No. 15-1713

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM SMITH,
Petitioner,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent,

and

DUKE ENERGY CAROLINAS, LLC;
ATLANTIC GROUP, INC., d/b/a DZ ATLANTIC,
Respondent-Intervenors.

METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION and GOVERNMENT ACCOUNTABILITY PROJECT,
Amici Supporting Petitioner.

On Petition for Review from a Final Decision and Order of the
United States Department of Labor's Administrative Review Board
ARB Case No. 14-027; ALJ Case No. 2009-ERA-007

FINAL FORM BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor
Fair Labor Standards Division

WILLIAM C. LESSER
Deputy Associate Solicitor

RACHEL GOLDBERG
Acting Counsel for Whistleblower Programs

ANN CAPPS WEBB
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W. N-2716
Washington, D.C. 20210
(202) 693-5797

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STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA" or "Act"), 42 U.S.C. 5851, and the regulations implementing the Act, 29 C.F.R. Part 24.[1] The Secretary of Labor ("Secretary") had subject matter jurisdiction over this case based on a whistleblower complaint filed with the Occupational Safety and Health Administration ("OSHA") by William Smith against Atlantic Group, Inc. d/b/a/ DZ Atlantic ("DZA") and Duke Energy Carolinas, LLC ("Duke") pursuant to 42 U.S.C. 5851(b).[2]

On February 25, 2015, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order affirming the decision of the Administrative Law Judge ("ALJ") dismissing Smith's complaint. Smith filed a petition with the Board for *en banc* review, which the Board denied on May 6, 2015. Smith filed a timely Petition for Review with this Court on June

[1] The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in cases arising under the employee protection provision of the ERA. *See* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (Oct. 19, 2012), 77 Fed. Reg. 69,378, 2012 WL 5561513 (Nov. 16, 2012); *see also* 29 C.F.R. 24.110.

[2] In this brief, DZA and Duke are referred to collectively as Intervenors.

26, 2015. Under 42 U.S.C. 5851(c)(1), because the alleged violation occurred in South Carolina, this Court has jurisdiction to review the Board's Final Decision.

STATEMENT OF THE ISSUE

Whether the Board reasonably concluded that the ALJ's analysis was consistent with the Board's precedent, and substantial evidence supports the ALJ's decision, as affirmed by the Board, that Intervenors showed by clear and convincing evidence that they would have terminated Smith's employment at the nuclear facility absent Smith's protected activity.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The ERA generally protects employees who report nuclear safety-related violations to an employer or the Federal government. The ERA provides that covered employers (including contractors and subcontractors) must not "discharge . . . or otherwise discriminate against any employee . . . because [*inter alia*] the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.)" or filed or caused to be commenced an enforcement proceeding under those laws. 42 U.S.C. 5851(a)(1)(A).

On July 7, 2008, Smith filed a complaint with OSHA alleging that Duke and DZA terminated his employment in violation of the ERA after he reported that his

co-workers had falsified records of firewatch rounds. July 7, 2008 Compl., RXD 1, CL #13, JA 361.[3] OSHA conducted an investigation and on March 26, 2009, issued findings dismissing Smith's complaint. Secretary's Findings, CL #63, JA 12. On April 27, 2009, Smith requested a hearing before an ALJ. Smith's Objections and Request for Hearing, CL #62, JA 16. ALJ Richard Stansell-Gamm held a hearing in Charlotte, North Carolina, on December 1–4, 2009. Tr. of Dec. 1–4, 2009 Hearing, CL #19–22, JA 22–199a. The ALJ issued a Decision and Order denying the complaint on September 29, 2010. *Smith v. Duke Energy Carolinas, LLC, et al.*, ALJ No. 2009-ERA-007 (ALJ Sept. 29, 2010) ("ALJ1"), CL #11, JA 393. Smith filed a timely Petition for Review with the ARB on October 12, 2010. CL #96, JA 525.

On June 20, 2012, the Board issued a Decision and Order of Remand reversing the ALJ's ruling on causation and remanding to the ALJ for further findings. *Smith*, ARB No. 11-003, 2012 WL 2588595 (ARB June 20, 2012) ("ARB1"), CL #10, JA 533. On January 15, 2014, following additional briefing, the ALJ issued a Decision and Order on Remand dismissing the complaint. ALJ

[3] References to the documents in the Certified List of the record filed with this Court by the ARB are indicated by the abbreviation "CL #" followed by document number. "JA" refers to the deferred Joint Appendix. "Tr." refers to the transcript of the December 1–4, 2009 hearing before the ALJ, included in the certified list at CL #19–22. Complainant's hearing exhibits are referred to as "CX," Duke's exhibits are referred to as "RXD," and DZA's exhibits are referred to as "RXZ."

No. 2009-ERA-007 (ALJ Jan. 15, 2014) ("ALJ2"), CL #1, JA 544. Smith again petitioned for review with the ARB and the Board issued its Final Decision and Order on February 25, 2015. ARB No. 14-027, 2015 WL 1399692 (ARB Feb. 25, 2015) ("ARB2"), CL #69, JA 639. On May 6, 2015, the Board denied Smith's Petition for Review En Banc. Order Denying Pet. for En Banc Review, CL #65, JA 661. Smith then filed a timely Petition for Review of the Board's decision with this Court.

B. Statement of Facts[4]

1. Safety regulations at Catawba Nuclear Station

Duke, a co-owner of the Catawba Nuclear Station ("Catawba"), is licensed by the Nuclear Regulatory Commission ("NRC") to operate the nuclear power plant. ALJ2 at 9, JA 552. The NRC's regulations at 10 C.F.R. 50.48 and 10 C.F.R. 50.9(a) require that Duke establish a fire protection program, and that all information Duke maintains pursuant to the regulations "shall be complete and accurate in all aspects." *Id.* The NRC also prohibits employees or contractors of a licensee from engaging in "deliberate misconduct," which includes any activity that would result in the licensee being in violation of an NRC requirement, including "deliberately submit[ting] to a licensee information 'that the person

[4] The Statement of Facts is based on the Findings of Fact as stated by the ALJ in ALJ1 and ALJ2 (JA 393, 544) and in ARB2 (JA 639) affirming the ALJ's decision on remand.

submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.'" *Id.* (quoting 10 C.F.R. 50.5(a)(1)–(2)).

In accordance with the NRC's requirements, Duke published a Nuclear Safety Directive ("NSD") establishing worker safety requirements. ARB2 at 3, JA 641; NSD-316, RXD 19, CL #13, JA 375. Section 316 of the NSD requires firewatch personnel to conduct hourly inspections to identify fire or smoke. ARB2 at 3, JA 641; NSD-316, RXD 19 at DUKE446, JA 383. NSD-316 also requires firewatchers to complete a Fire Watch Surveillance Log Sheet that is subject to NRC inspection. ARB2 at 3–4, JA 641–42. The NSD-316 log form must be completed by "the person currently responsible for the fire watch tours," *id.* at 4, JA 642; NSD-316, RXD 19 at DUKE452, JA 389, and the form provides that "[t]he time that is logged on the Fire Watch Surveillance Log Sheet is to be the time when that inspection is completed." NSD-316 App'x A, RXD 20, JA 391; ALJ1 at 95, JA 487.

DZA is a contractor to Duke that provided staff to be firewatchers at Catawba. ALJ2 at 9, JA 552. DZA's firewatchers at Catawba were subject to DZA management and were directly supervised by Duke managers. *Id.* NRC and Nuclear Energy Institute ("NEI") regulations require that licensees determine the trustworthiness of personnel, including firewatchers, who must have unescorted access authorization in the industry-wide database. *Id.* at 10, JA 553. DZA's

Safety Manual and Handbook requires workers to comply with the safety regulations at their worksite, to "bring to [the company's] attention any nuclear safety concerns," and to "immediately" report unsafe situations. ARB2 at 4, JA 642 (citing DZA Handbook, RXZ B1 at SMITH46, CL #18, JA 245). The DZA Manual establishes a progressive disciplinary policy ranging from verbal warnings to termination, but the progressive steps are not mandatory. ALJ2 at 9, JA 552; RXZ B1 at SMITH7–SMITH8, JA 206–07.

2. Chronology of events

In February 2007, DZA hired Smith to work as a firewatcher at Duke's Catawba facility. ARB2 at 4, JA 642. Duke granted Smith unescorted access to all areas of the facility to perform the firewatch duties. *Id.* Smith's night shift firewatch partner was Cathy Reid, and the day shift firewatchers were Jeffrey Pence and Chris Borders. *Id.* The firewatchers were directly supervised by a group of five Duke managers titled Single Points of Contact ("SPOCs") that included Claude Mabry and David Hord. *Id.* When Smith started at Catawba, Duke's Maintenance Job Sponsor, Tommy Withers, trained Smith and other new employees on the job responsibilities and the nuclear safety policies. ALJ2 at 10, JA 553. Withers informed Smith that the firewatch log should be filled out when the inspection is completed, and any concerns should be raised to a supervisor. *Id.* In January 2008, Hord informed the Catawba firewatch crew that the NRC took

enforcement action at the San Onofre nuclear station because of falsified firewatch logs, and emphasized that the firewatchers were expected to follow recordkeeping procedures. *Id.* at 12, JA 555.

On February 12, 2008, Smith arrived an hour and fifteen minutes early for his night shift and went to the firewatch work room, where he noticed that Borders appeared to have left before the end of her day shift. ALJ2 at 12, JA 555. Smith looked at the firewatch log, and saw that Borders had signed for rounds at the end of the day shift. *Id.* When Pence, who was finishing the day shift, returned to the work room, Smith asked about the discrepancy in the log, and Pence responded that he was doing Borders a favor by completing the rounds that she pre-signed so that she could leave early. *Id.* at 13, JA 556. Smith told Pence that the firewatch log needed to be corrected to show that Pence actually completed the rounds, and that Smith would have to report it if it were not corrected. *Id.* Pence responded that he would correct the log; however, he never corrected Borders' pre-signed signatures. *Id.* Smith signed that same log sheet (below Borders' signatures) for his own rounds during the night shift, but he did not report the inaccuracy. *Id.*; ARB2 at 5, JA 643. Smith also worked on February 14 and 15, 2008. ALJ2 at 13, JA 556.

Six days later, on February 18, 2008, Borders told Reid that she was angry with Smith because she believed Smith spread rumors about her personal life and

reported her to Withers for lying on her timesheet. ALJ2 at 14, JA 557. That morning, Borders lodged a sexual harassment complaint against Smith with Duke manager Mabry, who reported the complaint to Duke and DZA managers. *Id.* When Smith arrived for the night shift that evening, Reid told him about Borders' comments. *Id.* During that shift, Smith looked back at the February 12, 2008 log and saw that Borders' signature was still entered for the firewatch round that Pence performed. *Id.*

On February 19, 2008, DZA managers Larry Ray and Ellen Simmons interviewed Smith about Borders' harassment accusation. ALJ2 at 15, JA 558. Smith denied the accusation, and when asked why he thought Borders would file a false complaint, Smith stated that Borders believed he was aware of an affair she was having and her falsification of time sheets. *Id.* Smith also stated that he had information about falsification of documents and time sheets, including that Borders had signed a document for a time she was not in the facility. *Id.* Following additional interviews, Simmons concluded that she did not have sufficient evidence to prove or disprove Borders' harassment complaint. *Id.* That same day, Smith told Duke manager Hord that on February 12, 2008, Borders had signed the firewatch log for rounds conducted when she was not on-site. ALJ2 at 5, JA 548. Hord reported the log falsification issue to his supervisor, Danny

O'Brien, and Duke also informed Ray that a DZA employee had reported an inaccurate firewatch log. *Id.*

On February 20, 2008, O'Brien oversaw Duke's investigation of the firewatch logs, which revealed that Borders had left the facility prior to rounds for which she had signed, and that Pence had pre-signed for a round that same day. ALJ2 at 16, JA 559. Pending the investigation, Duke suspended all four of the firewatchers and their access badges. *Id.* DZA project manager Michael Henline assisted Ray with DZA's investigation of the firewatch log falsification. *Id.* Through their investigation, Henline and Ray also concluded that Borders falsified her time sheet and the firewatch log on February 12, that Pence covered up Borders' actions, and that Smith knew of the inaccuracies and delayed reporting them. *Id.*

On February 21, 2008, DZA's Henline and Ray, and Duke's O'Brien and another Duke manager interviewed Smith and the other firewatchers to give each an opportunity to explain him or herself. ALJ2 at 17, JA 560. In a "tense" meeting, Smith was asked why he delayed reporting Borders' falsification and he responded that "he didn't think of it at the time" and that he reported it on February 19 because the discrepancy "had begun to bother him" and he wanted to report it by the end of the month. *Id.* Henline determined that "Smith's inaction and failure to report the falsification issue for seven days and only when presented with the

sexual harassment charge indicated" that Smith purposefully chose not to promptly report the falsification. *Id.* at 27, JA 570. Henline had "serious doubts about whether absent Ms. Borders' allegation" Smith would have informed his Duke supervisors of the firewatch log falsification. ARB2 at 5, JA 643. At the conclusion of the meeting, Henline told Smith that his employment with DZA was unfavorably terminated because his failure to timely report the firewatch log falsification was an integrity and trustworthiness problem. ALJ2 at 17, JA 560. DZA initially indicated that Smith was not eligible for rehire, although this designation was later changed to permit rehire for a limited set of job positions. *Id.* at 18, JA 561.

Henline also decided to terminate DZA's employment of Borders and Pence because of their issues with integrity and trustworthiness. ALJ2 at 17, JA 560. During their interviews, Borders admitted to the falsifications, and Pence told Henline that he believed that conducting the firewatch round was more important than who signed for the round, but that he knew he should have corrected Borders' pre-signed entries. *Id.* Pence was deemed eligible for rehire by DZA, and when Pence later asked Henline to reconsider his termination, Henline unsuccessfully attempted to help Pence find work. *Id.* at 18, JA 561; Pence Termination Form, RXZ C20, CL #18, JA 252,

After the February 21, 2008 interviews, O'Brien informed DZA's Henline and Ray that Duke was terminating the employment of Borders and Pence at Catawba because they created and failed to correct inaccurate firewatch records, and also terminating Smith's employment at Catawba because he failed to report his discovery of the inaccuracies. ALJ2 at 16, JA 559; ALJ1 at 16, JA 408. Because of the basis for the terminations, Duke subsequently determined that Smith, Pence, and Borders were not sufficiently trustworthy or reliable to have authorization for unescorted access in Duke's industry-wide database. ALJ2 at 19, JA 562. Reid was also released from employment by Duke and DZA at Catawba but was immediately reassigned because she was found to have no involvement in the February 12, 2008 log falsification. *Id.* at 17, JA 560.

3. NRC Notice of Violation

In September 2009, the NRC investigated a report of the firewatch log discrepancy at Catawba, and issued Duke a Notice of Violation. ARB2 at 6, JA 644. The NRC concluded that Duke violated 10 C.F.R. 50.9(a), which requires that all information maintained by licensees pursuant to NRC regulations "shall be complete and accurate in all material respects." *Id.* The NRC further concluded that even though the investigation did not show any missed firewatch rounds, "the issue is considered more than minor due to the willful aspects of the performance

deficiency." *Id.* (quoting Sept. 25, 2009 Notice of Violation, CX 51 at SMITH837, JA 332).

C. ALJ and Board Decisions

1. ALJ's September 29, 2010 Decision and Order (ALJ1)

Following a hearing, the ALJ issued a decision and order denying Smith's complaint. ALJ1 at 131, JA 523. The ALJ found that Smith engaged in protected activity under the ERA on four occasions: (1) when he told Pence to correct the signatures on the firewatch log on February 12, 2008, (2) when he informed Hord of Borders' firewatch log falsification on February 19, 2008, (3) when he filed his ERA complaint with OSHA, and (4) when he participated in the NRC investigation. *Id.* at 114–16, JA 506–508. The ALJ further concluded that Smith undisputedly experienced adverse personnel actions when his employment was terminated by Duke on February 20, 2008, and by DZA on February 21, 2008, and subsequently when he was denied unescorted access authorization and was not rehired by DZA. *Id.* at 113, JA 505. The ALJ dismissed Smith's complaint, however, because he determined that Smith's protected activity was not a contributing factor to the termination of Smith's employment by Duke and DZA

and that the basis for his termination—failure to promptly report the February 12 log falsification—was not pretext. *Id.* at 121, 127, JA 513, 519.[5]

2. ARB's June 20, 2012 Decision (ARB1)

On review of the ALJ's initial decision and order, the Board reversed the ALJ, concluding that Smith's protected activity was a "contributing factor" in the adverse personnel actions because the Board found that Smith's protected report was "inextricably intertwined" with the investigation that led to the termination of his employment. ARB1 at 7, JA 539. Thus, the Board concluded that the burden then shifted to Duke and DZA to demonstrate by clear and convincing evidence that they would have taken the same personnel action absent the protected activity, and remanded to the ALJ to make findings on the Intervenors' affirmative defense. *Id.* at 8, JA 540.

3. ALJ's January 15, 2014 Decision on Remand (ALJ2)

On remand, the ALJ concluded that Duke and DZA proved by clear and convincing evidence that they would have taken the same personnel actions absent Smith's protected activities, and dismissed Smith's complaint. ALJ2 at 37, JA 580. The ALJ primarily considered the three factors set out in *Carr v. Social*

[5] The ALJ also denied Intervenors' claim that Smith engaged in "deliberate misconduct" under section 211(g) of the ERA, 42 U.S.C. 5851(g), which precludes protection under the ERA if an employee deliberately violates the ERA or the Atomic Energy Act not at the employer's direction. ALJ1 at 128–30, JA 520–22.

Security Administration, 185 F.3d 1318 (Fed. Cir. 1999), a case interpreting analogous language under the Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. 1201 *et seq.*, to evaluate whether Intervenors met the "clear and convincing evidence" standard for their affirmative defense: (1) the strength of the evidence supporting the employer's personnel action; (2) the employer's motive to retaliate; and (3) the treatment of similarly situated non-whistleblowing employees. ALJ2 at 24–30, JA 567–73; *see Carr*, 185 F.3d at 1323.

Regarding the first factor, strength of the evidence supporting Intervenors' defense, the ALJ first noted that the NRC regulations for licensees (such as Duke and its subcontractor DZA) require that the NSD-316 firewatch log sheets indicate the time when the inspection is completed, and that the information maintained under the NRC regulations "be complete and accurate in all respects." ALJ2 at 25, JA 568; NSD-316, RXD 19, JA 375; 10 C.F.R. 50.9. The ALJ found that Withers told the firewatchers to record their inspections upon completion, and that Hord explained the enforcement consequences experienced by Duke at its San Onofre plant for not following proper firewatch procedures. ALJ2 at 25–26, JA 568–69. The ALJ concluded that the evidence indicated Smith's seven-day delay in reporting Borders' and Pence's falsification of the firewatch log was a serious matter because it implicated Duke's licensing requirements. *Id.* at 26, JA 569.

The ALJ also noted that the NRC regulations require Duke to ensure that firewatchers have unescorted access to the nuclear facility, and credited the testimony of O'Brien and Peter Fowler (Duke Access Service Manager) indicating that nuclear industry employees must be fundamentally trustworthy and reliable. ALJ2 at 26, JA 569. The ALJ credited O'Brien's and Fowler's testimony that they concluded Smith's delay in reporting the firewatch log falsification, and the circumstances indicating Smith only made the report because of Borders' harassment complaint, showed Smith lacked sufficient trustworthiness and reliability. *Id.* The ALJ found that the evidence substantiated O'Brien's conclusions because Smith's confrontation of Pence on February 12, 2008, showed that Smith understood the serious nature of the log falsification. *Id.* Moreover, the ALJ found that Smith had numerous opportunities to verify that the log had not been corrected, and to report the incorrect log, but he did not do so until after he was confronted with the harassment allegations on February 19, 2008. *Id.* at 26–27, JA 569–70. Based on this evidence, the ALJ concluded that Duke showed "exceptionally strong evidence" supporting O'Brien's determination that Smith's employment should be terminated because he lacked the reliability and trustworthiness required for the job. *Id.* at 27, JA 570.

Similarly, the ALJ found that the evidence supported Henline's credible testimony that he determined that Smith's "inaction and failure to report the

falsification" until confronted with a harassment charge seven days later was "contrary to [DZA's] policy," and raised doubt about whether Smith could be trusted to report violations. ALJ1 at 27, JA 419. The ALJ found that Henline's decision to terminate Smith's employment rather than apply DZA's progressive discipline policy was supported by evidence that Smith told Henline he "didn't think to report" the log falsification, even though Smith had acknowledged the importance of the violation when he threatened Pence that he would report it. *Id.* at 27–28, JA 419–20.

Regarding the second factor, motive to retaliate, the ALJ found that the record lacked evidence of a retaliatory motive on the part of the Duke and DZA supervisors. ALJ2 at 28, JA 571. The ALJ noted that the record lacked convincing circumstantial evidence of animus based on the temporal proximity of Smith's February 19, 2008 report and his termination because the investigation of Borders' fire log falsification revealed Smith's seven-day delay in reporting the violation. *Id.* The ALJ specifically credited O'Brien's testimony that his decision to end Smith's employment with Duke was not motivated by Smith's protected disclosure, but rather the lack of reliability demonstrated by Smith's delay in making the report. *Id.*

On the third factor, whether non-whistleblowers received similar treatment, the ALJ credited Henline's testimony that DZA has discharged non-whistleblowers

who presented problems with truthfulness or integrity. ALJ2 at 29, JA 572. The ALJ concluded that Henline's decision to immediately terminate the employment of Pence and Borders for falsifying the firewatch log indicates he treated similar issues of integrity with the same personnel action. *Id.* The ALJ recognized that Pence received somewhat differing treatment in that he was initially deemed eligible for rehire and, when Pence asked for help, Henline unsuccessfully attempted to assist him in finding a new position. *Id.* However, the ALJ credited Henline's testimony that he viewed Pence's explanation for his error as more reasonable than Smith's statement that he didn't think to report the falsification at the time he learned of it or in the subsequent days, and that Smith did not ask for help. *Id.*

Regarding Duke's comparator evidence, the ALJ found the record inconclusive. Specifically, the ALJ noted that Duke admitted that no other employee's position had been terminated "for failure to promptly report a violation," but the ALJ also found that this fact was not significant because the Duke supervisors testified that they were not aware of any other employees who did not promptly report a problem. ALJ2 at 29, JA 572.

In sum, the ALJ dismissed Smith's complaint because the "record provide[ed] exceptionally strong evidence" establishing clear and convincing proof that Intervenors would have taken the same adverse personnel actions if they had

learned of Smith's late reporting of the firewatch log falsification "through some means other than the contents of his protected activities." ALJ2 at 30, JA 573.[6]

4. ARB's February 25, 2015 Final Decision and Order (ARB2)[7]

The only issue on review before the ARB was "whether substantial evidence support[ed] the ALJ's determination that [Intervenors]" had "demonstrate[ed] by clear and convincing evidence that they would have taken the same adverse action in the absence of any protected activity." ARB2 at 8 (citing 29 C.F.R. 24.109(b)(1)) (internal quotation marks and alteration in original omitted), JA 646. Reviewing the ALJ's legal conclusions *de novo* and factual findings for substantial evidence, the ARB affirmed the ALJ's findings and dismissal of Smith's complaint. *Id.* at 8, 11, JA 646, 649; *see* 29 C.F.R. 24.110(b); 5 U.S.C. 557(b).

The ARB considered Intervenors' affirmative defense through the lens of the Board's April 25, 2014 decision under the ERA in *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014), which was issued three months after the ALJ's January 25, 2014 decision in this case, and therefore presented new applicable ARB precedent. ARB2 at 8, JA 646. The

[6] The ALJ also made alternative findings on remedies in the event that the ARB did not affirm his dismissal of the complaint. ALJ2 at 30–36, JA 573–579.

[7] A panel of three administrative appeals judges reviewed the ALJ's decision. One administrative appeals judge drafted the majority decision to which a second judge added a concurrence, and a third judge dissented from the majority decision. ARB2 at 1, JA 639.

Board explained that *Speegle* articulated three questions to be considered "flexibly on a case by case basis" when analyzing whether a respondent's "same-action" defense meets the "clear and convincing evidence" standard under the ERA: "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity." *Id.* at 8–9, JA 646–47 (quoting *Speegle*, 2014 WL 1758321, at *7). In a concurring opinion, Administrative Appeals Judge Corchado explained that *Speegle* did not introduce an entirely new standard, but rather clarified the terms of the ERA's affirmative defense clause. *Id.* at 12 (Corchado, J., concurring), JA 650. The Board recognized that the ALJ applied the factors from the Federal Circuit's decision in *Carr*, and, noting that the *Carr* and *Speegle* analyses are similar, concluded that the same evidence supporting the ALJ's ruling supported the dismissal of the complaint under *Speegle*. *Id.* at 9 n.2, JA 647.

The Board first reviewed the evidence that under Duke's NSD-316, established pursuant to NRC regulations, the firewatchers were required to maintain accurate records and firewatch logs were to be filled out by the person responsible for that firewatch tour. ARB2 at 9, JA 647. Moreover, the Board noted that DZA required employees to promptly report safety matters to

supervisors, and that failure to comply with safety manual requirements could result in discipline, including termination. *Id.* The Board emphasized that "[i]t is undisputed that Smith knew that on February 12, 2008, Borders pre-signed the firewatch log, and that Pence completed Borders' firewatch inspections so that she could leave early" and Smith did not report the discrepancy in the records until seven days later. *Id.* at 10, JA 648.

Next, the Board determined that the ALJ reasonably concluded that Duke and DZA decided to terminate Smith's employment as a firewatcher because the failure to promptly report raised concerns about his "trustworthiness, reliability, and integrity." ARB2 at 10, JA 648. The Board cited the testimony of DZA manager Henline, who decided to terminate Smith's employment after investigating the problems with the firewatch log and determining that Smith did not have a sufficient excuse for the delay to make up for the concerns about trustworthiness raised by his delayed report. *Id.* The Board also pointed to Duke manager O'Brien's testimony that he considered a discrepancy in the logs to be a serious matter, and was concerned that Smith had not raised the firewatch log issue with the SPOC supervisors. *Id.* Emphasizing that "[p]rotected activity will not shield an under-performing worker from discipline," the Board affirmed that the ALJ reasonably concluded that Smith's delay, and not the report itself, was the

basis for Henline's and O'Brien's determinations that Smith lacked sufficient trustworthiness for his position in a nuclear facility. *Id.* (citations omitted)

Finally, the Board determined that the evidence showed that "Smith was treated the same as the two other employees with whom he worked," Borders and Pence, whose employment was also terminated as a result of their involvement in the log falsification. ARB2 at 10–11, JA 648–49. And, the Board noted that the record showed DZA had previously terminated a worker who failed to report a co-worker's violation. *Id.* at 11, JA 649. The Board also noted that Pence was initially eligible for rehire, but that the ALJ had credited Henline's testimony that Pence stated he understood the importance of making sure the firewatch tour was completed, while Smith told Henline he did not think to report the log falsification at the time. *Id.* Thus, the ARB concluded that the ALJ's decision was supported by substantial evidence showing that Duke and DZA would have taken the same adverse personnel actions against Smith if they had learned of Smith's delay in reporting the firewatch log falsification through some other means. *Id.*

The concurring Administrative Appeals Judge further explained that "despite the Board's previous finding that Smith's reporting was inextricably intertwined with the unfavorable employment actions, the statutory law expressly requires the ALJ to consider a hypothetical scenario when considering the employer's affirmative defense: what [Intervenors] would have done in the

absence of Smith's reporting." ARB2 at 12–13 (Corchado, J., concurring), JA 650–51. Judge Corchado noted that the ALJ only had to hypothesize that Intervenors learned about Smith's failure to report some other way, and that the evidence showed that Intervenors took the violations seriously in the case of Smith's co-workers who did not make protected reports. *Id.*[8]

SUMMARY OF ARGUMENT

Consistent with its precedent, the ARB properly concluded that substantial evidence supported the ALJ's conclusion that, although Smith established by a preponderance of the evidence that his protected activity contributed to Intervenors' decision to terminate his employment, Intervenors proved by clear and convincing evidence that they would have terminated Smith's employment absent the protected activity. The Board, in reviewing the ALJ's decision, concluded that the ALJ properly analyzed Intervenors' affirmative defense, and that the ALJ's decision satisfied the Board's subsequent decision in *Speegle* elaborating on the Board's analysis of employers' affirmative defense under the ERA. This Court

[8] In a dissenting opinion, Administrative Appeals Judge Royce disagreed with the ALJ's factual determinations, concluding that: the ALJ should not have considered any facts closely related to Smith's protected activity; Smith's delay was insignificant because there was no failure to conduct a firewatch tour; Smith should be credited with raising the discrepancy with Pence on February 12, 2008; Borders' false accusation of harassment should be treated as retaliation for Smith's protected activity; and, termination was not a proportional response to Smith's delayed report. ARB2 at 13–20 (Royce, J., dissenting), JA 651–58.

should defer to the ARB's reasonable and consistent interpretation of the ERA and ARB precedent, and affirm the ARB's decision dismissing Smith's case because it is supported by substantial evidence in the record.

The ALJ's decision, as affirmed by the Board, found facts supported by substantial evidence in the record that address each element of the Board's *Speegle* analysis. First, substantial evidence supports the conclusion that Intervenors proved by clear and convincing evidence that employee integrity, accurate firewatch logs, and prompt reporting of safety-related matters were highly significant. As a nuclear facility licensee, Duke is required to maintain accurate firewatch records and also to evaluate firewatch employees' trustworthiness for purposes of granting unescorted access to the facility. DZA's safety handbook requires employees to immediately report safety-related matters and provides that any violation of the handbook could be grounds for termination. In this context, Duke and DZA managers credibly testified that they determined Smith displayed a lack of trustworthiness when he did not promptly report his co-workers' falsification of firewatch log entries, which he knew required correction as evidenced by his initial confrontation of Pence about the false log entries.

Second, substantial evidence supports the ALJ's finding, as affirmed by the Board, that Intervenors would have terminated Smith's employment absent his protected activities. Specifically, substantial evidence showed that termination was

a proportional response where Intervenors took seriously concerns of reliability and trustworthiness. The ALJ concluded that Henline credibly testified that his concerns about Smith's integrity were based on Smith's failure to promptly report to management the falsified firewatch records and his lack of explanation for the delay. Relatedly, the evidence shows that Intervenors treated Smith's co-workers Pence and Borders, who displayed a lack of integrity but did not make protected reports, similarly to Smith, because they were also fired due to their involvement in the firewatch log falsification. The Board properly considered Pence and Borders as similar to Smith because the same manager, in the same workplace, determined that their actions constituted a lack of integrity and fired each employee. The Board also reasonably considered Henline's testimony that another DZA employee was fired for failing to report a co-worker's safety-related violation.

Third, consistent with *Speegle* and other precedent, the ALJ and the Board properly considered a hypothetical scenario that excised Smith's protected activity by analyzing whether Intervenors would have fired Smith if they had discovered the falsified firewatch logs and Smith's seven-day delay in reporting them to management through other means. Intervenors were not required to show through what other means (or if) they would have discovered the situation. Moreover, the ALJ and the Board did not improperly consider Smith's motive for making the protected report because the fact that Smith did not elevate the log falsification

until confronted with Borders' harassment allegations was relevant only to show Smith did not otherwise intend to report the issue. The Board's decision is consistent with court of appeals decisions holding that employers proved their affirmative defense even where the adverse action was inextricably intertwined with the protected activity.

Finally, the Board's decision does not create a scenario in which employees are penalized if they report an issue too early but also penalized if they report it too late because, as this case illustrates, there is no basis to assume that an employee like Smith who was certain about the existence of safety violations would be penalized if the employee made a reasonably timely effort to report the safety violations. The Board's decision is also consistent with the Department of Labor's ("Department") guidance in the related context of reporting workplace injuries, which recognizes employers' legitimate interest in requiring prompt reporting of injuries and safety matters and recommends scrutiny of the employer's reasoning where the adverse action is taken based on the violation of injury reporting procedures.

ARGUMENT

I. STANDARD OF REVIEW

Under the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. 5851(c)(1), this Court reviews the Secretary's Final Decision and Order

(ARB2) according to the standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)(A), (E). The APA provides that the Court must affirm the agency's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2)(A). This Court reviews the ARB's conclusions of law *de novo*, "giving deference to the ARB's interpretation" of a statute that Congress has charged the Secretary with administering. *Welch v. Chao*, 536 F.3d 269, 275–76 (4th Cir. 2008) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984), in affirming the ARB's decision under the whistleblower provision of the Sarbanes-Oxley Act); *see Platone v. U.S. Dep't of Labor*, 548 F.3d 322, 326 (4th Cir. 2008) (same); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999) (granting *Chevron* deference to the ARB's reasonable construction of the ERA); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931–32 (11th Cir. 1995) (same); *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) (granting deference to the ARB's interpretation of the whistleblower provision of the Surface Transportation Assistance Act).

Further, pursuant to the APA, this Court is "compel[led] . . . to uphold the ARB's findings of fact if they are supported by substantial evidence." *Platone*, 548 F.3d at 326. Under the substantial evidence standard, a court may not displace an agency's "choice between two fairly conflicting views, even though the court

would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1364 (4th Cir. 1995). Substantial evidence is something "more than a mere scintilla of evidence but may be less than a preponderance," *Smith v. Chater*, 99 F.3d 635, 638 (4th Cir. 1996), or in other words "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" *Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

This Court therefore "accord[s] a degree of deference to the factual findings of the ALJ," recognizing that "[t]he ARB's standard for reviewing the factual findings of the ALJ is substantial evidence." *Platone*, 548 F.3d at 326 (citing 5 U.S.C. 706(2)(E)). In a substantial evidence review, this Court "do[es] not undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [the court's] judgment for that of the Secretary." *Craig*, 76 F.3d at 589 (citing *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990)); *see Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1129 (10th Cir. 2013) (explaining that when "the Board's opinion is in agreement with and based in part on the ALJ's credibility determinations, it is entitled to great deference" (citation and brackets omitted)).

II. CONSISTENT WITH ITS PRECEDENT, THE BOARD PROPERLY AFFIRMED THE ALJ'S DECISION BECAUSE THE ALJ'S ANALYSIS SATISFIED THE BOARD'S FRAMEWORK IN *SPEEGLE* FOR DETERMINING WHETHER INTERVENORS PROVED THEIR AFFIRMATIVE DEFENSE AND SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDINGS UNDER THAT FRAMEWORK

Actions under the whistleblower protection provisions of the ERA are governed by the statutory burdens of proof in 42 U.S.C. 5851(b)(3)(C) and (D) and the applicable regulations at 29 C.F.R. Part 24. To prevail on an ERA claim, a complainant must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) the employer was aware of such activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 42 U.S.C. 5851(b)(3)(C); 29 C.F.R. 24.109(b)(1). If the complainant proves that his protected activity was a contributing factor in the employer's unfavorable personnel action, the burden of proof shifts to the employer to prove "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence" of the protected activity. 42 U.S.C. 5851(b)(3)(D); 29 C.F.R. 24.109(b)(1). The only issue on appeal before the ARB was the ALJ's decision on remand (ALJ2) holding that Intervenors proved by clear and convincing evidence that they would have terminated Smith's employment absent the protected activity. ARB2 at 2, JA 640.

When the ALJ issued his January 15, 2014 decision on remand, the Board had not yet issued its April 25, 2014 decision in *Speegle v. Stone & Webster*

Construction, Inc., ARB No. 13-074, 2014 WL 1758321 (ARB Apr. 25, 2014). The ALJ considered the framework discussed in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), for analyzing whether an employer has demonstrated by clear and convincing evidence that it would have taken the same personnel action absent the protected activity under the analogous affirmative defense in the Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. 2302(b)(8); 5 U.S.C. 1221(e)(2). ALJ2 at 22, JA. Under the *Carr* framework, the ALJ analyzed: "the strength of the [employer's] evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the [employer's] officials who were involved in the decision; and any evidence that the [employer] takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr*, 185 F.3d at 1323, 1327 (affirming the Merit Systems Protection Board's decision that the [employer] would have fired Carr absent her protected disclosures under the WPA on the basis of her own misconduct) (citing *Geyer v. Dep't of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd* 116 F.3d 1497 (Fed. Cir. 1997) (Table)); ALJ2 at 22–24, JA 565–67.

Similarly, the ARB in *Speegle* articulated a set of questions to be "applied flexibly on a case-by-case basis" in analyzing the employer's affirmative defense under the ERA. *Speegle*, 2014 WL 1758321, at *7. The ARB concluded that the

employer's affirmative defense should be analyzed by considering: "(1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity." *Id.*

Smith broadly argues that the Board arbitrarily and capriciously failed to apply its own precedent in *Speegle* by misapplying each part of the analysis described in that case. Page Proof Brief of Petitioner ("Pet'r Br.") 15. As explained in detail below, Smith's argument fails because the ALJ's conclusions, as affirmed by the Board, were based on an analysis of the *Carr* factors that also fully satisfy the Board's *Speegle* framework, and substantial evidence in the record supports the ALJ's factual findings.

As an initial matter, it bears noting that Smith acknowledges what Administrative Appeals Judge Corchado pointed out in his concurrence in this case: *Speegle* "did not introduce a new standard"; rather it clarified the Board's interpretation of the employer's affirmative defense under the ERA. Pet'r Br. 15, n.1 (quoting ARB2 at 12–13 (Corchado, J., concurring), JA 650–51). This is consistent with the Board's explanation that, "[w]hile *Speegle* applies in [the Board's] review, the analysis set out in *Speegle* is not unlike that set out in *Carr*, and the evidence supporting the ALJ's ruling on [Intervenor's] affirmative defense

is correct even applying the *Speegle* analysis." ARB2 at 9, n.2, JA 647.[9] Moreover, the Board noted that the ALJ understood that the ERA's statutory text required Intervenors to prove what they "would have done" in the "absence of" the protected activity by the high "clear and convincing" standard. *Id.* at 12–13 (Corchado, J., concurring), JA 650–51. By recognizing that the ALJ's application of the *Carr* factors in this case involved an inquiry similar to the Board's *Speegle* analysis, the Board correctly concluded that, because the ALJ's decision was supported by substantial evidence, the *Speegle* test was also satisfied. *Id.* at 9, n.2, JA 647.

As discussed above, this Court should grant *Chevron* deference to the Board's reasonable interpretation of the ERA and its own precedent. *See*, *e.g.*, *Platone,* 548 F.3d at 326 (deferring under the Sarbanes-Oxley Act); *Trimmer*, 174 F.3d at 1102 (granting *Chevron* deference to the Secretary's interpretation of the ERA); *Bechtel Constr. Co.*, 50 F.3d at 931–32 (same). Where, as here, the ARB has affirmed the ALJ's factual findings in an ERA case, in part based on the ALJ's credibility determinations, the Board's opinion is especially "entitled to great deference." *See Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 357 (8th Cir. 1996) (internal quotation marks and citation omitted); *cf. Stone & Webster Constr., Inc. v.*

[9] Smith misconstrues the Board's footnote as suggesting that *Speegle* did not apply to the Board's decision, Pet'r Br. 19, n.4, but that interpretation directly conflicts with the Board's plain statement in ARB2, footnote 2.

U.S. Dep't of Labor, 684 F.3d 1127, 1132 (11th Cir. 2012) (noting increased scrutiny where the ARB does not affirm the ALJ).

A. Substantial Evidence Supports the ALJ's Conclusion, as Affirmed by the Board, that Intervenors Proved by Clear and Convincing Evidence that They Considered Employee Integrity, Accurate Firewatch Logs, and Prompt Reporting of Safety-Related Issues to be Highly Significant

The first inquiry that the ARB identified in *Speegle* as relevant to consider when evaluating whether an employer has met its affirmative defense is the degree to which the independent significance of the non-protected activity is clear and convincing. 2014 WL 1758321, at *7. Here, substantial evidence supports the ALJ's conclusion, as affirmed by the Board, that Smith's non-protected activity, i.e., his delay in reporting the firewatch log falsification, was particularly significant. Specifically, substantial evidence in the record shows that Intervenors proved clearly and convincingly that accurate firewatch logs were a regulatory requirement, prompt reporting of safety-related issues was required and highly significant, and employee integrity was requisite for the job of firewatcher. Smith asserts that the ARB "misapplied" the first of the *Speegle* factors by "adopting justifications for Intervenors' adverse actions that are contrary to the record." Pet'r Br. 18–19. The ALJ, however, fully analyzed the evidence indicating the importance of the firewatch log and the "magnitude and seriousness" of Smith's failure to promptly report the falsified log. ALJ2 at 26, JA 569. The ALJ's conclusions, although made in the context of considering the strength of the

employer's evidence generally in the *Carr* framework, were properly affirmed by the ARB because they fully address the inquiry articulated in the first *Speegle* factor. ARB2 at 9 n.2, JA 647.

As a preliminary matter, the NRC regulations requiring Duke to maintain accurate and contemporaneous firewatch records as an NRC licensee showed the significance of accurate records. ALJ2 at 25, JA 568. In addition, the ALJ found that the "record definitively demonstrates Duke Energy's significant concern for NRC compliance regarding the fire watch tours," because Withers had trained the firewatchers to log inspections when completed, Hord had specially informed the firewatchers about the NRC's enforcement action at San Onofre involving falsified firewatch records, and immediately upon learning of Borders' alleged falsification, Duke carried out a full investigation and corrective action. *Id.* at 25–26, JA 568–69; *see* Withers Dep. CX 23 at 33:3–22, CL #15, JA 273; Hord Dep. CX 24 at 82:14–24, CL #15, JA 256. The ALJ also found that the firewatch log form (NSD-316) instructed employees that "[t]he time that is logged on the Fire Watch Surveillance Log Sheet is to be the time when that surveillance is completed," NSD-316 App'x A, RXD 20, JA 391, and employees were instructed to correct any errors by crossing through the error and initialing next to the correction. ALJ2 at 10, 25, JA 553, 568. Each of the facts found by the ALJ demonstrates the

independent significance of a delay in a safety-related report by a worker in a Duke nuclear facility.

Evidence in the record also indicates that DZA considered prompt reporting of safety-related matters to a supervisor to be important. The ALJ noted that DZA's Safety Manual and Handbook required workers to comply with all safety regulations at the worksite, ALJ1 at 71, JA 463, and the ARB further noted that DZA's handbook required employees to "report [unsafe acts or work conditions] to your supervisor immediately," and stated that "[a]ny violation of the . . . rules may be grounds for termination," ARB2 at 4, JA 642 (quoting RXZ B1 at SMITH4, SMITH44, JA 203, 243).

Furthermore, substantial evidence supports the ALJ's finding that Duke's Fowler credibly testified that trustworthiness is a requisite character trait for employees in the nuclear industry, and O'Brien decided to remove Smith from firewatch duty because Smith demonstrated he was unreliable by not reporting the falsified records to management in a timely manner. ALJ2 at 26, JA 569; Tr. 169:12–170:12, 745–747:17, JA 66–67, 140–42.[10] Moreover, the ALJ found that

[10] Following the filing of the deferred Joint Appendix, undersigned counsel determined that Smith's counsel used copies of the Dec. 1, 3, and 4, 2009 hearing transcripts with different pagination from the transcript cited by the ARB and the Secretary. For the Court's convenience, the citations to the transcript in this final brief have been revised to conform with the pagination on the transcript excerpts in the JA. Where the ARB's citations to the hearing transcript are referenced, the JA

the NRC and NEI required firewatchers to have unescorted access to the facility, and required Duke to evaluate the trustworthiness and reliability of each worker granted that access. ALJ2 at 25, JA 568; Tr. 780:3–20, JA 145. Similarly, the ALJ found that DZA manager Henline credibly testified that he had serious concerns about Smith's trustworthiness because Smith waited seven days to elevate the information about the falsified log to management. ALJ2 at 27, JA 570; Tr. 109:8–12, 929:5–930:16, JA 38, 170–71. While the ALJ noted that both O'Brien and Henline referenced the fact that Smith did not report the falsification until confronted with the harassment allegation, as discussed below, consideration of this fact does not conflict with *Speegle* because it is significant to the extent that it shows Smith did not intend to report the log falsification, and not because of the circumstances of Borders' allegation (i.e., her frustration that she believed Smith had reported her actions to management). ALJ2 at 27; *see* Tr. 118:18–119:6, 1026:18–1027:4, JA 42–43, 199–199a.

Smith argues that the ARB and the ALJ "misconstrued" the import of the safety issues raised by the firewatch log falsification. Pet'r Br. 28–31. Smith focuses on whether there was an "imminent hazard" as a result of the falsified firewatch log when Pence had completed the firewatch tour for which Borders

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citations direct the Court to the referenced transcript page. Pursuant to FRAP 30(c)(2)(B), no other changes have been made to this brief.

signed. But as the ARB and the ALJ noted, even if Borders' falsification did not create an "imminent hazard," the NRC did find Duke to have committed a Security Level IV violation of the NRC regulation requiring accurate recordkeeping, which was a breach of Duke's license that was "of more than minor safety significance" because several employees willfully created inaccurate firewatch records. ARB2 at 6–7 (citing Sept. 25, 2009 Notice of Violation, CX 51 at SMITH837, JA 332); ALJ2 at 25–26, JA 568–69. While Smith did the right thing by initially confronting Pence about the error in the log, the ALJ noted that he had ample opportunities over several days to notice that Pence had not corrected the log, and his failure to elevate the matter during that time supports Intervenors' conclusions that he was unreliable, even if Duke did not have a specific policy requiring Smith to watch Pence correct the log. ALJ2 at 26–27, JA 569–70. Based on the evidence in the record, the ALJ, as affirmed by the Board, reasonably concluded that Intervenors viewed Smith's failure to elevate the uncorrected log entry as an indication that they could not consistently rely on him to bring important safety issues to the attention of managers. *Id.*; ARB2 at 9, 11 (Corchado, J., concurring).

Substantial evidence supports each of the facts found and weighed by the ALJ showing the serious implications and significance to Intervenors of both timely reports of safety-related issues to management and accurate firewatch records. The Board therefore properly affirmed the ALJ's conclusions because

these findings and conclusions comport with the Board's *Speegle* analysis, are fully supported by evidence in the record, and clearly and convincingly demonstrate the "independent significance" of Smith's untimely report of the firewatch log falsification.

B. Substantial Evidence Supports the ALJ's Conclusion, as Affirmed by the Board, that Intervenors Clearly and Convincingly Showed that They "Would Have" Taken the Same Action Absent Smith's Protected Activity Based on the Proportional Relationship Between the Significance of the Misconduct and the Decision to Terminate Smith's Employment and the Treatment of Similarly Situated Employees

Contrary to Smith's assertion that the Board "fail[ed] to apply the second prong of *Speegle*," Pet'r Br. 18, the ALJ's analysis, affirmed by the Board, fully considered the evidence demonstrating what action Intervenors "would have" taken absent Smith's protected activity. The Board in *Speegle* explained that employers may rely on direct or circumstantial evidence to demonstrate that they "would have" taken the same action absent the protected activity and noted that an employer's circumstantial evidence may include:

> (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.

Speegle, 2014 WL 1758321, at *7. The ALJ, as affirmed by the Board, considered several of the categories of evidence that the Board in *Speegle* suggested may be

relevant to demonstrating what the employer "would have" done, including employer policies (discussed above), the proportional relationship between the reason for the termination and the significance of the misconduct, and evidence of similarly situated employees treated the same way.[11] *See* ALJ2 at 25–29, JA 568–72; ARB2 at 9–10, JA 647–48.

1. Proportional relationship between the seriousness of the misconduct and the decision to terminate Smith's employment

Substantial evidence supports the ALJ's conclusion, as affirmed by the Board, that Intervenors proved by clear and convincing evidence that they would have fired Smith absent his protected activity, as shown by the proportional relationship between Smith's misconduct of delaying reporting the firewatch logs falsification and the termination of his employment. As discussed above, the ALJ found that Intervenors established that subject to NRC regulations, they had policies of prompt reporting of safety-related matters, and also of keeping contemporaneous firewatch logs. ALJ2 at 25–26, JA 568–69. Relatedly, the ALJ found that despite Smith's previously good work record, "the evidentiary record also demonstrate[d] the magnitude and seriousness of Mr. Smith's seven day delay

[11] The ALJ also explained that the record did not contain any probative evidence of retaliatory motive on the part of Duke or DZA, and specifically that the temporal proximity between Smith's protected report and his termination (approximately two days) "did not represent probative circumstantial evidence of impermissible retaliation for reporting Ms. Borders' falsification." ALJ2 at 28, JA 571.

in reporting the fire watch log falsification, which involved a misrepresentation about who had actually conducted the fire watch tour." *Id.* at 26, JA 569. The ALJ particularly found that O'Brien considered a falsified firewatch log to be "a serious violation of Duke Energy's licensing requirements," and that Smith's failure to come forward with the information in a timely manner raised serious concerns about his trustworthiness and reliability. *Id.*; *see* O'Brien Dep., CX 13 at 127:5–19, CL #15, JA 286. And the ALJ found that Henline's decision to terminate Smith's employment was consistent with DZA's progressive disciplinary policy because Smith's explanation for his misconduct of not promptly reporting the falsification was that he "didn't think about reporting it at the time[,]" which Henline did not consider a sufficient explanation for Smith's delay in reporting the falsification. ALJ2 at 27–28, JA 570–71; *see* Tr. 116:20–118:8, 147–148:3, 928:12–931:20, JA 41–43, 55–56, 169–72.

It is not the role of the ARB or of this Court to "'sit as a super-personnel department that reexamines an entity's business decisions . . . .'" *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 281 (7th Cir. 1995), as modified (Sept. 7, 1995) (quoting *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)). Rather, the question before the Board was "whether all the evidence taken as a whole makes it highly probable that" Intervenors would have fired Smith for failing to report the falsified firewatch log. *Speegle*, 2014 WL 1758321, at *7,

n.67 (internal quotation marks omitted). The ARB reviewed Henline's and O'Brien's testimony and properly affirmed the ALJ's finding that each of these facts supported a reasonable conclusion that Intervenors would have terminated Smith for failing to report (or making an untimely report) because it showed a lack of reliability and trustworthiness. ARB2 at 9–10, JA 647–48 (citing Tr. 145, 148, 166, 904, 923, 927–30, & 975, JA 57, 64, 155, 165, 169–72, 188).

Contrary to Smith's assertions, the evidence supporting the ALJ's finding that Intervenors found Smith unreliable is not ambiguous and satisfied the clear and convincing evidence standard. Pet'r Br. 32–34. It was undisputed, and therefore not ambiguous, that Smith did not elevate the firewatch log falsification for seven days, despite knowing that correct logs were important, as evidenced by his confrontation of Pence. ALJ2 at 27–28, JA 570–71. Further, considering the record as a whole, the ALJ and the Board found that Henline credibly testified that he recognized that Smith previously had a good work record and ultimately properly reported the firewatch log problem, but that Henline's concerns about Smith's trustworthiness stemmed from his seven-day delay in reporting the issue and lack of explanation for the delay, indicating that Smith deliberately withheld the information from his managers, and most likely would not have disclosed it unless prompted by the sexual harassment investigation. *Id.* at 27, JA 570; ARB2 at 9–10, JA 647–48 (citing Tr. 923, 927–930, 975, JA 165, 169–72, 188). And

although the ALJ found, having weighed conflicting testimony, that Smith's interview on February 21, 2008 was "tense," ALJ1 at 107 n.21, JA 499, when Smith had an opportunity to explain his seven-day delay, his response was that he did not think of reporting it at the time, ALJ2 at 17, JA 560; Tr. 976, JA 188.[12] By thoroughly considering the evidence, including that Intervenors found Smith lacked the integrity requisite for the firewatch position, the ALJ's findings, as affirmed by the Board, support the conclusion that terminating Smith's employment was a proportional response to his failure to promptly report the falsified firewatch log.

Smith attempts to cast findings on the credibility of an employer's assessment of an employee's misconduct as necessarily ambiguous and therefore not sufficient to satisfy the clear and convincing burden of proof applied by the ALJ. But this argument ignores the principle that a reviewing court "'may not decide questions of credibility,'" and is highly deferential to the ALJ's findings where they are supported by substantial evidence. *Hoffman v. Solis*, 636 F.3d 262, 271–72 (6th Cir. 2011) (quoting *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)). Under this deferential standard, this Court should affirm the

[12] Moreover, Smith's suggestion that by concluding Smith lacked reliability and trustworthiness Intervenors were labeling him "disloyal," Pet'r Br. 34, ignores the evidence that Henline was not upset that Smith reported the recordkeeping problem to Duke, and that DZA ultimately found Smith eligible for rehire. *See* Tr. 918:20–919:9, JA 159–60; Smith Termination Form, RXZ C12, CL #18, JA 251.

ALJ's findings, as affirmed by the Board, that Intervenors proved clearly and convincingly that terminating Smith's employment was proportional to their reasons for taking the adverse personnel action where Smith's behavior supported his employers' assessment that he lacked integrity.

2. Treatment of similarly situated employees

The Intervenors' treatment of similarly situated employees, as found by the ALJ and affirmed by the Board, further demonstrates that Intervenors would have fired Smith absent his protected activity. The ALJ, as affirmed by the Board, thoroughly analyzed the evidence that Smith was treated like other similarly situated employees and found it clear and convincing. ALJ2 at 29–30, JA 572–73. Smith asserts that Pence and Borders were not sufficiently similarly situated to Smith for purposes of showing similar treatment of non-whistleblowers. Pet'r Br. 35–40. However, in the Title VII context, this Court has noted that while an employee's comparator evidence should be very similar, it "need not be an exact match," *Haywood v. Locke*, 387 F. App'x 355, 359–60 (4th Cir. 2010), and key information includes having the same supervisor, being subject to the same requirements, and engaging in similar conduct. *See Nichols v. Caroline Cty. Bd. of Educ.*, No. CIV. JFM-02-3523, 2004 WL 350337, at *7 (D. Md. Feb. 23, 2004) *aff'd*, 114 F. App'x 576 (4th Cir. 2004) (finding that teachers who worked at

different schools under different managers and who were terminated on different grounds were not similarly situated).

Contrary to Smith's assertion, the ALJ and the Board did not conclude that Pence and Borders were similarly situated to Smith solely because their terminations resulted from the same underlying situation, but rather because the same manager, Henline, at the same worksite, under the same disciplinary policy, concluded that each employee displayed a lack of integrity and trustworthiness based on their respective failure to comply with expectations relating to the firewatch log, and that termination was appropriate. *See* ALJ2 at 29, JA 572. The ALJ acknowledged that the specific infractions of Borders (falsification), Pence (assisting Borders' falsification), and Smith (failing to report the falsification) were not identical, but reasonably concluded that Henline's underlying basis for terminating each employee was "integrity issues" related to reporting safety matters. *Id.*; Tr. 930:13–16, JA 171. And Smith is incorrect in asserting that Pence's different treatment after termination was not considered. Pet'r Br. 36–37. The ALJ explained that he credited Henline's testimony that Henline was willing try to help Pence find a job because he found Pence's integrity issues to be less severe given that, unlike Smith, Pence provided a more satisfactory reason for his failure to correct the log and asked for help after he was fired. ALJ2 at 29, JA 572;

see Tr. 119:7–121:4, JA 44–46. The ARB, in affirming the ALJ, therefore reasonably determined that Pence and Borders were similarly situated to Smith.

Smith also ignores that the ALJ considered Henline's testimony credible that he "consistently selects termination" from the progressive discipline policy when lack of integrity is the basis for the action. ALJ2 at 29, JA 572. Henline's testimony was supported by his consistent treatment of Borders and Pence, who were fired unfavorably for displaying a lack of integrity. *Id.*; *see* Tr. 119:18–24, 124:20–125:16, JA 44, 49–50. The Board also reasonably considered Henline's credible testimony that DZA had previously fired an employee for failing to report another employee's marijuana use at the worksite. ARB2 at 11, JA 649 (citing ALJ1 at 8, JA 400; Tr. at 103, JA 35). While the circumstances of that employee's termination were not as similar to Smith's as Pence's and Borders' were, they bolster the conclusion that DZA consistently treated the failure to report the safety-related misdeed of another employee as an integrity issue warranting termination.[13]

This Court should affirm the Board's decision because the ALJ's analysis of the evidence in the record showing that Intervenors proved by clear and convincing evidence that they "would have" fired Smith for failing to report the firewatch log

[13] The ALJ concluded that the evidence in the record was "inconclusive" regarding Duke's treatment of similarly situated non-whistleblowers because the Duke supervisors who testified were not aware of any previous situations involving an employee who did not promptly report a problem. ALJ2 at 29, JA 572.

falsification satisfies the *Speegle* analysis and is supported by substantial evidence in the record, and the ARB therefore properly affirmed the ALJ's decision. Specifically, both the evidence of the proportional relationship between Smith's misconduct in delaying his reporting of the log falsification and the decision to terminate his employment, and the evidence of Intervenors' consistent treatment of similarly situated non-whistleblowing employees support the Board's conclusion that substantial evidence showed that the Intervenors would have fired Smith absent his protected activity. Even if this Court were to find that Intervenors did not show sufficiently similar comparator evidence, it should be noted that *Speegle* does not require the employer to show this particular form of circumstantial evidence, and the record contains sufficient additional evidence to demonstrate that Intervenors would have terminated Smith's employment absent his protected activity. *See Speegle*, 2014 WL 1758321, at *7 ("The circumstantial evidence *can include, among other things* . . . evidence of other similarly situated employees . . . .") (emphasis added).

C. The ALJ, as Affirmed by the Board, Properly Considered a Hypothetical Scenario that Excluded Smith's Protected Activity

The third inquiry that the ARB identified in *Speegle* as relevant in determining whether an employer has met its affirmative defense is consideration of the facts that would have changed in the absence of the protected activity. 2014 WL 1758321, at *7. Smith asserts that the ARB "ignored its precedent in *Speegle*"

by considering facts that Smith argues are "logically related" to his protected activity, such as his seven-day delay in reporting the falsified log and his ultimately reporting the safety issue during a meeting about Borders' allegation of harassment. Pet'r Br. 19–23. As the concurring Board member in this case explained, however, all that the ERA and *Speegle* require to separate facts related to the protected activity is that the ALJ consider a hypothetical scenario, and here the ALJ satisfied that requirement by "assum[ing] only that [Intervenors] discovered the violation another way." ARB2 at 12–13 (Corchado, J., concurring), JA 650–51. Smith's argument fails, therefore, because his interpretation of "logically related" facts is overly rigid.

The facts in *Speegle* are illustrative. The whistleblower in *Speegle* raised his disagreement with a safety policy change to his supervisors repeatedly over a period of days, frustrating his supervisors. 2014 WL 1758321, at *2. Speegle then had an outburst at a group safety meeting in which he loudly cursed and rejected the new policy. *See id.* at *3. He was subsequently fired for insubordination. *Id.* The Board noted that Speegle's protected activity entirely overlapped with his insubordinate outburst, and removing the fact of Speegle's protected activities left the outburst without "context to understand what Speegle's statement meant," (i.e. that he continued to refuse to comply with the employer's policy despite previous

discussions), which diminished the ability to determine what the employer would have done absent the protected activity. *Id.* at*8.

Unlike the outburst in *Speegle* that had no context without the previous protected activities leading up to the outburst, here the delay in reporting the log falsification stands on its own. *Speegle* therefore does not require the Board or the ALJ to ignore the facts that Smith delayed reporting the falsification for seven days and that he did not report it until prompted by the employer's investigation of the harassment allegation because Smith's failure to promptly report can be separated from his protected activities of reporting the log falsification. The ALJ, as affirmed by the Board, properly considered the facts that would have changed absent the protected activity by excising the fact of Smith's protected reports and examining Intervenors' affirmative defense based on the hypothetical of what action Intervenors would have taken "if they had discovered by other means of Mr. Smith's failure to promptly report the falsification of the February 12, 2008 fire watch logs." ALJ2 at 24, JA 567. Substantial evidence supports the ALJ's conclusion that if Intervenors had learned through some means other than Smith's protected activities about the firewatch log falsification and that Smith knew about it at the time but did not report it, Intervenors would have taken the same adverse action of firing Smith.

Moreover, Smith's rigid interpretation of *Speegle* would make it all but impossible for an employer to show that it would have taken the same action absent the protected activity where the employer's basis for the adverse action and the protected activity are intertwined.[14] As Smith acknowledges, the Board in *Speegle* indicated that even where the protected activity is "inextricably intertwined" with the adverse action, the employer could still feasibly prove by clear and convincing evidence that it would have taken the same action absent the protected activity. *See* 2014 WL 1758321, at *6; Pet'r Br. 17. While the Board has recognized that Congress intended the burden on employers to be high under the ERA, the purpose of the employer's affirmative defense is to provide an opportunity for the employer to prove that the outcome would have been the same absent the protected activity.

The Board's approach is consistent with the approach that the courts of appeals have taken in related cases. For example, in *Kalil v. Department of Agriculture*, 479 F.3d 821 (Fed. Cir. 2007), an administrator of a government program engaged in protected activity under the WPA when he had an ex-parte conversation with a judge's clerk in which he accused the government of fraud in a

[14] Amici also argue that where the protected activity and the employer's basis for the adverse action are "inextricably intertwined," the employer "bears the risk" that the dual motives cannot be separated. Brief of Amici Curiae, Metropolitan Washington Employment Lawyers Ass'n and the Government Accountability Project ("Amici Br.") 35.

case involving his program. *See id.* at 822–23. Kalil was suspended for, among other things, improper interference with the litigation and release of a report without prior approval. *See id.* at 823. The Federal Circuit upheld the suspension based on the manner in which Kalil made his protected whistleblower complaint even though his employer would not have learned of any misconduct in the absence of the protected conduct. *See id.* at 824–25. The court rejected the argument that when the adverse action is intertwined with the protected disclosure, an employer can never establish its defense, concluding instead that the "character of [the otherwise protected] disclosure itself supplies clear and convincing evidence" to support discipline. *Id.* at 825. Thus, the employer made out its affirmative defense based on facts extrinsic to the protected activity, even though the basis for the adverse action was connected to the protected activity.

Similarly, the court in *Formella v. U.S. Dep't of Labor*, 628 F.3d 381 (7th Cir. 2010), affirmed the ARB's decision under the Surface Transportation Assistance Act, 49 U.S.C. 31105, concluding that substantial evidence supported the ARB's reasonable determination that Formella was fired not because of his safety complaint, but because he crossed the line of acceptability in his insubordinate and disruptive manner of voicing those concerns. *See* 628 F.3d at 393. These cases demonstrate that, like the Board, courts have found that even in cases where the protected activity and the basis for the adverse action are

intertwined, employers can overcome the high burden to prove that they would have taken the same action in a hypothetical scenario where the protected activity is not considered.

Smith and Amici further assert that the ALJ, as affirmed by the Board, improperly considered Smith's motive in reporting the firewatch log falsification by considering that Smith's report was made following Borders' harassment allegation. Pet'r Br. 43; Brief of Amici Curiae, Metropolitan Washington Employment Lawyers Ass'n and the Government Accountability Project ("Amici Br.") 10–11 n.3. While the Secretary agrees that generally a whistleblower's motive for whistleblowing is not considered, *see, e.g.*, *Carter v. Elec. Dist. No. 2 of Pinal Cnty.*, No. 92-TSC-11, 1995 WL 848028, at *8 (Sec'y Dec. July 26, 1995), Smith's underlying motive is not at issue here. The fact that Smith decided to report the falsification to management once confronted by Borders' allegations is not significant as its own fact, but rather as evidence supporting the conclusion that Smith did not otherwise intend to report the log falsification. ALJ2 at 27, JA 570; Tr. 1026:18–1027:4, JA 199–199a (O'Brien testifying that "we did not question why he brought it forward. We questioned why he delayed in bringing it forward."); Tr. 118:18–119:6, JA 43–44 (Henline testifying that his decision would have been the same absent the harassment charge). In other words, the ALJ and the Board properly permitted consideration of Smith's motive for not reporting the

violation when he discovered it because, when viewed in light of Smith's statement that "he didn't think to report it," his reporting the problem only when confronted with harassment allegations reasonably indicates that he likely would not have otherwise made the report.

Even if the fact of Borders' harassment charge were removed from consideration, the hypothetical scenario considered by the ALJ assumed that Intervenors discovered the log falsification *and* Smith's failure to elevate it despite several days to do so by means other than the harassment investigation. Thus the ALJ's conclusion would remain unchanged even without the fact of Borders' allegation.

Smith further asserts that the ARB's recent decision in *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, 2015 WL 5781070 (ARB Sept. 30, 2015), supports an interpretation that an analysis of whether the employer would have taken the same action "absent the protected activity" requires excluding not only Borders' harassment allegations but also the fact of the firewatch log falsification. Pet'r Br. 26. But the hypothetical that the ALJ considered here is consistent with the holding in *DeFrancesco*, which arises under an analogous provision of the Federal Railroad Safety Act, 49 U.S.C. 20109(d)(2)(A). In *DeFrancesco*, the employee reported an injury, and the employer subsequently determined through an investigation that the employee had not been following certain safety

precautions immediately prior to the injury. *See DeFrancesco*, 2015 WL 5781070, at *1–2. The Board concluded that the hypothetical that the employer needed to prove was whether it would have disciplined the employee if it had learned of "identical conduct (failure to take slow deliberate steps) in the absence of an injury report." *Id.* at *8. That hypothetical excises the potentially prejudicial fact of the injury report, but it does not entirely strip the scenario of facts unrelated to the protected report, such as the type of conduct involved.[15] In Smith's case, the ALJ's hypothetical is similar to that applied in *DeFrancesco* because it excises Smith's protected activities and considers only how Intervenors would have responded if they learned of identical conduct—knowledge of and failure to elevate a falsified firewatch report for at least seven days—in the absence of any protected report.

[15] Smith also over-reads the Secretary's brief as *amicus curie* to the ARB in *DeFrancesco*, which was filed on January 13, 2014, prior to the Board's April 25, 2014 decision in *Speegle*. The Secretary explained, consistent with the Board's decision in this case, that in order to determine the employer's motivation "the analysis of the employer's affirmative defense under FRSA should focus on evidence demonstrating whether the employer would have disciplined the employee had it learned of *identical conduct* where the employee was not hurt, but where the conduct was unsafe." Brief of the Assist. Sec'y of Labor for Occupational Safety & Health as *Amicus Curie* at 19, *DeFrancesco*, ARB No. 13-057 (ARB filed Jan. 13, 2014) *available at* http://www.dol.gov/sol/media/briefs/defrancesco_2014-01-13.pdf (emphasis added).

Smith additionally argues that Intervenors only learned about the firewatch log falsification and Smith's failure to report it as a result of Smith's protected report to Pence and subsequently during the investigation of Borders' harassment complaint. Pet'r Br. 21. How Intervenors learned of Smith's failure to report is irrelevant, however, because the hypothetical scenario considered by the ALJ operated to avoid that exact inquiry by assuming that Intervenors' discovered Smith's failure to promptly report the firewatch log falsification "by other means." ALJ2 at 30, JA 573; ARB2 at 11, JA 649. What those "other means" could have been is immaterial to the question of how Intervenors would have responded to Smith's failure to promptly report a log falsification in the hypothetical scenario required by *Speegle*. ALJ2 at 30, JA 573. The ARB does not require employers to prove how they would have discovered the content of the protected report in order to show that they would have taken the same action absent the report. *See DeFrancesco*, 2015 WL 5781070, at *6; *see also Watson v. Dep't of Justice*, 64 F.3d 1524, 1528 (Fed. Cir. 1995) (declining to adopt an "inevitable discovery" requirement in WPA cases where the content of the protected disclosure is intertwined with the facts supporting the personnel action).

For the reasons discussed above, the Board reasonably applied its precedent when it affirmed the ALJ's decision because the ALJ's analysis fully addressed the inquiry articulated by the Board in *Speegle* by determining that even absent

Smith's protected reports, Intervenors showed by clear and convincing evidence that they would have terminated Smith's employment because of the lack of trustworthiness shown by his failure to promptly report the firewatch log falsification. Thus, this Court should defer to the Board's reasonable interpretation of the ERA and its own precedent and affirm the Board's decision because substantial evidence in the record supports the ALJ's decision, as affirmed by the Board.

D. The ARB's Decision Is Consistent with Policy Considerations and the Department's Guidance

Smith and Amici raise two additional arguments relating to the purported policy implications of the ARB's decision and asserting that the ARB's decision in this case is a departure from the Department's guidance on whistleblower cases. Neither of these arguments has merit because the ARB's decision is entirely consistent with policy considerations and the Department's guidance; nevertheless, the Secretary will address each argument.

First, although using different literary references, Smith and Amici similarly argue that the ARB's decision places employees in a "Catch-22" or "Zeno's paradox" scenario in which, according to Smith and Amici, it is effectively impossible for an employee to report an issue promptly without having the early report be treated as having been made without an "objectively reasonable belief" and therefore not be a protected activity. Pet'r Br. 41–42; Amici Br. 24–25. The

facts in this case demonstrate, however, exactly the opposite: it is possible for an employee to have an objectively reasonable belief that a safety violation has occurred and to report it promptly. Smith knew on February 12, 2008 that the log was incorrect even after he asked Pence to correct the signatures because Pence left the false entries in the log at the end of Pence's shift and shortly thereafter Smith signed the same log several times just a few lines below. ALJ2 at 13, 26, JA 556, 569; Feb. 12, 2008 Firewatch Log, CX 63, JA 339. Thus, Smith was not uncertain that the firewatch log had been falsified and, given the Intervenors' earlier communications to their firewatchers, he was aware that falsification was a safety policy violation. If he had immediately reported it as required by Intervenors' policies, there would have been no question that his belief that the log falsification was a safety violation was objectively reasonable and that he had timely reported the safety violation.[16]

[16] Where an employee is certain about the violation, an employer's rule requiring prompt reporting of the violation does not conflict with the protective purpose of the ERA because the ERA serves to encourage timely reporting by protecting the employee from retaliation for making the report. As the court in *Watson v. Dep't of Justice*, 64 F.3d 1524 (Fed. Cir. 1995), explained under an analogous provision of the WPA, in the context of law enforcement officers required to report certain misconduct, "[t]he fact that a protected disclosure may be made as part of an employee's duties, but that an employee may nevertheless be disciplined for violating [the employer's] policy if his disclosure is untimely, strikes a balance between the intent of the WPA [to encourage disclosures and prevent reprisals] and the [employer's] interest in prompt disclosure of wrongdoing." *Id.* at 1530.

Unlike the employees in the cases Amici cite, Amici Br. 24–25 (citing *Wallace v. Tesoro Corp.*, 796 F.3d 468, 480 (5th Cir. 2015), and *U.S. ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739–40 (D.C. Cir. 1998)), Smith was not in the process of collecting information about the violation, nor was he in the dark about details of the violation; therefore, affirming the ARB's decision in this case will not conflict with the holdings in those cases.

Second, Amici argue that the ARB's decision is not in line with the Department's guidance in whistleblower cases or the ARB's previous whistleblower decisions. Pet'r Br. 40–42; Amici Br. 17–18, 30.[17] Specifically, Amici assert that the ARB's decision conflicts with the Department's guidance set out in the Memorandum from Richard E. Fairfax, Deputy Assistant Secretary for OSHA, to Regional Administrators, Whistleblower Programs Managers, Re: Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012)

[17] None of the six ARB cases that Amici cite are directly related to or affected by the ARB's decision here. One case, *Siemaszko v. First Energy Nuclear Operating Co.*, ARB No. 09-123, 2012 WL 694495 (ARB Feb. 29, 2012), involves the ERA's section 211(g) defense where the employee was also criminally indicted; the other five cases involve factually distinguishable situations in which the employers' bases for taking adverse action were questioned or rejected, *see Vannoy v. Celanese Corp.*, ARB No. 09-118, 2011 WL 4915757 (ARB Sept. 28, 2011); *Fabricius v. Town of Braintreemark Dep't*, ARB No. 97-144, 1999 WL 65702 (ARB Feb. 9, 1999); *Leveille v. N.Y. Air Nat'l Guard*, No. 94-TSC-3 & -4, 1995 WL 848112 (Sec'y Dec. Dec. 11, 1995); *Martin v. Dep't of the Army*, No. 93-SDW-1, 1995 WL 848062 (Sec'y Dec. July 13, 1995); *Moravec v. HC&M Transp., Inc.*, No. 90-STA-44, 1992 WL 752682 (Sec'y Dec. Jan. 6, 1992).

("Fairfax Memorandum"), *available at* https://www.osha.gov/as/opa/whistleblowermemo.html. Amici Br. 17–18, 30. The Fairfax Memorandum addresses employer policies and practice regarding injury reporting and whether employer work rules on the time and manner of reporting work injuries may violate whistleblower protection statutes. In their reliance on the Fairfax Memorandum, Amici fail to acknowledge, however, that OSHA expressly recognizes in the Fairfax Memorandum that employers have a "legitimate interest" in having rules about the procedures for reporting injuries. *See* Fairfax Memorandum. The Fairfax Memorandum states that "careful scrutiny" is warranted where an employer takes an adverse action based on a violation of a "time or manner" rule for reporting an injury. *Id.* A key reason for the additional scrutiny is that employees may not immediately realize they are injured or that the injury is serious enough to report. *See id.* OSHA recommends several factors to consider, including

> whether the employee's deviation from the procedure was minor or extensive, inadvertent or deliberate, whether the employee had a reasonable basis for acting as he or she did, whether the employer can show a substantial interest in the rule and its enforcement, and whether the discipline imposed appears disproportionate to the asserted interest.

Id.

These questions are nearly identical to the factors carefully applied by the ALJ and the ARB in Smith's case, and the decision is therefore consistent with the

Fairfax Memorandum. The ALJ found that Smith's seven-day delay was significant and deliberate, that Smith did not provide a reasonable basis for not promptly elevating the log entry problem, that Intervenors showed they had a strong interest in ensuring the firewatch logs were correct and ensuring employees' reliability in making timely reports, and the discipline was proportionate where Intervenors showed they consistently terminated employees who displayed integrity problems. ALJ2 at 26–27, 29, JA 569–70, 572. Thus, this Court should affirm the ARB's decision affirming the ALJ in this case because it is consistent with the Fairfax Memorandum and ARB precedent.[18]

[18] Amici also argue that the Board has adopted a rule that employers may not discipline an employee who does not "follow the chain-of-command" or who disrupts "shop discipline" in making a protected report of a safety issue. Amici Br. 12, 14–16. However, the cases cited by Amici, including *Leveille*, are not relevant here because Smith has not been accused of failing to follow the chain of command or insubordination.

CONCLUSION

For the reasons discussed above, the Secretary requests that this Court affirm the ARB's February 25, 2015 Final Decision and Order dismissing Smith's complaint.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor
Fair Labor Standards Division

WILLIAM C. LESSER
Deputy Associate Solicitor

RACHEL GOLDBERG
Acting Counsel for Whistleblower Programs

/s/ Ann Capps Webb
ANN CAPPS WEBB
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. N-2716
Washington, D.C. 20210
(202) 693-5797
webb.ann.c@dol.gov

STATEMENT ON ORAL ARGUMENT

Although Respondent Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on the parties' briefs.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

CASE NO. 15-1713, *Smith v. U.S. Department of Labor, et al.*

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7(B) because:

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/s/ Ann Capps Webb
ANN CAPPS WEBB
Attorney for the Secretary of Labor

U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. N-2716
Washington, D.C. 20210
(202) 693-5797

Dated: February 11, 2016

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on February 11, 2016, I caused the Final Form Brief for the Secretary of Labor to be electronically filed via the Court's CM/ECF system. I certify that I served this brief on all parties' counsel of record through the Court's CM/ECF system.

I further certify that I have served one (1) paper copy of the Final Form Brief for the Secretary of Labor to the Clerk of this Court by express mail on the 11th day of February 2016, and that the text of the PDF version of this Brief that was filed via the Court's CM/ECF system is identical to the paper copy that was served to the Court.

/s/ Ann Capps Webb
ANN CAPPS WEBB
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. N-2716
Washington, D.C. 20210
(202) 693-5797

Dated: February 11, 2016