U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

NAHUN GUTIERREZ,

COMPLAINANT,

v.

R.B. STEWART PETROLEUM PRODUCTS, INC., JUSTIN FREY, and SAM POGUE,

RESPONDENTS.

ARB CASE NO. 2024-0013

ALJ CASE NO. 2022-STA-00043
ALJ ANGELA F. DONALDSON

DATE: May 22, 2026

Appearances:

For the Complainant:
Peter L. LaVoie, Esq. and Paul O. Taylor, Esq.; *Truckers Justice Center*; Edina, Minnesota

For the Respondents:
Kevin Cazalas, Esq.; *Buc-cee's Ltd.*; Pearland, Texas; Tashwanda Pinchback Dixon, Esq.; *Balch & Bingham LLP*; Atlanta, Georgia

Before KAPLAN and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.[1] Complainant Nahun Gutierrez filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondents R.B. Stewart Petroleum Products, Inc., Justin Frey, and Sam Pogue retaliated against him for engaging in STAA protected activity. A United States Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.)

[1] 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2025).

denying Complainant's complaint. Complainant petitioned the Administrative Review Board (ARB or Board) for review. For the following reasons, affirm the ALJ's D. & O.

BACKGROUND

Complainant was employed by R.B. Stewart Petroleum Products, Inc. (RBS) from June 27, 2017, to February 21, 2022.[2] Complainant's official title was "Tanker Driver."[3] As a Tanker Driver, Complainant was responsible for picking up, transporting, and delivering fuel.[4]

During a shift that began on February 15 and ended in the early morning hours of February 16, 2022, Complainant completed multiple deliveries and took several breaks.[5] At approximately 3:46 a.m., while driving back toward RBS's terminal, Complainant began experiencing symptoms of fatigue and parked his truck on the shoulder of a two-lane highway, where he remained for approximately 32 minutes.[6]

While the truck was parked, Complainant activated the truck's hazard flashers but did not place reflective warning triangles behind the truck, and the truck was not positioned at a sufficient distance from the roadway, in violation of RBS's Transportation Policies & Procedures Manual (RBS's Transportation

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2 D. & O. at 7.

3 *Id*.

4 *Id*.

5 *Id*. at 10-11.

6 *Id*.

Policies)[7] and Department of Transportation (DOT) regulations.[8] Once stopped, Complainant did not notify dispatch or management that he was fatigued or that he had stopped driving.[9] Drivers are permitted to take reasonable breaks during shifts, but are required to record any break or change in duty status in their driver logs, and to notify dispatch if a break exceeds approximately 25-30 minutes.[10] Moreover, drivers who cannot complete their shift due to fatigue or illness are required to notify dispatch, so that dispatch can determine whether the driver could safely return to RBS's terminal or, if not, arrange for a replacement driver to take over to

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[7] RBS's Transportation Policies state, in pertinent part:

> Reflective Triangles: There are three (3) reflective triangles in the cab of the truck located in a red plastic box. These triangles are to be used for mechanical breakdowns or roadside flat tire repairs, or any other time the vehicle is stopped on the traveled portion or the shoulder of a highway for any reason other than necessary traffic stops. These reflective triangles should be placed in accordance with [DOT] regulations.

Id. at 12-13. RBS's Transportation Policies also state, "[a] driver who experiences any of the above [fatigue] warning signs should immediately get off the road and stop where safely and legally allowed to stop to get rest and to awaken the body and mind[,]" and "[i]n transit drivers are expected to: . . . [p]lan breaks and stops at reputable and established truck stops or rest areas where other trucks are present." Joint Exhibit (JX) 11 at 2; JX-24 at 32, 38; *see* D. & O. at 17.

[8] At the time relevant to this case, DOT regulations provided, in pertinent part:

> [T]he driver shall, as soon as possible, but in an event within 10 minutes, place the warning devices . . . in the following manner: (i) One on the traffic side of and 4 paces (approximately 3 meters or 10 feet) from the stopped commercial motor vehicle in the direction of approaching traffic; (ii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial motor vehicle in the center of the traffic lane or shoulder occupied by the commercial motor vehicle and in the direction of approaching traffic; and (iii) One at 40 paces (approximately 30 meters or 100 feet) from the stopped commercial motor vehicle in the center of the traffic lane or shoulder occupied by the commercial vehicle and in the direction away from the approaching traffic."

49 C.F.R. § 392.22. The DOT amended this regulation in 2026, in a manner not relevant to this appeal, to remove the references to liquid-burning flares from the warning device requires in the Federal Motor Carrier Safety Regulations. Parts and Accessories Necessary for Safe Operation; Liquid-Burning Flares, 91 Fed. Reg. 7867 (Feb. 19, 2026) (Final Rule).

[9] *See* D. & O. at 12, 17, 26.

[10] *See id*. at 7-8, 11.

complete the shift.[11] Complainant was aware of these policies and practices and had previously used the replacement-driver practice on several occasions.[12]

Shortly after the February 15-16 shift ended, dispatch asked management to review Complainant's driving logs because of concerns about the length of the shift and whether Complainant was "milking the clock."[13] Justin Frey, Regional Operations Manager, and Sam Pogue, Director of Safety, reviewed the logs and obtained video footage of Complainant's 3:46 a.m. stop.[14] The video footage showed that Complainant had stopped on the shoulder of a dark, high-speed roadway for an extended period without deploying warning devices and in close proximity to passing traffic.[15] Frey and Pogue viewed these actions as serious safety violations given the hazardous nature of the cargo and the risks posed to the public and Complainant.[16] After reviewing the logs and footage, Frey and Pogue recommended terminating Complainant's employment due to unsafe conduct.[17] The termination, however, could not be finalized without approval from RBS's vice president, who had final authority over that decision.[18] At the time Frey and Pogue recommended termination, Complainant had not reported that he stopped because of fatigue.[19]

When Complainant reported for his next scheduled shift, on February 16-17, RBS's vice president had not yet responded to the termination recommendation.[20] Frey and Pogue therefore arranged for a driver trainer to accompany Complainant on the shift.[21] During this shift, Complainant reported to the driver trainer that he was fatigued and stopped driving.[22] The driver trainer relayed this information to a supervisor, drove Complainant back to RBS's terminal as instructed by the supervisor, and then completed the assigned deliveries.[23] Later that evening,

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11 *Id*. at 8.

12 *Id*. at 5, 8.

13 *Id*. at 11.

14 *Id*. at 11-12.

15 *Id*. at 12.

16 *Id*. at 12, 14.

17 *Id*. at 14.

18 *Id*.

19 *Id*. at 15.

20 *Id*. at 14.

21 *Id*.

22 *Id*. at 15.

23 *Id*.

Complainant sent management an email reporting fatigue symptoms he experienced during the February 16-17 shift.[24]

On February 17, management received notice of Complainant's email and discussed it internally.[25] Management did not forward the email or its contents to RBS's vice president because "the decision was already made" to terminate Complainant based on his conduct during the February 15-16 shift.[26] By early afternoon, RBS's vice president approved the termination, and human resources drafted language for the termination notice and emailed the proposed language to management for approval.[27] Later that afternoon, Complainant notified dispatch that he was ill and would not report to work.[28]

Complainant was next scheduled to work on Sunday, February 20, but was instructed not to report due to an ongoing investigation.[29] Instead, Complainant was directed to report the following day because corporate personnel were unavailable on Sundays.[30] On February 21, Frey and Pogue met with Complainant and terminated his employment.[31] The termination notice outlined Complainant's conduct during the February 15-16 shift and cited violations of RBS's Transportation Policies and DOT regulations.[32] Frey and Pogue also considered Complainant's prior training and disciplinary history in connection with the termination decision.[33] During the termination meeting, Complainant stated that he stopped during the February 15-16 shift because he was tired.[34]

On March 1, 2022, Complainant filed a complaint with OSHA alleging that Respondents retaliated against him in violation of the STAA.[35] On April 4, 2022, OSHA issued Secretary's Findings, concluding that there was no reasonable cause

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24 *Id*. at 16.

25 *Id*.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*. at 16-17.

31 *Id*. at 17.

32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*. at 3.

to believe a violation occurred and dismissed the complaint.[36] Complainant filed objections to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges (OALJ).[37]

The ALJ held a formal hearing on January 11-12, 2023.[38] On December 28, 2023, the ALJ issued a D. & O., finding that Complainant's protected activity was not a contributing factor in his employment termination and, in the alternative, Respondents would have terminated Complainant absent his protected activity.[39]

Complainant filed a timely petition for review with the Board. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review appeals from ALJ decisions and to issue agency decisions in cases arising under the STAA.[40] In STAA 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.[41] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[42] Under this standard, the "threshold for such evidentiary sufficiency is not high."[43] When reviewing decisions under a substantial evidence standard, the Board is precluded from "deciding the facts anew, making credibility determinations, or re-weighing the evidence."[44]

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36 *See id.*

37 *Id.*

38 *Id.* at 2.

39 *Id.* at 28.

40 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).

41 29 C.F.R. § 1978.110(b); *Halliday v. Transp. Express, Inc.*, ARB No. 2023-0024, ALJ No. 2020-STA-00067, slip op. at 11 (ARB Oct. 7, 2024) (citing *Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 10 (ARB Apr. 16, 2024)).

42 *Halliday*, ARB No. 2023-0024, slip op. at 11 (citing *Stokes v. Albertson's, LLC*, ARB No. 2022-0007, ALJ Nos. 2020-STA-00080, -00082, slip op. at 5 (ARB May 20, 2022)).

43 *Biestek v. Berryhill*, 587 U.S. 97, 103 (2019).

44 *Dick*, ARB No. 2022-0063, slip op. at 16 n.116 (quoting *Clem v. Comput. Scis. Corp.*, ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 13 (ARB Mar. 10, 2021)).

DISCUSSION

1. Governing Law

The STAA provides that a person may not "discharge," "discipline," or discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in protected activity.[45] To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in activity that STAA protects; (2) his employer took adverse action against him; and (3) his protected activity was a contributing factor in the adverse action.[46] If the complainant meets this burden of proof, the respondent may avoid liability if it establishes an affirmative defense, proving by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[47]

2. Complainant's Alleged Protected Activity Did Not Contribute to His Employment Termination

To prove causation in a STAA whistleblower case, a complainant must prove that his protected activity was a contributing factor in the adverse action taken against him.[48] The Board has noted that this is a relatively low standard for an employee to meet—the activity need only play some role and "need not be 'significant, motivating, substantial or predominant."[49] Complainants may meet their evidentiary burden for the contributing factor element with circumstantial evidence.[50] Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism.[51] While the Board recognizes that

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[45] 49 U.S.C. § 31105(a)(1); *see also* 29 C.F.R. § 1978.102(a). STAA complaints are governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b).

[46] 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a); *Halliday*, ARB No. 2023-0024, slip op. at 12 (citations omitted).

[47] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1978.109(b); *Halliday*, ARB No. 2023-0024, slip op. at 12 (citations omitted).

[48] 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a); *Halliday*, ARB No. 2023-0024, slip op. at 12 (citations omitted).

[49] *Dick*, ARB No. 2022-0063, slip op. at 14 (citing *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 9 (ARB May 13, 2020)).

[50] *Halliday*, ARB No. 2023-0024, slip op. at 22 (citing *Williams v. QVC Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023)).

[51] *Id*.

temporal proximity is an important part of a case based on circumstantial evidence, and is often the most persuasive factor, the causal inference that temporal proximity gives rise to may be severed by a legitimate intervening event, especially one undertaken by the complainant.[52]

Although the ALJ determined that Complainant engaged in protected activity by ceasing to operate his vehicle due to fatigue and by reporting fatigue and illness to Respondents, the ALJ concluded that Complainant failed to establish that his protected activity was a contributing factor in the decision to terminate his employment.[53] The ALJ found that management terminated Complainant's employment after reviewing driver logs and video footage showing that he stopped his truck on the shoulder of a highway while transporting hazardous materials, failed to place required reflective warning devices, failed to position the vehicle a safe distance from the roadway, and failed to notify dispatch or request assistance.[54] The ALJ determined that these actions were viewed as serious safety violations and that Respondents' decision to terminate Complainant was made before Complainant reported fatigue symptoms, stopped driving during the February 16-17 shift, or called in sick on February 17.[55]

On appeal, Complainant argues that the ALJ misapplied the contributing factor standard and failed to give proper weight to the evidence showing that his protected activity contributed to his termination.[56] Complainant further contends that Respondents knew about his protected activity before deciding to terminate his employment and that the temporal proximity between his protected activity and termination was not negated by intervening events because the events were inextricably intertwined with the protected activity.[57]

The Board disagrees. The ALJ thoroughly discussed the record evidence and explained her factual findings in support of her legal conclusions. Substantial evidence supports the ALJ's finding that any protected activity in which Complainant engaged in did not contribute to his termination.

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[52] *Bush v. Donato's Pizza*, ARB No. 2024-0009, ALJ No. 2022-TAX-00006, slip op. at 8 (ARB Dec. 30, 2025) (citing *Jones v. Exclusive Jets, LLC*, ARB No. 2023-0035, ALJ No. 2022-AIR-00003, slip op. at 16 (ARB Dec. 31, 2024)).

[53] D. & O. at 23-27.

[54] *Id*. at 25-27.

[55] *Id*. at 24-27.

[56] Complainant's Brief on Review (Comp. Br.) at 15-26.

[57] *Id*. at 16-26.

First, Respondents lacked knowledge of Complainant's alleged protected activity during the February 15-16 shift when he stopped on the shoulder of the highway. Complainant did not communicate to dispatch or management that he had stopped driving due to fatigue until the termination meeting five days later.[58] Although management reviewed video footage of the stop and could have inferred that Complainant was resting or sleeping, such inference does not establish knowledge that he was refusing to drive because of fatigue or otherwise engaging in protected activity. Drivers routinely took breaks throughout their shift for reasons unrelated to protected activity.[59] Further, when a driver took an extended break or was unable to complete a shift due to fatigue or sickness, the driver was expected to call dispatch.[60] A refusal is protected only if it provides sufficient context to put the respondent on notice that it is grounded in an actual or perceived safety or regulatory violation.[61] Here, Complainant provided no explanation until the termination meeting, and the surrounding circumstances did not place Respondents on notice or indicate that Complainant was refusing to drive based on an actual or perceived safety or regulatory violation.

Second, assuming for the sake of argument that Respondents knew or should have known that the stop constituted protected activity, intervening events severed any causal connection between the protected activity and termination. Specifically, during this stop, Complainant parked the truck on the shoulder of a dark, high-speed highway and failed to place the required reflective triangles behind the vehicle.[62] These choices were independent and serious safety violations that created a hazard to Complainant and the public, particularly given the nature of cargo.[63] Complainant has argued that Respondent's reason for taking adverse action against him is "inextricably intertwined" with Complainant's protected activity, but that fact alone could not establish causation.[64] The relevant inquiry is whether the protected activity itself influenced the decision-makers.[65] Here, substantial evidence

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58 D. & O. at 15, 17, 24-26.

59 *Id*. at 7-8.

60 *Id*. at 8.

61 *See Sharpe v. Geiger Excavating, Inc.*, ARB No. 2024-0038, ALJ No. 2023-STA-00027, slip op. at 6 (ARB Apr. 29, 2026) (evaluating a refusal to drive claim in the context of protected activity analysis, though the same reasoning applies here) (citations omitted).

62 D. & O. at 11-13, 24-26.

63 *Id*. at 12, 14, 26.

64 The Board has maintained that the "inextricably intertwined" or "chain-of-events" analysis cannot substitute for contributing factor causation. *Klinger v. BNSF Ry. Co.*, ARB No. 2019-0013, ALJ No. 2016-FRS-00062, slip op. at 9 (ARB Mar. 18, 2021) (holding that reliance on an "inextricably intertwined" theory constitutes legal error).

65 *See id.* (citing *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 21 n.13 (ARB May 19, 2020) ("Even in situations in which both the

supports that management was not influenced by the stop itself, but by the manner in which Complainant stopped—namely, his choice of an unsafe location and his failures to take required safety precautions during the stop.

Third, with respect to Complainant's reports of fatigue symptoms, decision to cease driving during the February 16-17 shift, and his February 17 call-out, substantial evidence supports the ALJ's finding that those protected activities were not a contributing factor in his termination because Respondents had already decided to terminate Complainant based on their investigation into his February 15-16 conduct. This finding is supported by credible testimony and contemporaneous documentary evidence. Specifically, Frey and Pogue credibly testified that, after reviewing the video of the incident, they concluded that termination was warranted and recommended that course of action to RBS's vice president before any protected activity occurred after Complainant's February 15-16 shift.[66] Their testimony was corroborated by emails detailing management's investigation into Complainant's February 15-16 shift, driver logs, and video footage.[67]

Although management reviewed and discussed Complainant's fatigue email before RBS's vice president approved the recommended termination, they did not forward the email or convey its content to him.[68] Moreover, once RBS's vice president approved the termination, human resources drafted and emailed the proposed termination language to managers before Complainant later called in sick that same day and before he first explained that his February 15-16 shift stop was attributable to fatigue.[69]

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protected activity and the employer's non-protected reason for adverse action arise from the same bundle of events or situations in which the protected activity incidentally initiated the sequence that resulted in the adverse action, the ALJ, as the fact-finder, must still decide whether the protected activity 'contributed to' the adverse decision.").

66 D. & O. at 11-12, 23-24.

67 *Id*.

68 In Complainant's Reply Brief, he argues that the law does not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker. Comp. Reply at 5. Complainant did not raise this argument before the ALJ or in his opening brief before the ARB. The Board does not typically consider arguments raised for the first time in a reply and declines to do so here. *Thibodeau v. Wal-Mart Stores, Inc.*, ARB No. 2017-0078, ALJ No. 2015-SOX-00036, slip op. at 19 n.100 (ARB Dec. 17, 2020) (citation omitted).

69 D. & O. at 16, 23-24.

It is a central to the concept of causation, that for an act to cause an outcome, the act must occur *first*. Accordingly, the Board affirms the ALJ's finding as it supported by substantial evidence.

3. Respondents Demonstrated by Clear and Convincing Evidence They Would Have Terminated Complainant's Employment in the Absence of His Protected Activity

If a complainant demonstrates that his protected activity was a contributing factor in the adverse action, the respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[70] The Board has previously held an employer satisfies this burden when it shows that it is "highly probable" it would have taken the action in the absence of protected activity.[71]

The ALJ concluded that even if Complainant had met his burden to show contributing factor causation, Respondents would still have avoided liability because they showed by clear and convincing evidence that they would have taken the same action regardless of any protected activity.[72] Specifically, the ALJ found that: (1) the termination was based on serious safety violations during the February 15-16 shift; (2) there was no evidence of retaliatory animus or pretext; and (3) credible testimony established that Complainant would not have been terminated had he followed required safety procedures or contacted dispatch for assistance.[73]

On appeal, Complainant argues that the ALJ erred by failing to give proper weight to evidence and by improperly relying on her causation findings, which do not satisfy the heightened clear and convincing standard.[74] Complainant also argues that Respondents failed to present evidence of consistent discipline for similar policy violations and lacked a legitimate business justification for the termination.[75] Complainant further argues that Respondents' policy concerning reflective triangles for longer stops is arbitrary and illogical, and that under the circumstances, he made the best decision available because he could neither continue driving lawfully nor park the truck at a safer location.[76]

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70 29 C.F.R. § 1978.109(b).

71 *Simpson,* ARB No. 2019-0010, slip op. at 9 (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52 (ARB Jan. 4, 2017)).

72 D. & O. at 27-28.

73 *Id*. at 28.

74 Comp. Br. at 27-29.

75 *Id*. at 28-30.

76 *Id*. at 31-32.

Again, the Board disagrees. The ALJ's finding that Respondents would have terminated Complainant's employment in absence of his protected activity is supported by substantial evidence. Respondents terminated Complainant's employment because he created a serious hazard by stopping on the shoulder of a dark, high-speed roadway while hauling hazardous materials, parking too close to the travel lane, and failing to timely deploy reflective triangles, in violation of company policy and safety regulations.[77] The ALJ reasonably credited testimony from Frey and Pogue that Complainant would not have been terminated had he stopped safely, contacted dispatch, or properly used warning devices.[78] That testimony was supported by evidence that Respondents routinely accommodated fatigued drivers without discipline by allowing rest, arranging relief drivers, or transporting drivers back to the terminal.[79] Complainant even acknowledged he had previously used those options.[80]

In addition, Respondents' explanation remained consistent and was corroborated by company policies, training materials, logs, video footage, and the termination notice.[81] Respondents had established fatigue-reporting and roadside-safety procedures, trained drivers on them, and Complainant knew those procedures.[82]

Finally, as noted by the ALJ, there was no evidence of retaliatory animus, hostility to fatigue complaints, shifting explanations, inconsistent enforcement, or any other signs of pretext.[83] Accordingly, the Board affirms the ALJ's finding as it is supported by substantial evidence.

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77 *Id*. at 14, 17, 28.

78 *Id*. at 12-14, 28.

79 *Id*. at 13-14, 28.

80 *Id*. at 5, 8, 28.

81 *Id*. at 7-8, 11-13, 28.

82 *Id*. at 5, 7-8, 28.

83 *Id*. at 28.

CONCLUSION

For the reasons stated above, we **AFFIRM** the ALJ's D. & O. Accordingly, Complainant's complaint is **DENIED**.

SO ORDERED.

ELLIOT M. KAPLAN
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge