



**In the Matter of:**

**FELIPE J. FRANCHINI,**

**ARB CASE NO. 18-009**

**COMPLAINANT,**

**ALJ CASE NO. 2009-ERA-014**

**v.**

**DATE: July 5, 2018**

**ARGONNE NATIONAL LABORATORY**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Felipe J. Franchini, pro se, Shorewood, Illinois**

***For the Respondent:***

**Jon E. Klinghoffer, Esq. and Kristen A. Jones, Esq.; *Goldberg Kohn LTD*, Chicago, Illinois**

**Before: Joanne Royce, *Administrative Appeals Judge* and Leonard Howie III, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case arises under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (Thomson Reuters 2009), as implemented by regulations codified at 29 C.F.R. Part 24 (2009). Felipe Franchini filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that Argonne National Laboratories, operated by UChicago

Argonne, L.L.C. (Argonne),<sup>1</sup> terminated his employment in violation of the ERA whistleblower provisions. OSHA dismissed his case, whereupon Franchini filed objections and requested a hearing with the Office of Administrative Law Judges. Before the assigned Administrative Law Judge (ALJ), Argonne filed a motion for summary decision seeking dismissal of Franchini's complaint that the ALJ granted by Order issued October 13, 2010. On appeal, the Administrative Review Board (ARB or Board) reversed and remanded, finding genuine issues of material fact and errors of law on the issue of causation. On remand, the case was assigned to a new ALJ, who again granted summary decision on Argonne's behalf and dismissed Franchini's complaint. Franchini again appealed to the ARB, which remanded to the ALJ for hearing. The ALJ on remand held a hearing and again ruled for Argonne on the merits. As explained below, we have reservations about the manner in which the ALJ conducted the hearing in light of Franchini's *pro se* status. Additionally, the ALJ's opinion contains factual and legal error. Nevertheless, we find the error ultimately harmless since substantial evidence supports the ALJ's finding that Franchini failed to prove that his protected activity contributed to the termination of his employment.

## BACKGROUND

UChicago Argonne hired Franchini in 2000 and terminated his employment on October 10, 2008. Franchini worked as a technician in the High Energy Physics (HEP) Division and reported to Manoel Conde, his immediate supervisor, who in turn reported to Hendrick (Harry) Weerts, the HEP Division Director. Darryl Howe served as Argonne's Employee Relations Manager. Franchini worked in Building 366, the focus of this case. Ken Wood was the Manager of Building 366. Leon Reed was Argonne's Safety Coordinator. Franchini was regarded as an excellent technician and a diligent and valuable employee.

Relevant to this case, Franchini made several safety complaints to both Argonne management and to the DOE in 2007 and 2008. Franchini filed a complaint with DOE in September 2007 concerning the work environment of Building 366. The September complaint reiterated earlier complaints and raised complaints about tool usage, frayed electrical cords, proper disposal of Devcon 60 epoxy, and eating in designated areas. On September 12, 2007, DOE's site manager at Argonne, Ronald Lutha, notified Argonne management of Franchini's complaints. Argonne responded by addressing the working conditions at Building 366.

### *Radiological storage in Building 366*

The Health Physics (HP) Department frequently surveyed radiation sources at Argonne. D. & O. at 4. In 2004, an HP technician discovered a background radiation signal coming from Cesium 137 stored in the ATLAS instrument room. The Cs-137 source is also known as the Zeus source driver. The Zeus source driver was moved outside of the building for further testing and then moved back into the instrument room. *Id.* at 6-7.

---

<sup>1</sup> Argonne National Laboratory is a scientific research facility owned by U.S. Department of Energy but operated by UChicago Argonne, L.L.C. We understand the Respondent to be UChicago Argonne, L.L.C.

When the signage was being updated for the Zeus source driver, two technicians discovered loose contamination in the storage area and initiated a follow-up check of the area. HP conducted further testing and found an additional source of contamination. It neutralized the material and quarantined the area. Upon internal review of the containment efforts, a review committee found that there was no non-compliance by Argonne in source, leakage, or response. Argonne examined the employees who worked in the area, including the technician who discovered the source as well as Franchini, and found zero dose recorded. *Id.* at 7-8.

When Franchini later learned of the incidents that took place in 2004, he requested information and data about the 2004 testing. Weerts and others at Argonne tried to obtain that information for him, but the information was archived and the individuals involved were not available. *Id.* at 8-9. Franchini also requested Material Safety Data Sheets (MSDS) on chemicals that he came into contact with while working in Building 366. *Id.* at 17. Weerts responded that the MSDS sheets are available to the public, and Franchini could collect this information through Argonne's online system. *Id.* at 4 n.9. Weerts complained of the time-consuming process that Franchini's questions entailed and directed Reed to spend only thirty minutes answering Franchini's queries. *Id.* at 18. Franchini was upset that he was asked to look up the chemical information on his own time.

#### *Franchini's concerns about the Zeus bunker and 2008 DOE complaint*

Also stored in Building 366, in a controlled concrete cave, was the Zeus module. In February 2007, the module was scheduled to be removed, dismantled, and placed in a SeaLand container outside until its final disposal.

On April 16, 2008, Franchini filed a formal complaint with DOE over working conditions in Building 366. Weerts informed employees at HEP that DOE would conduct interviews and that all HEP employees should cooperate. *Id.* at 15-16.

On April 23, 2008, Franchini called HP to survey an instrument in Building 366. The HP tech picked up a signal emanating from the SeaLand container. Reed spoke with the individual who explained that the instrument used to detect the measurable radiation would have picked up normal radiation at those distances. Reed conveyed that there was no danger from the container under normal circumstances unless someone were to stand on top of the container 365 days a year without a dose monitor. *Id.* at 13-14. The assessment team performed a contamination survey and issued a contamination report on May 14, 2008. *Id.* at 12-13. Additional cleaning was recommended and took place on June 5, 2008. On May 20, 2008, the Zeus module and container were shipped out. *Id.* at 14.

In early May 2008, Franchini emailed several individuals at Argonne and DOE, complaining about deficient processes and seeking more information about the radiological conditions and possible dangers. Franchini alleged that he did not receive important information about possible dangers from the Zeus source driver, module, or SeaLand container. Schuman

responded by forwarding the email to Lutha and others. DOE also responded to Franchini's email and investigated.

DOE's June 2008 findings, issued in response to Franchini's April 2008 complaint, addressed many of the items that he complained of in 2007 as well as whether employees were exposed to radiation, whether employees had proper training, and whether Argonne's response was appropriate. DOE concluded that Argonne did not inform all the employees of all the chemicals used in Building 366 and associated hazards with each chemical per DOE regulations. Specifically, one employee was not given an MSDS or list of chemicals that had been requested. DOE also found that some items were not stored correctly and the food and beverage area was not appropriately labeled. *Id.* at 16-17.

After receiving the 2008 DOE Report on June 11, Franchini responded to Lutha on June 23rd, stating that several items were omitted from DOE's report. Franchini mentioned the SeaLand container outside Building 366 and the lead bricks from the Zeus bunker. Franchini said that he worked in or near the room that had been the site of a radiation leak in 2004. Franchini also reiterated complaints made earlier about disposal of Devcon 60 and complaints about ventilation controls. *Id.* at 28-29.<sup>2</sup>

*Franchini violated Argonne's sick-leave policy and recorded employees without permission*

In May 2008, Franchini complained of anxiety and depression related to his harassment and work environment at Argonne. Franchini took sick leave. On May 23, 2008, Weerts emailed Franchini that he had been observed entering the Argonne campus on days that he had called in sick. Weerts informed Franchini that he was not permitted to return to work until he had been cleared by a physician and scheduled an appointment with Argonne medical. On June 2 and 4, Franchini was again seen on campus despite his prior warning about entering campus while in sick-leave status. RX-7. Franchini's June 4 purpose for being at Argonne was to provide medical personnel with a release but he had not scheduled an appointment and had not been cleared by his physician. Franchini was directed to report to a June 6 meeting to discuss his violation of Argonne's sick-leave policies. At the meeting, Franchini received a formal reprimand for violating the May 23 directive. D. & O. at 19.

When Franchini entered the June 6 meeting room, he touched an object in his front pocket at the beginning of the meeting. Howe asked Franchini if he was recording the meeting, to which Franchini answered yes. Franchini claimed that he had recorded many individuals, and had been doing so since 2004. Franchini had close to 100 recordings of up to 50 people including DOE

---

<sup>2</sup> Argonne conducted a Compliance, Oversight, Assessment (COA) investigation during the summer of 2008. On July 7-8, 2008, the COA safety team walked-through Building 366. The ALJ noted that these assessments may have taken place as a result of Franchini's complaints. On August 13-14, 2008, there was a follow-up report assessing radiological controls in Building 366. D. & O. at 30. The surveillance report listed several deficiencies regarding signage and employee uniforms.

personnel, union personnel, and Argonne medical personnel. *Id.* at 21, 23. Franchini did not trust people, and he wanted to capture instances of harassment and dishonesty. *Id.* at 21.

During the June 6 meeting, Howe asked Franchini to turn in his tapes, photographs, and videos on Monday June 9. Franchini's office, desk, and locker were searched for tapes and video equipment. Franchini agreed to return the tapes but reiterated that his purpose for making the recordings was to document people lying about his reporting. *Id.* at 22. Howe informed Franchini that failure to return the tapes would be considered insubordination. Howe's June 6 directive, CX-41:

I am requesting for you to provide to the Laboratory immediately all taped recordings of meetings, phone conversations or any other kind of taped recorded information you have that involves your job here at the Laboratory. This includes all recording devices that you have used.

I am also requesting for you to provide to the Laboratory immediately all video recordings or web cam recordings that you have used here at the Laboratory to record any and all uses of this type of recording devices.

I am also requesting for you to provide to the Laboratory immediately all pictures that you have taken using any kind of a camera whether it is digital, cell phone pictures, Polaroid, including photos on disk.

I am also advising you that the computer in the office assigned to you is going to be removed and analyzed along with any DVDs or other computer files. This will also include a review of the office you're using and your locker.

You should also understand that this is a directive that is being given to you and you should consider this as coming from your Division Director. You are also advised that your failure to comply with the request that I have just given to you will be considered as insubordinate and it will subject you to corrective action up to and including release from the Laboratory.

FF responded:

I am busy providing information for Federal agencies, which is more important. I won't provide it. Put it in writing. Make a request to my lawyer.

DH: No. You are the employee. I am making this request to you.

FF: If I don't have it now, I will provide it to you Monday [June 9].

DG: Yes, provide all the requested information on Monday. Do you have any of this at the Lab?

FF: No, it is in a secure location. I will bring it on Monday.

CX-41, pp 5-6.

Franchini returned to Argonne on June 9. Franchini testified that he returned several tapes on June 9 and left a note that these eight tapes were all that he could gather at this time. RX-8; D. & O. at 26. Howe and Weerts testified that Franchini was briefly on campus but did not return any tapes. Hearing Transcript (Tr.) at 115, 131, 160.

Franchini went on extended sick leave on June 9 and was on sick leave until his termination in October 2008. D. & O. at 26.

On June 13, 2008, Argonne sent a written directive to Franchini by FedEx repeating the June 6 directive and claiming that he failed to return the tapes and pictures by June 9. Argonne again requested the tapes upon return from sick leave and informed him that refusal to return the tapes and pictures would be insubordination.

[O]n June 6, 2008, you stated that you have been recording numerous meetings and telephone conversations with various [Laboratory] and DOE employees since 2004. You also stated you did this without the knowledge of the other parties. In fact, you attempted to tape record our meeting on June 6 without the knowledge of any of the attendees. When you were asked about that tape recording, you stated you were recording our meeting right now and at that time you were requested to turn off your recorder.

Furthermore, you informed us that you have taken numerous pictures of equipment and other items you felt related to safety concerns at the Laboratory with your camera. You stated that you had been taking pictures, recording meetings, telephone conversations, and other conversations while on the job since you were hired at the Laboratory.

You are not authorized to engage in any type of recording of meetings, conversations, or telephone conversations at the Laboratory. This prohibition includes use of any type of recording devices such as hand-held tape recording units, video recordings, computer/web recordings and/or cell phones.

During our June 6 meeting you were directed to produce all tape recordings of meetings, conversations, telephone conversations, video recordings, and pictures that you have taken at the Laboratory. At the meeting you stated that you had these materials in your possession and control and would bring them in on Monday, June 9, 2008. You reported to work on Monday, June 9 without the requested materials. [The Laboratory] considers that delay in producing these materials insubordination.

This memo is to advise you that you are again directed to produce all tapes and other media containing recordings of meetings, conversations, telephone conversations, video recordings and pictures taken at the Laboratory since your employment began on January 31, 2000. You are directed to bring all items to Darryl Howe . . . This is a direct order. Failure to comply with this directive will be cause for additional corrective action up to and including release from Laboratory employment.

Additionally, you reported sick from June 10-13 . . . you are required to call your immediate supervisor daily to report any sick leave occurrences. Because you have been absent on sick leave in excess of three days, you are required to provide your doctor's release and medical certification before you return to work. You are not to return to work or come on-site at [the Laboratory] without this certification.

RX-10; D. & O. at 26-27.

On June 18, Franchini responded to the June 13th directive, explaining why he made the recordings and claiming that the directive failed to mention other discussion points from the June 6 meeting. Also on June 18, Weerts informed Franchini that the search of his locker and desk revealed contents that may violate Argonne policies. Franchini was directed to turn in his badge and reminded to comply with the June 13 directive. D. & O. at 28. On July 10, Weerts wrote to Franchini to remind him, as stated in the directive, to comply with the medical procedures to submit physician certifications. *Id.* at 30.

#### *The termination of Franchini's employment and his OSHA complaint*

On October 3, Weerts sent Franchini, who was still on sick leave, a prepaid FedEx box asking Franchini to return the tapes. RX-16. Franchini was again informed that failure to return the tapes may result in termination. Franchini claims he never received the FedEx package. D. & O. at 42. A FedEx receipt indicates that FedEx delivered the package at 9:33 a.m. on October 6. Franchini did not mail back the tapes or respond to the October 3 letter. RX-20.

On October 10, 2008, Weerts by FedEx letter terminated Franchini's employment for violating laboratory policies, including employee conduct 7400.1 (insubordination). RX-17. Weerts and Howe were the decision-makers. D. & O. at 31. Howe testified that Franchini was fired for multiple instances of insubordination in failing to return the tapes. Howe testified that if Franchini had returned the tapes he would not have been terminated. Argonne disciplined another employee for recording but did not terminate the employee because the employee returned the tapes. RX-15, 12; D. & O. at 32.

On or about April 1, 2009, Franchini filed a complaint with the Occupational Safety and Health Administration. On June 29, 2009, OSHA concluded that Franchini engaged in protected activity under the ERA but that a series of intervening events occurred between the protected activity and the termination. OSHA found that Franchini failed to show that protected activity was a contributing factor in his termination. Franchini filed objections with the Office of Administrative Law Judges and requested a hearing.

Before the ALJ assigned to the case, Argonne filed a motion for summary decision that the ALJ granted. On appeal to the ARB, the ARB found that the ALJ erred in handling temporal proximity between the protected activity and adverse action.<sup>3</sup> The ARB remanded the case to the ALJ. On remand, Argonne filed a second motion for summary judgment. The ALJ again granted summary judgment, concluding that Argonne terminated Franchini's employment solely for his insubordination in failing to return the tapes. The ARB again remanded finding that there was a genuine issue of material fact and ordered an evidentiary hearing. The ALJ held a hearing and ruled in Argonne's favor. The ALJ concluded that Franchini engaged in protected activity but that he was fired solely for insubordination in failing to return the tapes after being asked multiple times to do so. This appeal follows.

### **JURISDICTION AND STANDARD OF REVIEW**

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA. 42 U.S.C.A. § 5851. The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012). See 29 C.F.R. Part 24. The ARB will uphold an ALJ's factual finding where supported by substantial evidence "even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

---

<sup>3</sup> *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014 (ARB Sept. 26, 2012) (*Franchini I*).



## DISCUSSION

Section 211 of the ERA provides, in pertinent part, that “No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954.” 42 U.S.C.A. § 5851(a)(1)(A). Subsection 5851(a)(1)(F) contains a catchall provision that prohibits discrimination against an employee who “assisted or participated or is about to assist or participate . . . in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.”

To prevail on an ERA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action taken against him. If the complainant’s protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it demonstrates its affirmative defense “by clear and convincing evidence that it would have taken the same unfavorable personnel action” in the absence of the protected activity.<sup>4</sup>

### *Franchini engaged in protected activity*

The ALJ found that Franchini engaged in protected activity, and Argonne does not dispute Franchini’s protected activity. The ALJ found that Franchini’s recordings were not protected because they related to racial harassment in reference to Franchini’s Equal Employment Opportunity complaint. D. & O. at 46-47. Franchini objects to this holding. Reviewing the recordings, we have difficulty agreeing with the ALJ that the content or purpose of the recording related only to racial harassment. In particular, CX-6, a February 2008 recording between Franchini and Weerts, contains numerous allegations of harassment and retaliation by co-workers in response to Franchini’s prior safety complaints alleged in Franchini’s 2007 DOE complaint as well as EEOC matters. Further, the ALJ summarized the content of a number of Franchini’s recordings that contain clear references to safety or radiation concerns Franchini raised.<sup>5</sup> As we observed in our most recent Decision and Order of Remand in this case: “to the extent that some of Franchini’s recordings taken during his employment involved work place safety concerns and were taken, as he testified, because he anticipated using the recordings in seeking resolution of problems he had identified “outside the Lab,” . . . such recordings would constitute ERA-protected

---

<sup>4</sup> 42 U.S.C.A. § 5851(b)(3)(C), (D); 29 C.F.R. § 24.109(b)(1); *Hoffman v. NextEra Energy, Inc.*, ARB No. 12-062; ALJ No. 2010-ERA-011 (ARB Dec. 17, 2013).

<sup>5</sup> D. & O. at 23-25 (*see, e.g.*, recording of meeting on August 15, 2007, in which complainant raised issues of “lead bricks, radiation contaminated bricks and health physics supervisor being upset about the radiation contamination signs not properly posted around contaminated lead bricks.”).

activity.”<sup>6</sup> The record reflects that Franchini’s recordings, at least in part, constitute protected activity,<sup>7</sup> despite the undisputed fact that most of the recordings were made in an effort to capture racial animosity. In any case, even if some of his taping constituted protected activity, substantial evidence supports the ALJ’s finding that Argonne fired him, not for the content of the tapes, but because he repeatedly failed to provide Argonne with the tapes as directed. The ALJ correctly observed that an “intervening event does not necessarily break a causal connection between protected activity and adverse action.” But given that nearly all of Franchini’s protected activity occurred prior to his repeated acts of insubordination, we affirm the ALJ’s inference that Franchini’s intervening insubordinate conduct significantly reduced, if not negated, any causal connection between his protected activity and his firing.

*Franchini failed to prove causation*

The ALJ decided the matter on contributing factor causation, ruling that Franchini failed to show that his protected activity contributed in any way to his termination. We disagree with the ALJ that “[t]here is no evidence that suggests that Weerts and Howe did or would have terminated Complainant because he raised safety concerns.” D. & O. at 52. On the contrary, Franchini’s allegations of harassment for reporting workplace safety concerns have some support in the record but flounder in part because Franchini was not represented by counsel at his hearing. The ALJ did not entertain Franchini’s lack of focus and may have prematurely cut-off Franchini’s lines of questioning and testimony. Had Franchini been represented by counsel, we expect that the record would show more support and argument in his favor. Nevertheless, ALJs have broad discretion to manage hearings and we decline to speculate on Franchini’s behalf to find that his reporting and perceived or endured harassment by co-workers contributed to a hostile work environment claim against Argonne.<sup>8</sup>

---

<sup>6</sup> *Franchini v. Argonne Nat’l Lab.*, ARB No. 13-081, ALJ No. 2009-ERA-014, slip op. at 14 (ARB Sept. 28, 2015) (*Franchini II*) (citations omitted). See *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 18 (ARB July 14, 2000) (“the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions [of the ERA]”); *Mosbaugh v. Georgia Power Co.*, ALJ No. 1991-ERA-001 (Sec’y Nov. 20, 1995) (tape recording to gather evidence in support of a nuclear safety complaint to the Nuclear Regulatory Commission protected under the ERA).

<sup>7</sup> The ALJ also improperly stated that an employee’s conduct must “implicate safety definitively and specifically,” citing the language of *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 9 (ARB Sept. 30, 2003). The ARB has since rejected this standard and held that a complainant need have only a reasonable belief that the complained-of conduct constitutes a violation of the relevant law, and that the belief is objectively reasonable “for an individual in [the employee’s] circumstances having his training and experience.” *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011).

<sup>8</sup> ALJs, like courts, are necessarily vested with the inherent power to manage their affairs so as to achieve the orderly and expeditious disposition of cases. *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, ALJ No. 2005-ERA-024, slip op. at 4 (ARB Feb. 29, 2008).

Furthermore, even had the ALJ acknowledged (or solicited at the hearing) some additional evidence that Franchini's protected activity contributed to his firing, substantial evidence supports his ultimate finding that Franchini failed to prove "by a preponderance of the evidence, that his protected activity was a contributing factor in his termination." D. & O. at 46. Even if some of the tapes constituted protected activity, Franchini agreed to return them and did not. Franchini was asked in definitive language on June 6 to return the tapes and warned of the consequences if he did not. He was again directed to do so on June 13 and warned of the consequences. Finally, he was given a final opportunity on October 3 to return the tapes but did not.

While Argonne did not have a formal policy specifically prohibiting surreptitious recording on premises, Argonne cites to a policy that incorporates lawful activity into Argonne's Code of Conduct. RX-4. Argonne demanded the tapes, in part, believing that Franchini's actions violated Illinois law. Weerts terminated Franchini's employment because he violated laboratory policies, including employee conduct § 7400.1 (insubordination). RX-3. Weerts testified that he fired Franchini for failing to return the tapes that he illegally recorded in violation of Argonne policy. D. & O. at 32. Howe also believed the recordings violated Illinois law. Tr. at 111.

The evidence shows that Argonne's termination of Franchini's employment was consistent with how Argonne treated others. Manoel Conde, who also surreptitiously recorded individuals, received a warning and directive to turn in recordings on June 19. Conde's warning follows closely after Franchini received warnings and directives on June 6 and 13, 2008. RX-12. On September 10, Conde received a 5-day suspension. Unlike Franchini, Argonne did not terminate Conde's employment because he returned the recordings when directed to do so. RX-15; D. & O. at 52. Howe testified that if Conde had not turned in his recordings, his employment, too, would have been terminated. D. & O. at 32, 52; Tr. at 120, 167; *see also* RX-32 (similar reprimand to another employee for inappropriate use of tape recording device, citing 7400. "Tape recording anyone without his or her knowledge is unethical and the Laboratory will not tolerate this kind of behavior.").

## CONCLUSION

Substantial evidence supports the ALJ's finding that Franchini failed to prove, by a preponderance of the evidence, that his protected activity was a contributing factor in the termination of his employment. Accordingly, the Board **AFFIRMS** the ALJ's dismissal of Franchini's complaint.<sup>9</sup>

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**LEONARD HOWIE III**  
**Administrative Appeals Judge**

---

<sup>9</sup> Franchini's and Argonne's other motions concerning striking material and discovery problems would not change the result of this disposition and are therefore deemed moot.