



**In the Matter of:**

**MICHAEL NEELY,**

**ARB CASE NO. 2020-0071**

**COMPLAINANT,**

**ALJ CASE NO. 2018-AIR-00019**

**v.**

**DATE: May 19, 2022**

**THE BOEING COMPANY,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Michael Neely; *Pro Se*; Huntsville, Alabama**

***For the Respondent:***

**Mack H. Shultz, Esq. and Laura C. Hill, Esq.; *Perkins Coie LLP*;  
Seattle, Washington**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*,  
Randel K. Johnson and Stephen M. Godek, *Administrative Appeals Judges***

**DECISION AND ORDER**

PER CURIAM. This case arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>1</sup> Complainant Michael Neely (Neely) filed a complaint alleging that his former employer, Respondent The Boeing Company (Boeing), retaliated against him in violation of AIR 21's whistleblower

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<sup>1</sup> 49 U.S.C. § 42121 (2020), as implemented by the regulations at 29 C.F.R. Part 1979 (2021).

protection provisions. After a formal hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Denying Relief (D. & O.) and dismissed Neely's complaint. Neely appealed the ALJ's decision to the Administrative Review Board (ARB or the Board). For the reasons set forth below, we affirm the ALJ's decision.

## BACKGROUND

### 1. Neely's Employment with Boeing and Assignment to the 777X Program

Neely began working for Boeing in 1995.<sup>2</sup> Most recently, he served as a Project Engineer, Level 5 (PE-5) at Boeing's Huntsville Design Center (HDC) in Huntsville, Alabama.<sup>3</sup> Neely reported to John Jones at the HDC until January 9, 2015, when Dane Richardson replaced Jones.<sup>4</sup> Richardson remained Neely's direct supervisor for the remainder of Neely's employment.<sup>5</sup>

In early to mid-2014, Neely had two separate travel assignments to Boeing's facility in Everett, Washington, to work on the 777X, a new aircraft in the nascent stages of development.<sup>6</sup> In October 2014, Neely began a longer-term, but still temporary, travel assignment to Everett working on the 777X's Electrical Load Management System (ELMS).<sup>7</sup> As described by the ALJ, the ELMS serves as the "nerve center of the electrical system that monitors the electrical power from the primary, backup and standby generating sources on the aircraft."<sup>8</sup> The ELMS is a critical component of the 777X, and affects items such as fuel quantity, refuel control, fuel management, cargo fire extinguishing, hydraulic pumps, and passenger oxygen mask deployment.<sup>9</sup> Neely was asked to assist the ELMS team in validating

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<sup>2</sup> D. & O. at 8.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 12.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 9, 11-12.

<sup>7</sup> *Id.* at 12-13.

<sup>8</sup> *Id.* at 7 n.17.

<sup>9</sup> *Id.* at 10.

ELMS's system requirements.<sup>10</sup> Those requirements were to be delivered to a vendor, General Electric Aviation (GE), which would design and build the system.<sup>11</sup>

As a practical matter, Jones and Richardson had little oversight over Neely's work on the ELMS program.<sup>12</sup> Neely's day-to-day work on the ELMS team was overseen by two ELMS managers in Everett, Anthony De Genner and David Demars, who served as Neely's functional first- and second-line supervisors, respectively.<sup>13</sup>

## 2. Neely's Concerns with ELMS and Alleged Protected Activity

As a new aircraft, the 777X required regulatory approval from the United States Federal Aviation Administration (FAA) through a process known as type certification. In this lengthy and detailed process, the FAA reviews the design of the aircraft and its component parts, and ensures they comply with all applicable regulations, including the FAA's safety and air-worthiness regulations.<sup>14</sup>

Neely alleges that almost immediately after he joined the ELMS team, he discovered Boeing was not adhering to the development and design processes and plans to which it was committed as part of the type certification process for the 777X.<sup>15</sup> In particular, Neely became concerned with, and complained about, Boeing releasing unvalidated (or partially validated) and defective system requirements to GE.<sup>16</sup> Given the significance of ELMS to the operation of the aircraft, Neely argues

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<sup>10</sup> *Id.* at 14. Validation involves reviewing the system requirements to ensure they are complete, current, feasible, and unambiguous. Hearing Transcript (Tr.) at 285.

<sup>11</sup> D. & O. at 13.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 12 & nn.33-34.

<sup>14</sup> See 14 C.F.R. Part 21; FAA Order 8110.4C, Type Certification (2017); see also 14 C.F.R. Part 25 (air-worthiness regulations for transport category aircraft); see generally Complainant's Exhibit (CX) 304 (Expert Report of Vance Hilderman); Respondent's Exhibit (RX) 62 (Expert Report of William Ashworth). The FAA had not yet approved the 777X for type certification as of the hearing in this case.

<sup>15</sup> D. & O. at 14; Complainant's Appeal Brief (Comp. Br.) at 23, 49-51; Tr. at 205-06; 364-66, 390-91, 465-66. Specifically, Neely cites 14 C.F.R. § 25.1309(a), which states "[t]he equipment, systems, and installations whose functioning is required by this subchapter, must be designed to ensure that they perform their intended functions under any foreseeable operating condition."

<sup>16</sup> D. & O. at 14, 16; Comp. Br. at 53; Tr. at 509-10, 1087.

these defective and unvalidated requirements and broken processes could lead to unsafe, and potentially catastrophic, design flaws in the system and would not satisfy the air-worthiness regulations and type certification requirements.<sup>17</sup>

Neely raised concerns about Boeing's release of unvalidated or partially validated requirements and other ELMS issues to De Genner, Demars, Richardson and others on the ELMS team on multiple occasions between December 2014 and November 2015.<sup>18</sup> Neely escalated his concerns by filing formal internal corporate complaints on November 6 and 7, 2015.<sup>19</sup> Neely also filed a complaint with the FAA regarding Boeing's conduct on or about March 9, 2016.<sup>20</sup> He asserts each of these complaints constituted protected activity under the Act.

### **3. Neely's Poor Interpersonal Skills and 2015 Performance Evaluation**

The record reflects that although Neely possessed proficient technical skills, during his time on the ELMS team in 2015, he proved to be abrasive, rude, and unprofessional in his interactions with supervisors, peers, and contractors. Neely's supervisors described him as combative, disrespectful, aggressive, and belligerent, and stated he was inconsiderate, intolerant, and overly critical of others.<sup>21</sup> Neely's colleague on the 777X program, Kelsie DeFrancisco, offered a similar view, testifying that Neely could be demoralizing, disrespectful, bullying, and relentless in his communications with others.<sup>22</sup> She expressed that working with Neely was the most negative experience of her career.<sup>23</sup> Managers also testified Neely was unwilling to accept opinions that differed from his own, laid blame on others, and perceived ill motives and malintent from his colleagues.<sup>24</sup> Examples of Neely's contemporaneous written communications in the record substantiate the witnesses'

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<sup>17</sup> Comp. Br. at 23, 55, 63; Tr. at 364-66, 509-10.

<sup>18</sup> D. & O. at 30-31, 39-40.

<sup>19</sup> CX 182, 183. Neely also states he filed a similar internal complaint in October, 2015. Comp. Br. at 30-31. There does not appear to be a record or copy of this October complaint in the exhibits admitted at the hearing.

<sup>20</sup> RX 76-78. The FAA determined Neely's complaints were not substantiated. RX 81-83.

<sup>21</sup> D. & O. at 21; Tr. at 1709-10, 1713-14, 1759.

<sup>22</sup> D. & O. at 21 n.63; Tr. at 1452-56, 1473-75.

<sup>23</sup> Tr. at 1455.

<sup>24</sup> *Id.* at 1190-91, 1249-50, 1710, 1713, 1759-60; D. & O. at 21-22.

testimony, and reflect inappropriate and accusatory language and excessive use of exclamation points and capital letters.<sup>25</sup> De Genner explained he received complaints from more than a dozen individuals on the ELMS team, from members of other Boeing teams and organizations, and from GE about Neely's behavior.<sup>26</sup>

Neely's interactions with others grew worse as his time on the ELMS team progressed, to the point where Neely's managers had to intervene to resolve conflicts involving Neely on at least a weekly or bi-weekly basis.<sup>27</sup> Neely's supervisors testified they tried to coach Neely and offer feedback to him on numerous occasions, but Neely was unwilling to accept feedback or responsibility for his behavior.<sup>28</sup>

In late 2015, Richardson began preparing Neely's 2015 annual performance evaluation. Evaluations were divided into two primary categories, each of which contained several individual performance measures. The primary categories were Business Goals and Objectives (BG&Os), which were goals tailored to the duties assigned to the employee, and Performance Values, which were general characteristics every employee was expected to display.<sup>29</sup> Employees received ratings for each individual performance measure, and overall scores for BG&Os and for Performance Values.<sup>30</sup>

On October 21, 2015, Richardson sought De Genner's and Demars' input for Neely's performance evaluation.<sup>31</sup> De Genner and Demars provided written feedback and recommended numerical scores for each of Neely's performance measures.<sup>32</sup> Both were satisfied with Neely's technical abilities and project management skills, but were critical of Neely's interpersonal skills and interactions with others.<sup>33</sup> Richardson incorporated De Genner's and Demars' feedback into

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<sup>25</sup> D. & O. at 21-23 & nn.64, 72; Tr. at 1761-69.

<sup>26</sup> D. & O. at 21-22, 23 n.65; Tr. at 1711-13; RX 21. DeFrancisco testified she also received complaints from GE about Neely's behavior. Tr. at 1456-57, 1467-68.

<sup>27</sup> *Id.* at 1461-63, 1709, 1722, 1759-60; D. & O. at 23 n.65, 24 n.69.

<sup>28</sup> D. & O. at 22; Tr. at 1238-42, 1720-22, 1727-28, 1769-71.

<sup>29</sup> D. & O. at 20.

<sup>30</sup> *See* CX 8, 216, 261.

<sup>31</sup> D. & O. at 24.

<sup>32</sup> *Id.*; RX 38.

<sup>33</sup> D. & O. at 24; RX 38.

Neely's evaluation nearly verbatim.<sup>34</sup> Richardson rated Neely as "3 Met Objectives" for each of his individual BG&Os and as "4 Exceeds Expectations" or "3 Met Objectives" for several of his Performance Values.<sup>35</sup> However, Richardson rated Neely as "2 Met Some Expectations" for the Performance Values of "Communication" and "Customer Satisfaction," and as "1 Does Not Meet" for the Performance Value of "People Working Together."<sup>36</sup> Richardson also rated Neely as "2 Met Some Expectations" overall for the Performance Value category.<sup>37</sup> Richardson explained the manner in which Neely interacted with others was an anathema to the HDC's standards and the professional decorum expected for a service position like Neely's.<sup>38</sup>

#### 4. Reduction in Force and Neely's Layoff

In October 2015, Demars learned the ELMS budget was going to be reduced by approximately twenty percent beginning in 2016 as part of 777X program-wide budget cuts.<sup>39</sup> To accommodate the budget reduction, Demars and De Genner decided to reduce staff on the program.<sup>40</sup> They elected to offload five employees from the ELMS team, including Neely and two of the other three employees temporarily assigned from the HDC.<sup>41</sup> Demars explained temporary assignments like Neely's were more expensive for ELMS than other positions because of significant expenses associated with travel.<sup>42</sup>

Demars notified Richardson that Neely was expected to be offloaded from the ELMS program by the end of March 2016.<sup>43</sup> Richardson attempted to find an

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<sup>34</sup> D. & O. at 24; Tr. at 1270-73; *compare* RX 38 *with* CX 216.

<sup>35</sup> CX 216.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Tr. at 1283-86, 1298-1301.

<sup>39</sup> *Id.* at 1778-79; D. & O. at 23, 25.

<sup>40</sup> D. & O. at 23, 25; Tr. at 1780-81.

<sup>41</sup> D. & O. at 23, 25; RX 42; Tr. at 1781-84.

<sup>42</sup> D. & O. at 23, 25.

<sup>43</sup> *Id.* at 25; Tr. at 1788.

alternative project for Neely, but there was not enough work available at the HDC in the PE-5 classification.<sup>44</sup> This triggered a reduction in force (RIF).<sup>45</sup>

Boeing employs a formal RIF process.<sup>46</sup> Managers for each employee in the impacted classification rate employees based on pre-defined, weighted criteria.<sup>47</sup> The employees' most recent year-end performance evaluation scores for BG&Os and Performance Values each account for twenty percent of their overall RIF assessments.<sup>48</sup> For the remaining sixty percent, managers rate employees in several "core competencies."<sup>49</sup> Once employees are rated, the managers meet to ensure their ratings were applied consistently.<sup>50</sup> When the ratings for each employee are finalized, the individual with the lowest cumulative weighted score is selected for layoff.<sup>51</sup>

The RIF impacting Neely occurred in January 2016 and included thirty-three employees in the PE-5 classification.<sup>52</sup> Neely's 2015 annual performance evaluation, in which he had received poor scores associated with his interpersonal skills, comprised forty percent of Neely's overall RIF score and contributed to him raking at the bottom of his classification.<sup>53</sup> Accordingly, Boeing selected Neely for layoff.<sup>54</sup>

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<sup>44</sup> D. & O. at 25; CX 222; Tr. at 1313-14.

<sup>45</sup> D. & O. at 25.

<sup>46</sup> *Id.* at 26; RX 3.

<sup>47</sup> D. & O. at 26.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* For the PE-5 classification, the core competencies, and associated weights, were: Communication (10%), Decision Making (10%), Engineer Knowledge and Comprehension (10%), Planning and Organization (10%), Project Leadership (10%), Customer Focus (5%), and Influencing Others (5%). RX 43.

<sup>50</sup> D. & O. at 26.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 27.

<sup>53</sup> *Id.*; RX 43. Richardson's core competency ratings for Neely's RIF assessment were consistent with the scores Neely received for his 2015 performance evaluation. Richardson rated Neely as a "3" or a "4" across all categories, except for "Influencing Others," in which he rated Neely as a "2." RX 43.

<sup>54</sup> D. & O. at 27. Two PE-5s were also laid off via RIFs conducted in October 2015. *Id.* at 26 n.79. Although Neely ranked near the bottom of the classification in those earlier RIF cycles, he was not the lowest ranked employee and was therefore not selected for layoff. *See* CX 178, 179. Neely's 2015 performance evaluation had not been completed as of October 2015, so his 2014 performance evaluation, in which he had received overall higher scores,

On January 21, 2016, Richardson gave Neely a formal Reduction in Force Notice, which notified Neely that he would be laid off in sixty days unless he was able to find alternative work within Boeing.<sup>55</sup> During the ensuing sixty-day period, Neely applied to numerous positions, but was not selected.<sup>56</sup> As a result, Boeing terminated Neely's employment on March 25, 2016.<sup>57</sup>

## 5. Procedural History and ALJ Decision

Neely filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration on March 10, 2016, alleging Boeing retaliated against him in violation of AIR 21 and the Sarbanes-Oxley Act (SOX).<sup>58</sup> Neely requested a formal hearing before the Office of Administrative Law Judges (OALJ). The ALJ assigned to the case held a formal hearing from May 2 to May 10, 2019.

The ALJ issued the D. & O. on September 24, 2020. Although the ALJ expressed reservations regarding whether some or all of Neely's complaints regarding the ELMS program were protected by AIR 21,<sup>59</sup> the ALJ ultimately concluded that even if Neely had engaged in protected activity, he had not

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was used for his RIF assessment in these earlier RIF cycles. D. & O. at 26 n.79; CX 8. His overall core competency ratings actually improved slightly between the October 2015 and January 2016 RIF cycles, but were offset by the poorer scores Neely received in his 2015 performance evaluation. D. & O. at 27; *compare* CX 178, 179 *with* RX 43.

<sup>55</sup> D. & O. at 27. Richardson also delivered Neely an "At Risk Notice" on the same day. *Id.* An At Risk Notice informs the employee of the RIF, identifies the criteria and ratings used in the RIF assessment, and gives notice they are likely to receive a formal notice of layoff. RX 44; CX 225 at 2. Neely asserts he should have received the At Risk Notice in advance of the Reduction in Force Notice, to allow him additional time to find alternative work. Substantial evidence supports the ALJ's decision that issuing the two documents at the same time is consistent with Boeing policy and practice. D. & O. at 25 n.76, 27 n.83; CX 225 at 12; Tr. at 1602-03.

<sup>56</sup> D. & O. at 27.

<sup>57</sup> *Id.*

<sup>58</sup> 18 U.S.C. § 1514A. SOX allows complainants to forego administrative proceedings and proceed in federal court under certain circumstances. *Id.* § 1514A(b)(1)(B). Neely opted to pursue his SOX claims in federal court. Accordingly, his SOX claims were not before the ALJ, and are not before the ARB on appeal.

<sup>59</sup> The ALJ expressed similar reservations regarding whether Boeing and Neely were covered by AIR 21, but ultimately accepted the parties' stipulation that they were covered. Neither party challenges that ruling on appeal, so we will not address it.

demonstrated that his protected activity contributed to his layoff. The ALJ also concluded that even if Neely had met his burden of establishing that his protected activity contributed to his layoff, Boeing had demonstrated by clear and convincing evidence that it would have laid Neely off in the absence of his protected activity. Neely appealed the D. & O. to the ARB on September 30, 2020.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR 21.<sup>60</sup> In AIR 21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ’s factual findings if they are supported by substantial evidence.<sup>61</sup> Substantial evidence “means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>62</sup> “[T]he threshold for such evidentiary sufficiency is not high.”<sup>63</sup> The substantial evidence standard “limits the reviewing court from ‘deciding the facts anew, making credibility determinations, or re-weighting the evidence.’”<sup>64</sup> If substantial evidence supports the ALJ’s conclusion, the ALJ’s decision must be upheld even if it is “possible that a reasonable mind could have come to a different finding.”<sup>65</sup>

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<sup>60</sup> Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

<sup>61</sup> 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

<sup>62</sup> *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotations and citation omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *Stone & Webster Const., Inc. v. U.S. Dep’t of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)).

<sup>65</sup> *Clem v. Comput. Sci. Corp.*, ARB 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Mar. 10, 2021).

## DISCUSSION

### 1. The ALJ's Decision that Neely's Alleged Protected Activity Did Not Contribute to His Layoff is Supported by Substantial Evidence<sup>66</sup>

AIR 21 states the holder of a type certificate “may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety.”<sup>67</sup> To prevail on a retaliation claim under this provision, the complainant must prove by a preponderance of the evidence that: (1) he engaged in activity protected by the statute; (2) he suffered adverse employment action; and (3) his protected activity was a contributing factor in the adverse action.<sup>68</sup> A “contributing factor” includes “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.”<sup>69</sup> If the employee meets this burden of proof, the respondent may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same adverse action even in the absence of the complainant's protected activity.<sup>70</sup>

The ALJ concluded Neely failed to prove by a preponderance of the evidence that his alleged protected activity contributed to his layoff. The ALJ determined there was abundant and credible evidence that Boeing had a legitimate need for the RIF, that Richardson rated Neely relatively poorly in his 2015 review exclusively because of his poor behavior, and that the poor rating resulted in Neely's selection for layoff in the RIF. The ALJ also concluded that Neely had not presented any

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<sup>66</sup> Boeing argued Neely's concerns about regulatory and safety issues were unreasonable and did not constitute protected activity under AIR 21. Respondent's Post-Hearing Brief at 33-38. It is unclear to the Board which, if any, of Neely's complaints the ALJ actually found to be protected by AIR 21. For purposes of this decision, we need not, and do not, determine which, if any, of Neely's complaints were protected. We have assumed Neely engaged in activity protected by the Act, as alleged.

<sup>67</sup> 49 U.S.C. § 42121(a)(1).

<sup>68</sup> *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 10 (ARB Mar. 29, 2022) (citation omitted).

<sup>69</sup> *Id.* at 18 (quoting *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461-62 (9th Cir. 2018)).

<sup>70</sup> *Id.* at 10 (citation omitted).

credible evidence to rebut Boeing's evidence and explanations for its actions or to otherwise establish that his alleged protected activity played any role in these decisions.

On appeal, Neely presents two primary arguments regarding why he believes the ALJ erred by finding that he had not demonstrated that his protected activity contributed to his layoff. First, he contends the explanations Boeing offered for its decisions were false and were pretext designed to mask Boeing's unlawful retaliatory motives. Second, Neely contends the timing of, and sequence of events between, his protected activity and his layoff shows a pattern of antagonism and a retaliatory plan to terminate his employment. Neely's arguments do not convince us to overrule the ALJ's decision, which we find to be logical, well-reasoned, and supported by substantial evidence in the record.

*A. Boeing Offered Legitimate and Credible Explanations for Its Actions, Which Neely has not Shown Were Pretextual*

Boeing argues it terminated Neely's employment because: (1) business conditions—specifically, budgetary constraints on the 777X program and a lack of work at the HDC—necessitated Neely's removal from the ELMS program and the initiation of a RIF; (2) it selected Neely for layoff pursuant to its established RIF process based on Neely's legitimate and well-deserved performance ratings; and (3) Neely was laid off in accordance with Boeing's policies when he could not find alternative work. Substantial evidence supports the ALJ's conclusions that Boeing's explanations were legitimate and were not motivated or affected by Neely's alleged protected activity.

*i. Boeing's Need for the RIF*

Boeing offered un rebutted evidence the 777X program, including the ELMS subsystem, faced significant budgetary constraints at the beginning of 2016.<sup>71</sup> Although Neely refers to the budgetary constraints as convenient, he has not offered evidence they were, in fact, contrived. Neely suggests the 777X program did not actually face budgetary constraints because Boeing continued to hire or promote new PE-5s in his classification in late 2015 and early 2016.<sup>72</sup> However, there is no evidence those new PE-5s were hired on the 777X program, or that the 777X and

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<sup>71</sup> RX 70 at 3; Tr. at 1779.

<sup>72</sup> See CX 224.

ELMS teams were otherwise expanding in 2016. Neely also cites an email from late 2015 in which Demars supposedly extended his assignment on the program through 2016.<sup>73</sup> He contends this extension proves his position was not intended to be part of the budgetary reductions. However, witnesses testified the email to which Neely cites merely gave ELMS the flexibility to retain Neely on the program in 2016, but only to the extent the budget could accommodate his assignment. Neely could not actually remain on the ELMS team without available and appropriated funds.<sup>74</sup>

The record also supports the ALJ's determination that when faced with these budgetary constraints, Boeing made the legitimate, non-retaliatory business decision to offload the salaries of several employees, like Neely, who were on expensive, temporary travel assignments to the ELMS team. Neely was just one of at least five employees whose assignments to ELMS ended as part of the budget cuts, including all but one of the HDC employees, like Neely, who were temporarily assigned to the program.<sup>75</sup> Boeing's explanation is supported by substantial evidence, and we will not second-guess these types of even-handed, reasonable budgetary decisions on appeal.<sup>76</sup>

Finally, Richardson explained that when Neely's assignment with ELMS ended, there were no other assignments to which he could transfer Neely, thus triggering a RIF.<sup>77</sup> Neely argues there were positions available for him, again citing the evidence that Boeing hired or promoted five new PE-5s in his classification in the last several months of 2015. However, Neely failed to establish any of the circumstances surrounding the promotion or hiring of these PE-5s, show that Richardson or other alleged retaliators had any knowledge of, or involvement in, these other hiring or promotion actions, or show that Richardson or any other alleged retaliator could have effectuated Neely's assignment to these other positions

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<sup>73</sup> CX 191.

<sup>74</sup> Tr. at 1571-73, 1785-88.

<sup>75</sup> *Id.* at 1781-84; RX 42. ELMS retained one software engineer from HDC. Tr. at 1785.

<sup>76</sup> See *Wright v. R.R. Comm'n of Tex.*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 4 n.9 (ARB May 22, 2019) ("We note that it is the role of neither the ALJ nor the Board to act as a super-personnel 'department that reexamines an entity's business decisions.'") (quoting *Jones v. U.S. Enrichment Corp.*, ARB Nos. 2002-0093, 2003-0010, ALJ No. 2001-ERA-00021, slip op. at 17 (ARB Apr. 30, 2004)).

<sup>77</sup> Tr. at 1313-15.

when Neely's assignment to ELMS ended.<sup>78</sup> Moreover, contrary to Neely's assertion that Richardson was motivated to effectuate Neely's discharge because of his protected activity, Richardson took steps to locate other work for Neely, but was unsuccessful.<sup>79</sup> Accordingly, we have no basis to find the ALJ erred by concluding Boeing lacked alternative assignments for Neely upon his return to the HDC, or that the initiation of the RIF was otherwise illegitimate or retaliatory.

*ii. Neely's Selection in the RIF*

At the end of the RIF process, Neely ranked at the bottom of the pool of PE-5s in his classification. Neely's low ranking resulted, primarily, from Neely's relatively poor 2015 performance evaluation, which comprised forty percent of his overall RIF rating. Substantial evidence supports the ALJ's conclusion that Neely's evaluation ratings and low ranking in the RIF assessment were driven by Neely's poor interpersonal skills and negative interactions with others in 2015, and not his protected activity.

There is abundant evidence in the record, highlighted in the Background section above, validating the ratings Neely received related to his poor interpersonal skills and his inability to effectively communicate with and interact with others on the ELMS program. Substantial evidence supports the conclusion that Neely was unprofessional and was unwilling to change his behavior despite several instances of feedback and coaching from his supervisors. Considering this evidence, the ALJ reasonably credited Richardson's, Demars', and De Genner's explanations for Neely's poor ratings and RIF ranking.<sup>80</sup>

Despite this evidence, Neely contends his adverse ratings were contrived and artificially deflated to justify his discharge. For example, he argues his poor ratings

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<sup>78</sup> Richardson testified he was not involved in the hiring or promotion of the new PE-5s. *Id.* at 1617-18.

<sup>79</sup> *Id.* at 1618-19; CX 222.

<sup>80</sup> Neely emphasizes the subjective nature of the ratings associated with his interpersonal skills. Although Neely is correct that subjective criteria should be scrutinized because of the ease with which they might be used to mask discrimination or retaliation, the use of subjective criteria is not per se proof of retaliation. *See Beck v. Buckeye Pipeline Servs. Co.*, 501 F. App'x 447, 450 (6th Cir. 2012) (unpublished); *Franklin v. Boeing Co.*, 232 F. App'x 408, 411 (5th Cir. 2007) (unpublished). Although Neely's ratings may be classified as subjective, we find no basis to conclude on this record that the ALJ erred by declining to find they were illegitimate or motivated by anything other than Neely's own misbehavior.

are inconsistent with the contemporaneous, positive feedback he received regarding his work on the ELMS program in 2015, including from De Genner and Demars. However, the positive feedback to which Neely refers primarily concerned Neely's technical and project management contributions, not his interpersonal skills.<sup>81</sup> Boeing agrees Neely was technically proficient, and Neely's 2015 performance evaluation and his core competencies ratings from the RIF assessment confirm Boeing considered Neely to be a technically adept engineer.<sup>82</sup> However, the fact that Neely may have performed well in one aspect of his job does not mean he performed well in all aspects of his job. Neely has not offered evidence his managers commended him or provided positive feedback regarding his interpersonal skills in 2015; to the contrary, Neely's supervisors testified they repeatedly sought to address Neely's deficiencies in that aspect of his employment.

Similarly, Neely argues the ALJ should have determined his poor ratings in 2015 were pretextual given how strongly they diverged from the allegedly unwaveringly positive ratings Neely previously received during his tenure with Boeing. We do not agree with Neely that his poor ratings in 2015 regarding his communication and interpersonal skills were an unprecedented aberration. The record reflects that at least once before, in 2011, Neely received similar poor ratings regarding his communication and ability to work with others.<sup>83</sup> Furthermore, Neely's 2015 performance evaluation and RIF ratings were issued by a different set of managers than those who performed his prior evaluations.<sup>84</sup> Richardson, Neely's supervisor and rating official in 2015, first began supervising Neely in January 2015.<sup>85</sup> Likewise, De Genner and Demars, who provided critical feedback regarding Neely's 2015 performance evaluation and provided his day-to-day supervision on the ELMS program, did not begin working with Neely until 2014 and June 2015, respectively.<sup>86</sup> We find no error in the ALJ's decision to decline to infer pretext or

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<sup>81</sup> *E.g.*, CX 7, 118; *see also* Tr. at 1775-76.

<sup>82</sup> D. & O. at 23 n.65; Tr. at 1709, 1759. For example, Richardson rated Neely as a "4 Exceeds Expectations" for the "Technical Skills and Knowledge" performance measure. CX 216. Similarly, Richardson rated Neely as a "4" for the core competencies of "Engineering Knowledge & Comprehension," "Planning and Organization," and "Project Leadership" during the January RIF cycle. RX 43.

<sup>83</sup> RX 39. Neely's 2011 review reflects scores of "2 Met Some Expectations" for "People Working Together" and "Leadership." *Id.*

<sup>84</sup> D. & O. at 12; *compare* RX 39 and CX 8 with CX 216.

<sup>85</sup> D. & O. at 12.

<sup>86</sup> *Id.* at 12 nn.33-34.

retaliation simply because Neely's scores dropped from one year to the next given this change in supervision, especially in light of the ample evidence validating the managers' criticism of Neely's interpersonal skills in 2015.<sup>87</sup>

Finally, Neely argues Richardson and Boeing ignored two key facts that should have helped him avoid selection in the RIF, despite ranking at the bottom of his classification. First, Neely asserts Richardson ignored his security clearance, which should have given him special consideration when finalizing the RIF rankings. Although Neely possessed a security clearance, Richardson explained that only a rare clearance, like top secret, would have possibly exempted an employee ranking at the bottom of his classification from layoff.<sup>88</sup> Neely did not hold such a clearance. Neely also asserts Richardson improperly removed a notation accompanying Neely's assessment in the earlier October 2015 RIF cycle indicating Neely was in a mission-critical position.<sup>89</sup> However, Richardson explained the notation accompanying Neely's October 2015 RIF assessment derived from Neely's assignment to ELMS. With the end of Neely's ELMS assignment, the notation was not applicable for the January 2016 RIF assessment.<sup>90</sup>

*iii. Neely's Inability to Find Alternative Work and Layoff*

Pursuant to Boeing's established RIF policy, Neely had sixty days to find an alternative position before his layoff became effective.<sup>91</sup> During that sixty-day period, Neely applied for more than sixty internal jobs, but was not selected.<sup>92</sup> Neely contends his non-selection is further evidence of retaliation and pretext, because he was well-qualified for these other positions. However, Neely has not pointed to any evidence in the record showing who was selected for the various positions to which he applied or how the decisions were made. Therefore, we have no basis to conclude Neely was equally or more qualified than the selectees, or any other basis to infer

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<sup>87</sup> *Lindeman v. Saint Luke's Hosp. of Kansas City*, 899 F.3d 603, 607 (8th Cir. 2018); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1175 (10th Cir. 2006); *Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002).

<sup>88</sup> Tr. at 1372-73.

<sup>89</sup> Compare CX 178, 179 with RX 43.

<sup>90</sup> Tr. at 1339, 1351-52.

<sup>91</sup> See RX 44; CX 225 at 12, 14.

<sup>92</sup> Tr. at 952.

retaliation or pretext in the selection decisions.<sup>93</sup> In addition, there is no evidence Richardson, Demars, De Genner, or any other person alleged to have played a role in the retaliation in this case had any hand in or influence over Neely's unsuccessful search.<sup>94</sup> To the contrary, Richardson encouraged Neely's job search efforts. For example, Richardson coordinated with the RIF skills manager regarding Neely's job search efforts, and approved Neely's request to spend company time on his search.<sup>95</sup>

For these reasons, we conclude substantial evidence supports the ALJ's conclusion that Boeing established a credible, legitimate, and non-retaliatory basis for laying Neely off in a RIF, and affirm the ALJ's judgment that Neely's attacks on Boeing's explanations and his arguments of pretext were not supported by the record.<sup>96</sup>

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<sup>93</sup> See *Farver v. McCarthy*, 931 F.3d 808, 812 (8th Cir. 2019); *Beal v. Convergys Corp.*, 489 F. App'x 421, 424 (11th Cir. 2012) (unpublished). Neely confirmed he did not believe the hiring managers for these various other positions even knew who he was, let alone were part of the conspiracy to retaliate against him. Tr. at 968.

<sup>94</sup> See *id.* at 1591-92. Neely refers to an email in which Richardson suggested to the RIF skills manager that anyone interested in considering Neely for employment should not speak to Neely directly before Neely received notice of his layoff. CX 222. There is no evidence Richardson gave this same type of instruction after Neely was notified of his selection for layoff. See Tr. at 1597-99.

<sup>95</sup> *Id.* at 1363-67; RX 45, 47, 48, 69 at 6; CX 230.

<sup>96</sup> Citing the Board's decision in *Palmer v. Canadian Nat'l Ry./Ill. C. R.R. Co.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017), Neely contends the ALJ improperly weighed Boeing's nonretaliatory reasons for its conduct against evidence otherwise proving his protected activity played at least some role in his layoff. To be clear, the ALJ decided Neely presented no credible evidence that Boeing's conduct was anything other than above-board, or that his protected activity played any role in its decision to lay him off. D. & O. at 45-46. This decision, which we affirm, is consistent with *Palmer*. See *Palmer*, ARB No. 2016-0034, slip op. at 55. ("But the evidence of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence in making that [contributing factor] determination; for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct." (emphasis original)). We are of course mindful that an employer could surreptitiously create a false record of performance on an employee in anticipation of using that false record to justify a RIF sometime in the future, to punish protected conduct. However, we see no evidence that this occurred here.

*B. Neely Has Not Established Temporal Proximity or A Pattern of Adverse Conduct that Tends to Establish Retaliation*

Neely also contends the timing of his layoff, particularly in relation to his formal internal complaints in November 2015, demonstrates his protected activity contributed to his discharge from employment. Although Neely engaged in some protected activity within a few months of his selection for the layoff, Neely avers he began engaging in protected activity in December 2014, fifteen months before he was laid off in March 2016. This lengthy temporal gap does not support the inference that Neely's protected activity contributed to his layoff in the particular circumstances of this case.<sup>97</sup> We find no error in the ALJ's conclusion that the timing of Neely's layoff after his alleged protected activity reflects coincidence, rather than retaliation.<sup>98</sup>

Neely attempts to connect his protected activity with his layoff by arguing Boeing took a series of unfavorable personal actions against him before his ultimate discharge. He contends these intermediary personnel actions, which began shortly after he began engaging in protected activity in December 2014, were designed to, and did, falsely justify and accelerate his discharge.<sup>99</sup> The ALJ determined these

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<sup>97</sup> See *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 9 (ARB Jan. 22, 2020) (noting insufficiency of temporal proximity as a basis for proving causation where an intervening event occurs); *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 11-12 (ARB June 17, 2019) (affirming ALJ's assessment that four month gap between temporal proximity and adverse action "lacked a strong temporal connection," especially where intervening events "diminished any causal inference from temporal proximity."); *Bechtel v. Competitive Techs., Inc.*, ARB No. 2009-0052, ALJ No. 2005-SOX-00033, slip op. at 18 (ARB Sept. 30, 2011) (finding temporal gap of several months, during which intervening difficulties occurred, did not allow clear inference of pretext).

<sup>98</sup> See *supra* Discussion Section I.A.; D. & O. at 45; see also *Stites v. Alan Ritchey, Inc.*, 458 F. App'x 110, 112 (3d Cir. 2012) (unpublished); *Acosta*, ARB No. 2018-0020, slip op. at 8 ("The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.") (citation omitted).

<sup>99</sup> We affirm the ALJ's determination that these earlier, unfavorable personnel actions are not separately actionable as adverse action under AIR 21 because Neely did not file a complaint with OSHA within ninety days of the date on which they occurred. 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1979.103(d); *Hoffman v. NetJets Aviation, Inc.*, ARB No. 2006-0141, ALJ No. 2005-AIR-00026, slip op. at 4 (ARB July 22, 2008). These actions are time barred even if they are "related" to the later, timely adverse actions, as Neely argues. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Although time barred, we have considered these earlier personnel actions as potentially relevant background evidence associated with Neely's timely adverse actions. See *id.*

various personnel actions were legitimate and not driven by retaliation. We find no error in the ALJ's judgment and conclude that his findings are supported by substantial evidence.

First, Neely asserts ELMS reassigned him to a "spurious" position as Supplier Program Manager (SPM) in April 2015, after he complained about requirements releases in December 2014 and March 2015. Neely contends he was set up to fail as the SPM because the position lacked clear authorities or responsibilities. However, contrary to the position Neely takes in this appeal, he admitted at the hearing that he did not believe his reassignment to the SPM position was retaliation in response to his AIR 21 claim.<sup>100</sup>

Even setting this admission aside, Richardson and others explained ELMS needed the SPM position, and that the position was a good opportunity for Neely and fit his skills.<sup>101</sup> De Genner also testified Neely advocated for the position, and Neely conceded he thought the position had potential and that it was not uncommon for his duties to change as programs and projects evolved.<sup>102</sup> Although Neely argues the position proved to be ill-defined, Richardson explained Neely could have worked with others to define the contours of the position to his satisfaction. However, Neely was unwilling to address the challenges he perceived with the position.<sup>103</sup>

Next, Neely asserts Richardson altered his performance goals at his June 2015 mid-year review. He argues this was also designed to set him up to fail, and to make his goals unachievable. Although Neely is correct that Richardson added one new BG&O measure to his goals mid-year to reflect Neely's reassignment to the SPM position, Richardson explained such changes were not unusual and that he alerted all his employees in advance that he would be considering necessary changes for the mid-year reviews.<sup>104</sup> Furthermore, when Neely complained about the new goal, Richardson agreed to remove it and revert Neely's performance goals

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<sup>100</sup> Tr. at 1012-14. Neely testified he believed this reassignment was age discrimination, and not retaliation under AIR 21. *Id.* His age discrimination and retaliation claims were not before the ALJ and are not before the Board.

<sup>101</sup> Tr. at 1266, 1404-05, 1422-23, 1427, 1707-08, 1733-35.

<sup>102</sup> *Id.* at 595-96, 1083, 1085, 1708, 1733-34.

<sup>103</sup> *See id.* at 1536-37.

<sup>104</sup> *Id.* at 1254-55, 1257-58, 1261-64, 1530-31.

to their original form.<sup>105</sup> Thus, we agree with the ALJ that there is no evidence the temporary change had any impact on Neely's ratings or was retaliatory.

Neely also asserts Richardson improperly issued him a written warning, called a Corrective Action Memorandum (CAM) in September 2015, falsely accusing him of making improper charges on his company credit card. The ALJ determined the CAM was legitimately issued because of Neely's violation of company policy. We agree. When Richardson was appointed as Neely's supervisor, Richardson gave Neely and his other direct reports guidance on expensing and allowable charges.<sup>106</sup> Neely violated Richardson's guidance once in May 2015. Richardson warned Neely about his violation, and Neely committed to complying with Richardson's guidance in the future.<sup>107</sup> Nevertheless, Neely violated the expensing rules again in August 2015, prompting the CAM.<sup>108</sup> Richardson explained Neely was the only one of his employees to violate his directives on expensing on more than one occasion.<sup>109</sup> Although Neely asserts his expensing behavior did not deviate from his past, accepted practice under different management, substantial evidence supports the conclusion that Neely's practices violated Richardson's pre-established expectations.

Finally, Neely contends Boeing hired a human resources representative, Ellory Cartagena, in August 2015 for the specific purpose of helping to "scheme" his discharge. The record does not support Neely's position. Neely cites to the fact that Richardson began forwarding several emails he exchanged with Neely to Cartagena shortly after she was hired. However, by that time, Neely had already accused Richardson of age discrimination and retaliation, and Richardson had reasonable concerns with the manner in which Neely was interacting with others.<sup>110</sup> Under these circumstances, we cannot infer retaliatory motives merely from the fact that Richardson engaged a human resources representative concerning his dealings with Neely.<sup>111</sup> Neely also contends Cartagena admitted in her deposition that she was hired for the specific purpose of helping to effectuate his discharge. Neely misconstrues her testimony. Although Cartagena confirmed she served as Neely's

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<sup>105</sup> *Id.* at 1264-65.

<sup>106</sup> *Id.* at 1195-99; RX 2, 4.

<sup>107</sup> RX 5; Tr. at 1200-03.

<sup>108</sup> RX 6-8; Tr. at 1203-04, 1215-22.

<sup>109</sup> Tr. at 1203.

<sup>110</sup> *Id.* at 1215, 1233-37, 1247-48; CX 117.

<sup>111</sup> *Couch v. Am. Bottling Co.*, 955 F.3d 1106, 1109 (8th Cir. 2020).

human resources point of contact and participated in his discharge, she did not testify that she was hired for that specific purpose.<sup>112</sup>

Accordingly, we affirm the ALJ's decision that these alleged unfavorable personnel actions do not evince a retaliatory motive or scheme on the part of Boeing, or otherwise support the conclusion that Neely's protected activity contributed to his layoff.

*C. Other Evidence Also Supports the ALJ's Conclusion that Neely's Alleged Protected Activity Did Not Contribute to his Layoff*

Additional evidence and circumstances cited by the ALJ also bolster the conclusion that Neely's protected activity did not contribute to his layoff. The ALJ noted, for example, that there was no evidence Boeing attempted to conceal the issues about which Neely complained.<sup>113</sup> While Neely asserts on appeal that Boeing attempted to conceal its alleged regulatory and safety violations, he failed to cite any record evidence supporting this proposition on appeal.

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<sup>112</sup> The testimony to which Neely cites is:

Q. Were you the complainant's assigned HR focal from January 2015 to his termination March 25, 2016? If no, please provide the dates you were and who was previously. . . .

A. No. I became the assigned HRG in August of 2015 to the termination, and the previous HRG was Vivian Harris.

Q. Why were you assigned as complainant's HR focal? . . .

A. Because I applied for the job and got the job to represent the Huntsville Design Center.

CX 279 at 8.

Q. Were you assigned as the complainant HR focal to terminate complainant's employment? . . .

A. Yes.

Q. Were you instructed by any Boeing employee to terminate complainant's employment?

A. No.

*Id.* at 20.

<sup>113</sup> See *Yadav v. L-3 Commc'ns Corp.*, 462 F. App'x 533, 537 (6th Cir. 2012) (unpublished); *Miller v. Tenn. Valley Auth.*, ARB No. 1998-0006, ALJ No. 1997-ERA-00002, slip op. at 5 (ARB Sept. 29, 1998).

Similarly, the ALJ observed that Boeing's management was well aware of the ELMS challenges about which Neely complained. Indeed, Neely repeatedly asserted below and on appeal that several of his colleagues within Boeing and employees of GE raised concerns about regulatory violations associated with the ELMS program like he did.<sup>114</sup> Yet, there is no evidence Boeing retaliated against other alleged whistleblowing employees. Neely has not explained why, under these circumstances, he would have been the only one singled out for raising concerns about the supposed regulatory violations, or why the alleged retaliatory motives, if they in fact existed, would not have extended to the other employees raising the same concerns.

For these reasons, and the others discussed above, we find that substantial evidence supports the ALJ's conclusion that Neely failed to demonstrate by a preponderance of the evidence that his alleged protected activity contributed to the adverse action taken against him.

## **2. The ALJ's Decision that Boeing Established Its Same-Action Defense Is Also Supported by Substantial Evidence.**

As set forth above, even if Neely established his protected activity contributed to the adverse action taken against him, Boeing would nevertheless escape liability if it proved by clear and convincing evidence that it would have taken the same action against Neely even if he had not engaged in protected activity. The ALJ determined Boeing established this same-action defense.<sup>115</sup> We affirm this decision for many of the same reasons set forth above. The record amply supports Boeing's position that the RIF was necessitated by prevailing business conditions—i.e., budgetary restrictions and lack of work—which were independent of, and not influenced by, Neely's alleged protected activity. Likewise, the record is replete with evidence Neely engaged in inappropriate workplace behavior and decorum, which prompted his relatively poor evaluation ratings and selection for layoff pursuant to Boeing's established RIF procedure. A whistleblower is not insulated or immunized from adverse action for his misbehavior, wrongdoing, or unsatisfactory performance.<sup>116</sup> Based on the record in this case, the ALJ reasonably

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<sup>114</sup> Tr. at 532-34, 681-83, 690-91, 1087-88; Comp. Br. at 53-54.

<sup>115</sup> D. & O. at 47 n.108.

<sup>116</sup> *Couch*, 955 F.3d at 1109; *Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 393 (7th Cir. 2009); *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017); *Clement v.*

concluded Neely’s protected activity played no role in his adverse action and, likewise, that Boeing would have taken the same adverse action even in the absence of his protected activity.

### 3. We Deny Neely’s Remaining Arguments and Post-Appeal Motions

#### A. Credibility and Neely’s Candor to the Tribunal

Neely challenges various credibility determinations the ALJ made regarding Neely and other witnesses. The Board “gives considerable deference to an ALJ’s credibility determinations and defers to such determinations unless they are inherently incredible or patently unreasonable.”<sup>117</sup> The ALJ’s credibility determinations are well-reasoned and supported by substantial evidence, and we find no basis to disturb them on appeal.

First, the ALJ found Neely’s credibility “wanting,” because of his lack of candor with the tribunal.<sup>118</sup> At the hearing, Neely represented that he had not taken any documents with him upon his departure from Boeing, that he had not forwarded himself any documents for this litigation or any other non-personal emails, and that if he had sent himself something it was by mistake and he had deleted it.<sup>119</sup> The ALJ determined these representations were “at best inaccurate, at worse, a knowingly false statement.”<sup>120</sup> This finding is supported by substantial evidence. Boeing introduced two emails Neely forwarded from his Boeing account to his personal account in November 2015 concerning the allegations of his case.<sup>121</sup> Neely gave these emails misleading subject lines of “Travel” and “travel

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*Milwaukee Transp. Servs., Inc.*, ARB No. 2002-0025, ALJ No. 2001-STA-00006, slip op. at 8 (ARB Aug 29, 2003).

<sup>117</sup> *Hunter v. CSX Transp., Inc.*, ARB Nos. 2018-0044, -0045, ALJ No. 2017-FRS-00007, slip op. at 3 (ARB Apr. 25, 2019) (citation omitted); *accord Bobreski v. J. Givoo Consultants*, ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 25-26 (ARB Aug. 29, 2014) (stating the Board will defer to an ALJ’s credibility determination when the “decision is based on testimony that is coherent and plausible, not internally inconsistent and not contradicted by external evidence.”) (quotations and citation omitted).

<sup>118</sup> D. & O. at 33-34.

<sup>119</sup> Tr. at 88-93, 1062-72. Neely made similar representations during his deposition. *Id.* at 1069-70, 1167-73, 1177-78.

<sup>120</sup> D. & O. at 34.

<sup>121</sup> RX 88, 89.

arrangements,” which the ALJ reasonably determined indicated an effort to conceal the emails from detection.<sup>122</sup> The ALJ also specifically warned Neely at the outset of the hearing about making false or misleading representations to the tribunal.<sup>123</sup> Under these circumstances, the ALJ did not clearly err by making an adverse finding as to Neely’s credibility.

Second, as relevant to this appeal, the ALJ found Richardson, DeFrancisco, and Cartagena credible.<sup>124</sup> Neely argues these witnesses were motivated to lie given their involvement in Neely’s termination from Boeing. Although motivation may be relevant in assessing credibility, we find no basis to second-guess the ALJ’s credibility assessments or the veracity of these witnesses’ statements merely because of their roles in the events of this case. Additionally, we reject Neely’s assertions that at least part of Richardson’s testimony was demonstrably false. Neely may disagree with Richardson’s testimony, but the ALJ reasonably determined Richardson’s testimony was consistent with and corroborated by contemporaneous documentation and other evidence in the record and was credible.

### *B. Discovery, Evidence, and Trial Control Issues*

Neely raises several challenges to the way the ALJ controlled the administrative proceedings, resolved discovery disputes, and conducted and controlled the formal hearing. The ALJ is granted broad discretion to control discovery and hearing procedures and will only be reversed upon a showing that he abused his discretion.<sup>125</sup> Neely has failed to establish the ALJ abused his discretion in the manner he controlled these proceedings.

First, Neely argues the ALJ erred by refusing to enforce an order compelling Boeing to comply with Neely’s discovery requests or to sanction Boeing for its supposed violation of the order. Neely does not articulate how the ALJ abused his

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<sup>122</sup> *Id.*; Tr. at 1179-80.

<sup>123</sup> Tr. at 14-15.

<sup>124</sup> Neely also challenges the ALJ’s credibility determinations with respect to the technical experts who testified on behalf of Boeing at the hearing. We need not address the credibility of these other witnesses because their testimony has limited or no relevance to the dispositive issues of causation and the same-action defense.

<sup>125</sup> 29 C.F.R. § 18.12(b); *Huang v. Ultimo Software Sols., Inc.*, ARB Nos. 2009-0044, -0056, ALJ No. 2008-LCA-00011, slip op. at 2-3 (ARB Nov. 10, 2011) (Order Denying Reconsideration) (citing *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 2004-0114, -0115, ALJ Nos. 2004-SOX-00020, -00036, slip op. at 8 (ARB June 2, 2006)).

discretion or how he was prejudiced by the alleged discovery infractions. Neely identifies only one document he claims Boeing should have produced but did not.<sup>126</sup> He does not articulate why he was entitled to the document or how this document, or any other document not produced by Boeing, could have helped him achieve a different outcome in this case.

Neely next argues the ALJ erred by restricting the length of the formal hearing and Neely's direct examination.<sup>127</sup> Again, however, Neely has not articulated how the ALJ's decisions prejudiced his case or constituted an abuse of discretion.<sup>128</sup> As it was, the hearing lasted seven days, featured testimony from twelve witnesses, and involved approximately 300 admitted exhibits. Neely's own direct examination spanned three days. Neely has not articulated what evidence he was unable to present because of the ALJ's constraints or explained why he needed more time than that which was afforded to him by the ALJ.

Neely also contends the ALJ erred by refusing to admit into evidence certain exhibits to which Boeing did not object before the hearing. The fact that some exhibits may not have been opposed or objected to in Neely's preliminary pre-hearing filing does not mean they should have been automatically admitted at the hearing, or that the ALJ abused his discretion in refusing to admit them when proffers could be made as to their relevance and other matters bearing on their

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<sup>126</sup> Comp. Br. at 12-13. Boeing produced the document Neely identified, but did so with redactions. Neely argues the document should have been produced without redactions. *Id.*

<sup>127</sup> We do not agree with Neely that the ALJ restricted Neely's direct examination. The ALJ required Neely to submit a list of questions he wished the ALJ to ask him during his direct examination to aid the efficiency of the presentation of evidence. D. & O. at 5. At the close of the first day of the hearing, Neely revealed the list of questions he had supplied was not complete. Tr. at 214-15. The ALJ directed Neely to complete his list of questions. *Id.* at 220-21. Although the ALJ expressed concerns with the length of Neely's examination and his focus on matters the ALJ regarded as irrelevant or duplicative, the ALJ did not order Neely to reduce the length of the examination. *Id.* at 219-21. Rather, Neely volunteered to reduce the number of questions himself. *Id.* at 216 ("What I was going to offer, sir, is I can go back and take the remaining of what we don't complete and try to condense and be into specific areas based on what I learned today . . ."), 218 ("I'm suggesting, based on what I've learned in this discussion, that I can go away and refine this. I will, hopefully, be even less than the amount of questions here for the entire case.").

<sup>128</sup> See 29 C.F.R. § 18.12(b)(1) (granting the ALJ the power to "[r]egulate the course of proceedings . . ."); *Franchini v. Argonne Nat'l Lab.*, ARB No. 2018-0009, ALJ No. 2009-ERA-00014, slip op. at 10 (ARB July 5, 2018).

admissibility.<sup>129</sup> Neely also failed to articulate how any of the excluded exhibits may have helped him achieve a different outcome in this case.

Finally, Neely contends the ALJ erred by refusing to admit testimony and evidence concerning Boeing's development of the 737 MAX aircraft. Neely argues the issues he raised regarding the 777X were like those that ultimately led to at least two fatal crashes of 737 MAX aircraft. Neely appears to contend the issues plaguing the 737 MAX support the reasonableness or validity of his concerns related to the 777X. The ALJ is vested with broad discretion to assess the admissibility and relevance of proffered evidence.<sup>130</sup> Neely has not articulated how the ALJ abused his discretion in refusing to admit or consider evidence concerning an aircraft Neely concedes he never worked on and about which he never complained. He also does not contend he was aware of the 737 MAX issues when he made his complaints about the 777X, or that they helped inform his opinion of the problems he identified with respect to the 777X's development. Furthermore, even if the evidence concerning the 737 MAX may have helped Neely establish the objective reasonableness of his concerns about the 777X, he has not explained how such evidence could help him establish that his protected activity contributed to the adverse action taken against him, and or that Boeing failed to establish its same-action defense.

### *C. ALJ's Reference to Neely's District Court Case*

In addition to his AIR 21 claim, Neely also simultaneously pursued claims against Boeing in the United States District Court for the Western District of Washington under SOX,<sup>131</sup> the Dodd-Frank Act,<sup>132</sup> the Age Discrimination in Employment Act,<sup>133</sup> and various state laws. The claims before the District Court

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<sup>129</sup> See 29 C.F.R. § 18.12(b)(5) (granting the ALJ the power to “[r]ule on offers of proof and receive relevant evidence.”); *Star Brite*, ARB No. 1998-0113, ALJ No. 1997-DBA-00012, slip op. at 15 (ARB June 30, 2000). The ALJ heard objections and ruled on the admissibility of exhibits throughout the hearing. Additionally, at the end of the hearing, the ALJ conducted a thorough final review of the parties’ proffered exhibits and objections. Tr. at 1912-2000.

<sup>130</sup> See 29 C.F.R. § 18.12(b)(5); *Star Brite*, ARB No. 1998-0113, slip op. at 15.

<sup>131</sup> 18 U.S.C. § 1514A.

<sup>132</sup> 15 U.S.C. § 78u-6(h).

<sup>133</sup> 29 U.S.C. § 623.

related to the same alleged adverse actions about which Neely complained in this case. The District Court ruled in Boeing's favor and dismissed Neely's claims.<sup>134</sup>

The ALJ referenced Neely's federal action in setting forth the procedural history in the D. & O. Neely contends it was improper for the ALJ to refer to the federal action and that the ALJ let the District Court's decisions influence his decision. We disagree. Although the ALJ mentioned Neely's federal action, he did so only to provide a meaningful summary of the procedural background of this case. The ALJ did not reference the District Court's decisions in his analysis of the merits of Neely's AIR 21 claim or invoke those decisions with respect to any of his factual findings or legal conclusions. We are satisfied the ALJ conducted his own, thorough analysis of Neely's AIR 21 claim.

*D. Timeliness of Hearing and D. & O.*

Neely argues the ALJ improperly delayed hearing and resolving this case in violation of time frames identified by the Act. The statute states ALJ "hearings shall be conducted expeditiously" and the Secretary "shall issue a final order" "[n]ot later than 120 days after the date of conclusion of a hearing."<sup>135</sup> Neely requested a hearing on February 9, 2018. The ALJ conducted the formal hearing from May 2 to May 10, 2019, and issued the D. & O. on September 24, 2020. Although the ALJ may not have met the time frames identified by the statute, we find no basis to invalidate the ALJ's decision. As the Board has expressed previously, "statutory time limits for agency action are usually deemed directory," not mandatory.<sup>136</sup>

Additionally, the Board has expressed that an ALJ's issuance of a decision beyond the statutory guides is not unreasonable where the ALJ "considered sharp conflicting testimony, and the result was a lengthy and well-reasoned decision."<sup>137</sup> In this case, the ALJ issued a detailed and well-reasoned 47-page decision involving highly technical factual issues. Twelve witnesses, including experts, testified over

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<sup>134</sup> *Neely v. The Boeing Co.*, No. C16-1791, 2018 WL 2216093 (W.D. Wash. May 15, 2018) (unpublished); *Neely v. The Boeing Co.*, No. C16-1791, 2019 WL 2178648 (W.D. Wash. May 20, 2019) (unpublished), *aff'd* 823 F. App'x 494 (9th Cir. 2020) (unpublished).

<sup>135</sup> 49 U.S.C. § 42121(b)(2)(A), (3)(A).

<sup>136</sup> *Huang v. Greatwide Dedicated Transp. II, LLC*, ARB No. 2019-0053, ALJ No. 2016-STA-00017, slip op. at 4 (ARB May 27, 2021) (quoting *Trans Fleet Enters., Inc. v. Boone*, 987 F.2d 1000, 1005 (4th Cir. 1992)).

<sup>137</sup> *Id.*

the course of a seven-day hearing, and the parties introduced approximately 300 exhibits. The technical and novel legal issues also prompted the ALJ to elicit amicus briefs from two federal agencies. The parties also mutually agreed to postpone the ALJ's hearing once, and the ALJ reasonably postponed the hearing a second time due to medical issues of Boeing's counsel.<sup>138</sup> Neely himself also requested page and time extensions for his post-hearing and appellate briefs based on the number and complexity of the issues involved and the size of the record. In these circumstances, we find the ALJ's schedule was reasonable.

#### *E. Allegations of Hearing Monitoring and Influence*

The ALJ conducted the formal hearing at an FAA facility in Des Moines, Washington. Neely asserts he was on a "live video feed camera pointing at him only during the entire hearing." Neely states the video feed transmitted to an adjacent room where a "large group of people, to include internationals" were meeting. Neely accuses the ALJ of "using FAA legal assistance and ex-parte participants advancing Boeing's litigations [sic]," and believes "this violates laws, to include international trade agreements if internationals truly had visibility to the hearing."<sup>139</sup> There is no evidence in the record supporting Neely's claim that he was being monitored or that any FAA representative or other person or entity had any access to or influence over the proceedings in this case.

#### *F. Motion for Default Judgment*

Neely requests the Board enter default judgment against Boeing, arguing Boeing did not file its opposition to Neely's opening appellate brief by the deadline set by the Board. We deny Neely's request. Boeing's opposition brief was due on or before February 8, 2021. Boeing filed its brief on February 8, 2021, using the Board's electronic filing (eFile) system, as required. Although it appears from materials Neely submitted that the docket entry for Boeing's opposition brief was not reflected in Neely's eFile user account until February 23, 2021, Boeing nevertheless filed its brief on time.<sup>140</sup> Neely also concedes Boeing served him with a

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<sup>138</sup> Although Neely argues the second postponement was unreasonable because several other attorneys had entered appearances on behalf of Boeing, the ALJ did not abuse his discretion by postponing the hearing to accommodate the medical needs of one of Boeing's attorneys.

<sup>139</sup> Comp. Br. at 13-14.

<sup>140</sup> Furthermore, even if Boeing's brief had been untimely, default judgment would not be an appropriate remedy. Boeing was not required to file an opposition brief, and the

copy of its brief via email the day it was filed, and he also subsequently received a hard copy of Boeing's brief via U.S. mail.<sup>141</sup> Accordingly, Neely also had timely and proper notice of Boeing's filing.<sup>142</sup>

*G. Rule 60(b) Motion*

After appellate briefing closed, Neely filed a motion styled as "60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding" (60(b) Motion). In the 60(b) Motion, Neely invoked Federal Rule of Civil Procedure 60(b), which gives a court the power to "relieve a party . . . from a final judgment, order, or proceeding" for defined reasons, including "mistake, inadvertence, surprise, or excusable neglect;" "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial;" "fraud . . ., misrepresentation, or misconduct by an opposing party;" and "any other reason that justifies relief." In the Motion, Neely cites a newspaper article; an FAA-sponsored Boeing white paper regarding safety issues and shortcomings in the development practices for commercial aircraft; House and Senate Reports; and a notice of settlement between the Department of Justice and Boeing regarding criminal charges. Except for the white paper, these materials relate to two fatal crashes involving Boeing's 737 MAX aircraft. Neely asserts the problems leading to the 737 MAX crashes, as discussed in the cited materials, are like those he raised with respect to the 777X and reflect systemic deficits in Boeing's design and development processes and procedures. He argues the cited materials demonstrate the reasonableness and credibility of his concerns regarding the 777X and justify immediate entry of judgment in his favor.<sup>143</sup>

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Board would still have to assess whether the ALJ's decision is supported by substantial evidence and is in accordance with the law even in the absence of an opposition brief.

<sup>141</sup> See 29 C.F.R. § 26.4.

<sup>142</sup> Neely contends he "cannot, and will not trust the [opposition] emailed to him is the authorized final version." Complainant's Motion for Extension of Time Requesting ARB Adjudicate Respondents [Sic] Non-Responsive Filing to ARB at 2. He also states "[u]nder Covid 19 restrictions, [he] will not open the mailed copy due to health issues and is conducting further investigations of [the] package." *Id.* Boeing served Neely as required by the Board's regulations and we have no basis to conclude the opposition brief Boeing served on Neely is different than the brief Boeing filed with the Board.

<sup>143</sup> Even if we accept Neely's assertion that the cited materials tend to validate his concerns about the 777X, it is not clear why he believes this fact warrants judgment in his favor, given the causation and same-action conclusions discussed above.

The Boeing-FAA white paper was issued in December 2016, several years before the hearing and D. & O. in this case. There is no evidence Neely moved to have the document admitted at trial or otherwise presented it to the ALJ for consideration. Having not been properly presented to the ALJ, we consider his arguments related to the document waived for purposes of this appeal.<sup>144</sup> Furthermore, with respect to all the documents, Neely's arguments should have been presented in the first instance to the ALJ as the tribunal from whose judgment Neely sought relief.<sup>145</sup> Accordingly, we deny Neely's 60(b) Motion.<sup>146</sup>

#### *H. Integrity of the Record*

Finally, Neely challenges the "integrity of the record" before the ARB. A small portion of the administrative record was not supplied with the OALJ's original transmittal to the Board. Upon request, the OALJ supplemented and completed the record. We have no basis to conclude that the record lacks integrity or is incomplete.

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<sup>144</sup> See *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 4 (ARB Dec. 10, 2012); *Talukdar v. U.S. Dep't of Veterans Affairs*, ARB No. 2004-0100, ALJ No. 2002-LCA-00025, slip op. at 14 (ARB Jan. 31, 2007).

<sup>145</sup> See *Allen v. Bank of Am. Corp.*, 478 Fed. App'x 340, 341 (8th Cir. 2012) (unpublished); *Tracy v. Winfrey*, 282 Fed. App'x 846, 847 (1st Cir. 2008) (unpublished); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2002); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 889-92 (4th Cir. 1999).

<sup>146</sup> We also deny Neely's motion to the extent it is construed as a request to reopen the record. The Board will only grant such a request "if the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed." 29 C.F.R. § 18.90(b)(1); accord *Kossen v. Asia Pac. Airlines*, ARB No. 2021-0012, ALJ No. 2019-AIR-00011, slip op. at 2-3 (ARB Oct. 28, 2021) (Order Denying Reconsideration and Motions to Reopen the Record). We conclude the materials cited by Neely are not material to, nor would they alter the outcome of, the dispositive issues in this appeal.

**CONCLUSION**

Accordingly, we **AFFIRM** the ALJ's D. & O. and the complaint in this matter is **DENIED**.<sup>147</sup>

**SO ORDERED**.<sup>148</sup>

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<sup>147</sup> Neely identified forty-one categories of error in his opening brief to the Board, many of which contained multiple arguments. To the extent not specifically addressed herein, the remainder of Neely's arguments and contentions on appeal are denied.

<sup>148</sup> In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).