IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, PLANTIFF, v. JAY EARNEST NIDAY, DEFENDANT.	NO. 20-CR-4081-LTS **DEFENDANT'S SENTENCING MEMORANDUM & BRIEF IN SUPPORT OF DOWNWARD VARIANCE FROM GUIDELINES**

The defendant, Jay Earnest Niday, through counsel, hereby submits the following Memorandum for the sentencing set for April 1, 2021, at 2:00 o'clock p.m.:

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1. Mr. Niday should not receive an upward adjustment either for his role in the offense or because of an abuse of public trust…….5

2. Mr. Niday's sentence should be reduced significantly below the guideline range because of the nature and circumstances of the offense, Mr. Niday's particular participation in the offense, his lack of criminal history, his age, the absence of any need to protect the public from any further crimes by him, and because a "stiff" sentence is not necessary to adequately deter criminal conduct (by Mr. Niday or anyone else)……...7

IV. CONCLUSION…….9

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I. FACTS:

Codefendant Patrick Schwarte and Defendant Jay Niday both pleaded guilty to an information charging (Count 1) conspiracy in violation of 18 U.S.C. § 371, and (Count 2) knowingly falsifying, tampering with, or rendering inaccurate a monitoring device or method required to be maintained by the Clean Water Act in violation of 33 U.S.C. § 1319(c)(4). This prosecution pertains to the Wastewater Treatment Plant (WWTP) at 3100 South Lewis Boulevard in Sioux City, Iowa. (PSIR ¶ 14) That plant was constructed in 1961 (Id). The plant had been managed since 2004 by American Water Services, Inc. ("American Water"). (PSIR ¶ 37)

The National Pollutant Discharge Elimination System ("NPDES") governs the discharge of pollutants into waters of the United States. (PSIR ¶ 7) The treatment plants are required to test the effluent (water discharged into the river) from March 15th through November 15th of each calendar year (the "disinfection season") (PSIR ¶ 21-22) for "fecal coliform".[1] There are many different technologies by which a treatment plant may disinfect its wastewater, and in the 2000's the City of Sioux City converted the plant from a gas chlorine disinfection system to a liquid chlorine disinfection system. (PSIR ¶ 25)

In June, 2015, the employment of both Schwarte and Niday was terminated by the City of Sioux City (PSIR ¶ 77) after it was discovered that the amount of chlorine being applied to the effluent was increased immediately before testing so that the water

[1] From November 16th through March 14th this effluent is untreated.

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treatment plant would pass the test, and then the chlorine levels were turned back to minimal levels. (PSIR ¶ 55-57).

Mr. Schwarte's and Mr. Niday's stipulation of facts in their plea bargains are virtually identical. (Doc. 10 for Niday). As noted in the PSIR (¶ 41), Schwarte was a thirty-year veteran employee at the plant and he possessed a grade II wastewater certification and possessed extensive training and experience in municipal wastewater management. That same paragraph states that "On January 3, 2011, the city assumed operation of the WWTP from American Water. The City hired the defendant and Patrick Schwarte, two American Water employees, as the WWTP's Superintendent and Shift Supervisor, respectively." Mr. Niday objected to this paragraph because it implied that the two of them started working at the WWTP at the same time. In fact, Schwarte had been there for several years before Niday began working at the plant. (2015 employment termination minus 30 years = about 1985 would have been when Schwarte started there.) Mr. Niday started work at the WWTP (then operated by American Water) in August of 2009. (PSIR ¶ 116).

At Mr. Schwarte's sentencing it was unsuccessfully argued by the government that Schwarte should receive an upward adjustment for aggravating role in the offense under USSG § 3B1.1 or for abuse of a position of public trust/use of a special skill pursuant to USSG § 3B1.3. Schwarte argued that Niday was the only other "participant" in the instant offense, and so he did not act as a "leader or organizer" for the purpose of his role in the criminal offense. Jay Niday told the government in his proffer that he was guilty of these charges because he found out that Pat Schwarte was monkeying with the chlorine

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levels and instead of firing him or reporting him he told him to quit doing it, and then he did not follow up and make sure that the fraudulent testing ceased but instead looked the other way. With regard to the five "first-shift" operators acting at the direction of defendant and Schwarte (Doc. 10 p. 10 "U") Mr. Niday believes the government will concede that these workers, who would have been operating the controls, were instructed by Schwarte—not Niday. Furthermore, that particular paragraph of the plea agreement (¶ U of Doc. 10), which contained 89 initialed paragraphs on 25 pages, is stressed by the presentence author as the reason for an upward role for Mr. Niday. (PSIR ¶ 86). That paragraph states:

> "U. No later than July 2012, defendant and Schwarte—and at least five first-shift operators acting at the direction of defendant and Schwarte—tampered with the monitoring methods at the WWTP in order to ensure the WWTP would pass all of its tests. The City did not report any exceedances of its 2006 Permit limits after July 2012."

Mr. Niday does not deny he initialed that paragraph but he consistently told the government that he did not learn that Schwarte was turning the chlorine down until about 2014.

II. WITNESSES AND EXHIBITS:

The defendant does not anticipate calling any witnesses at the sentencing hearing.

Mr. Niday anticipates offering the following character letters and court documents and news articles pertaining to cases the defense believes are similar to this case for sentencing:

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Exhibit 101: Letter from Kennedy Candor.

Exhibit 102: Letter from Doug Rainforth.

Exhibit 103: Letter from James Bane, P.E..

Exhibit 104: Letter from Jay Whalen.

Exhibit 105: Letter from Robin Niday.

Exhibit 106: Information, guilty plea, and judgment in US v. Wolf (CR14-4091).

Exhibit 107: Sioux City Journal article (10/05/2020) about Thomas Miller.

Exhibit 108: Sioux City Journal article (2/14/2021) about Calvin Diehl.

III. ISSUES:

1. Mr. Niday should not receive an upward adjustment either for his role in the offense or because of an abuse of public trust.

Jay Niday was not the organizer or leader of this criminal activity. He was not Schwarte's "leader or organizer". He was the plant superintendent. As such, he was Schwarte's superior but the guideline speaks in terms of being the organizer or leader of a criminal activity. Schwarte had been working at the plant for years before Niday worked there. The government bears the burden of proving by a preponderance of the evidence that the aggravating role enhancement is warranted. *United States v. Garcia*, 703 F.3d 471, 475 (8th Cir. 2013) (*citing United States v. Gaines*, 639 F.3d 423, 427 (8th Cir. 2011). Mr. Niday denies that he started this ball rolling. The five "first-shift" operators were acting upon Schwarte's direction—not his. Furthermore, there is a lack of evidence that any other worker besides Schwarte and Niday were criminally responsible for the

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