daily tests are not required to be submitted to a certified laboratory.²²¹ Crumly said those samples are analyzed using field equipment, such as thermometers and pH kits.²²² It is the community water supply operator's responsibility to oversee things that are going on in the water system at the plant.²²³

60. Crumly opined that an operator who falsified monthly operating reports should be sanctioned with revocation "[b]ecause our whole industry is based on trust of self-reporting. And if you don't know what's in the water, then you can get people sick."²²⁴

CONCLUSIONS OF LAW

1. The Complainant in this action had the burden to prove by the preponderance of the evidence its allegations against the Respondent.²²⁵

2. As noted above, the Respondent moved for directed findings at the close of the Complainant's case in chief, and the motion was taken under advisement.²²⁶ The Respondent cited no legal authority that the Hearing Officer was empowered to rule upon such a motion, and no such authority has become known to the Hearing Officer since the hearing, whether through the parties' briefs or otherwise. At the point in the record at which the Respondent moved for directed findings, however, the Complainant had satisfied its *prima facie* case, and, thus, denial of the motion would have been appropriate. To the extent the Hearing Officer may possess as-of-yet undiscovered authority to rule on a motion for directed findings, it is now denied as moot.

²¹⁶ R. 128:6-12.

²¹⁷ R. 128:13-21.

²¹⁸ R. 129:7-10.

²¹⁹ R. 129:15-18.

²²⁰ R. 132:10-14.

²²¹ R. 132:15-18.

²²² R. 132:19-24.

²²³ R. 133:17-21.

²²⁴ R. 150:2-11.

²²⁵ 35 Ill. Adm. Code 168.266; 35 Ill. Adm. Code 681.701.

²²⁶ R. 371:4-373:24.

3. In Respondent's Closing Brief, the Respondent asserts he has been denied the constitutional due process protections enumerated by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill*²²⁷. That case established that public employers must provide certain pre-termination procedures before removing an employee, including (1) oral or written notice of the charges; (2) an explanation of the employer's evidence; and (3) an opportunity for the employee to tell his side of the story.²²⁸

The Respondent contends he was not afforded these due process requirements prior to his termination by the Clayton Camp Point Water Commission, and that Illinois EPA "then perpetuated the constitutional error" by relying upon information provided by the Commission in bringing this action. The Respondent argues "[t]he [Illinois] EPA, as an element of state government, and particularly its lawyers, are touched with knowledge that governmental employers are required to afford *Loudermill* due process protections. Yet, the [Illinois] EPA has no record of a *Loudermill* hearing." The Respondent claims the Commission's failure to abide by *Loudermill* resulted in the spoliation of evidence, although his argument is largely speculative. The Respondent further contends Illinois EPA should have interviewed him promptly and should have examined documents of Commission purchases to substantiate his claim that the Commission owned a portable spectrometer and that he used that for the sampling on the days in question. Instead, the Respondent argues Illinois EPA "failed to do anything but take the Commission's word for what may or may not have occurred, knowing that Mr. Potts has not yet been heard from and proceeds to file an action without ever giving a long-term licensee a chance to explain what actually occurred."

Imposing *Loudermill* obligations upon third-party agencies could result in thwarting those agencies' abilities to carry out duly authorized licensing, permitting, or certifying actions based upon the procedural errors of parties whose termination practices lie beyond the agencies' scope of authority and control. The Respondent's argument would allow an incompetent operator to effectively enjoy immunity as to her certification if her employer also were incompetent in terminating her.

Notably absent from the Respondent's five-page *Loudermill* argument, however, is citation to any authority that the *Loudermill* due process requirements that are imposed upon a public employer such as the Commission somehow extend to third parties such as Illinois EPA and were in any way applicable to non-employment proceedings, such as the instant action. The Respondent's termination is not at issue in this matter, only whether his actions or inactions provide sufficient cause warranting sanction of his certification. The Respondent's *Loudermill* arguments are red herrings, and as such are rejected. *Loudermill* is inapplicable to the instant case.

4. Pursuant to Section 681.720 of the Water Supply Operator Certification regulations²²⁹, the Hearing Officer provided a copy of the hearing transcript and documentary exhibits to the Water Supply Operator Certification Advisory Board by Certified Mail on June 10, 2014, with the Board receiving it on June 12, 2014. The video exhibits were previously provided to the Board on DVD.

By letter dated July 8, 2014 and received on July 10, 2014, the Board provided its recommendation as to whether a sanction was appropriate and, if so, the suspension or

²²⁷ 470 U.S. 532 (1985).

²²⁸ See, e.g., *Wainscott v. Henry*, 315 F.3d 844, 852 (7th Cir. 2003).

²²⁹ 35 Ill. Adm. Code 681.100 *et seq.*

revocation period. The Board found Illinois EPA's allegation of the Respondent's falsification of laboratory results "to be convincing and sides with the State." The full Board unanimously recommended the revocation of the Respondent's Public Water Supply Operator Certification.

In Respondent's Closing Brief, the Respondent argues the Board's recommendation should be stricken. The Respondent contends the Board impermissibly reversed the burden of proof and persuasion from Illinois EPA onto the Respondent when stating that "Board members felt that Mr. Potts' defense was without merit." The Respondent also argues the Board's statement that the Respondent's "claim of having additional testing equipment in his truck that his employer had no knowledge of and was no longer locatable was unprovable" was one that impermissibly invaded the province of the Hearing Office's credibility determination. Finally, the Respondent argues the Board improperly cited U.S. Weather Service temperature information not found in the record of this case.

Administrative regulations have the force and effect of law.²³⁰ The familiar rules that govern construction of statutes apply as well to administrative regulations.²³¹ Like statutes, administrative regulations are presumed valid.²³² Section 681.720 of the Water Supply Operator Certification regulations requires the Water Supply Operator Certification Advisory Board to submit "a recommendation on the basis of the hearing transcript whether a sanction is appropriate and, if a sanction is appropriate, the suspension or revocation."²³³ That section also provides that the recommendation is to be in writing and "shall include a statement of reasons for the Advisory Board's actions."²³⁴

In his Proposal for Decision, the Hearing Officer wrote the following: "And though the Respondent complains of the Board's comments about facts being unprovable, the Respondent himself came forward with those facts and argued them in his defense, thus the Respondent had the burden of proving them. The Recommendation merely reflects that they were unable to be proven in the Board's view." (Proposal for Decision at 20-21.) The Respondent contends that the statement concerning the burden of proof "is noxiously and irretrievably error." Resp.'s Objections at 13. The Respondent is mistaken.

The Hearing Officer's statement was made within discussion concerning the Water Supply Operator Certification Advisory Board's recommendation, which itself is not binding. Further, the term "burden of proof" has two aspects: the burden of producing evidence as to a particular matter, and the burden of persuading the trier of fact as to the existence of the fact asserted. *E.g., Bd. of Trade of City of Chicago v. Dow Jones & Co.*, 108 Ill. App. 3d 681, 686 (1st Dist. 1982). The burden of persuasion rests upon one party and does not shift during the course of a trial, whereas the burden of production, also known as the burden of going forward, shifts from party to party during the course of a trial. *Id.* For example, "once the plaintiffs set forth a prima facie case, the burden of production shifts to the defendants to come forward with evidence." *Ambrose v. Thorton Township School Trustees*, 274 Ill. App. 3d 676, 680 (1st Dist. 1995). Consequently, when the Hearing Officer spoke of the Respondent having the burden of proving facts he had asserted and argued in his defense, the Hearing Officer spoke in terms of the burden of production and not the burden of persuasion, which remained at all times upon the Complainant. Further, while the Recommendation does speak of the Respondent's defense being

²³⁰ *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 368 (2009).

²³¹ *Id.*

²³² *People v. Molnar*, 222 Ill. 2d 495, 508 (2006).

²³³ 35 Ill. Adm. Code 681.720(b).

²³⁴ 35 Ill. Adm. Code 681.720(c).

without merit, it also stated that the Board found the State's allegations to be convincing, thus suggesting that it knew the State had the burden of convincing or persuading with its proof.

The Respondent makes no argument that Section 681.720 is invalid. As it is an administrative regulation, Section 681.720 has the force and effect of law. Thus, the Board was required to provide the recommendation specified. Further, neither Section 11 of the Public Water Supply Operations Act²³⁵ nor the Water Supply Operator Certification regulations, including Section 681.720, require the Board to know and apply the appropriate evidentiary and other legal rules to their recommendation; it is, after all, a recommendation, and no argument has been made that it is binding upon the Hearing Officer or the Director.

That said, the Board was required to make its recommendation based upon the hearing transcript. Whether it must be based *solely* upon the transcript and cannot be based in part upon extrinsic information is uncertain. Nonetheless, to the extent the Board's recommendation is based upon stated reasons that lie outside the hearing transcript, those reasons have been given no weight in this Final Decision.

5. As addressed in the Findings of Fact, the Complainant proved by a preponderance of the evidence that the Respondent did not conduct the daily testing he was required to perform as a certified operator on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013. In failing to conduct the tests for five nearly consecutive days, the Respondent went beyond incompetency in not complying with the applicable standard of care—daily testing of raw and finished water—and instead committed misconduct and gross negligence, as the repeated failure to conduct the tests evidenced a disregard for the potential harm which could befall the water supply and public without such tests in place to protect them. Thus, the Complainant also has proven by a preponderance of the evidence that the Respondent committed gross negligence, misconduct, and incompetency in the operation of a public water supply.

6. Further, and as also addressed in the Findings of Fact, the Complainant proved by a preponderance of the evidence that the Respondent entered fabricated data into the Commission's records for the results of the daily testing he was required to conduct as a certified operator, and that the Respondent entered this false information into reports required to be submitted to Illinois EPA on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013.

CONCLUSION

The Respondent's actions by falsely reporting results of tests that were never conducted on samples never drawn constitute severe violations of the Public Water Supply Operations Act. The falsification of such reports by a certified operator means a public water supply cannot be assured in its ability to provide water on those dates in question that is "safe in quality, clean, adequate in quantity, and of satisfactory mineral characteristics for ordinary domestic consumption."²³⁶ In the instant case, the Respondent falsified water supply operation reports on five days. Pursuant to Section 681.730²³⁷ of the Water Supply Operator Certification regulations,

²³⁵ 415 ILCS 45/0.01 *et seq.*

²³⁶ 35 Ill. Adm. Code 681.730(a)(1)(B).

²³⁷ 35 Ill. Adm. Code 681.730 replaced 35 Ill. Adm. Code 680.704.

the frequency and duration of these violations, coupled with their devastating impact upon the water supply's ability to be assured of the safety and quality of the water it distributes to the public, results in a severity warranting not suspension but revocation, as also recommended by the Water Supply Operator Certification Advisory Board, and that the Respondent's operator certification be immediately revoked for a period of four (4) years.

Consequently, I find that the Complainant proved by a preponderance of the evidence that the Respondent did not conduct the daily testing he was required to perform as a certified operator for the Clayton Camp Point Water Commission on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013, and that this failure went beyond incompetency and constituted misconduct and gross negligence in the operation of a public water supply. I also find that the Complainant proved by a preponderance of the evidence that the Respondent entered fabricated data into the Commission's records for the results of the daily testing he was required to conduct as a certified operator, and that the Respondent entered this false information into reports required to be submitted to Illinois EPA on December 26, 2012; December 27, 2012; December 28, 2012; January 2, 2013; and January 3, 2013. As such, I find that cause exists pursuant to Section 10(d) of the Public Water Supply Operations Act to suspend or revoke the Respondent's certificate of competency; and that the severity of the Respondent's violations warrants the immediate revocation of his Class A Water Supply Operator Certification for a period of four (4) years.



LISA BONNETT

Director

Illinois Environmental Protection Agency

1021 North Grand Avenue East

P.O. Box 19276

Springfield, Illinois 62794-9276

(217) 782-2829

Entered: 6/23, 2015
(Month) (Day)

WITHIN 35 DAYS AFTER RECEIPT OF THIS DECISION, THE OPERATOR MAY
APPEAL THE DECISION TO THE POLLUTION CONTROL BOARD
PURSUANT TO 735 ILL. ADM. CODE 681.735.

AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

I, (name) Kimberly Kross, under oath, state that I have personal knowledge of the statements contained in this affidavit, that I am over 21 years of age and of sound mind and body, and if called to testify, I would testify as follows:

1. That a true copy of the foregoing Final Decision was served via certified mail, return receipt requested, by depositing said document in the U.S. Mail on (month & day) June 23, 2015, with proper postage or delivery charge prepaid, in an envelope or package addressed as follows:

Anthony B. Cameron
Attorney for Respondent
529 Hampshire, Suite 511
Quincy, IL 62301

2. That a true copy of the foregoing Final Decision also was served by personal delivery on (month & day) June 23, 2015 to each of the persons on the service list below:

Meredith Kelley
Docket Clerk
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Mail Code 21
P.O. Box 19276
Springfield, Illinois 62794-9276

Rex L. Gradeless
Joanne M. Olson
Attorney for Complainant
Division of Legal Counsel

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

I have read the foregoing and affirm that the facts contained herein are true and correct to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NOT.

BY: Kimberly Kras
(signature)
Kimberly Kras
(print name)
Office Coordinator
(print title)
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

SUBSCRIBED and SWORN to before me
this 23rd day of June, 2015.

Michael J McCabe
Notary Public

(SEAL)



ANTHONY B. CAMERON

ATTORNEY AT LAW

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QUINCY, ILLINOIS 62301

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Of Counsel: **John W. Citro**

July 29, 2015

John Therriault, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

RECEIVED
CLERK'S OFFICE

JUL 31 2015

STATE OF ILLINOIS
Pollution Control Board

Re: **James Potts**
ID No. 194068252
Public Water Operator, Certificate of Competency
DLC No. 299-2013
Our File No. 13-1104



ORIGINAL

Dear Clerk Therriault:

Enclosed please find original and three copies of Notice of Filing and Petition to Review and for Appeal of Director's Order Revoking Operator's Certification we wish to file on behalf of the Petitioner, James Potts.

Also enclosed is our Client Funds Account check #3068, in the amount of \$75.00, made payable to the Illinois Pollution Control Board, for the filing fee.

Thank you for your kind attention.

Sincerely,

Anthony B. Cameron

IL Attorney No. 037455

AR Attorney No. 73137

Sender's Email: dacamara@adams.net

ABC:lm

Encs.

cc: IEPA

Mr. James Potts