UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATIVE REVIEW BOARD

JAMES J. BOBRESKI,	**ARB Case No. 13-001**
Complainant,	OALJ Case No. 2008-ERA-3

against,

J GIVOO CONSULTANTS, INC.

Respondent.

COMPLAINANT'S BRIEF TO THE ADMINISTRATIVE REVIEW BOARD

I. INTRODUCTION AND SUMMARY OF THE CASE ON REMAND[1]

This case concerns whether in 2006, J Givoo Consultants ("Givoo") refused to hire the Complainant, Mr. James Bobreski, for one of the many available I&C technician positions at the Hope Creek plant as a result of Bobreski engagement in protected activity. Bobreski actively sought to be hired by the Respondent, J. Givoo Consultants, Inc. ("Givoo"), as an Instrument and Control ("I&C") technician for the Spring 2006 Hope Creek nuclear power station refueling outage ("Hope Creek outage"). The Hope Creek and Salem nuclear facilities are located side-by-side and owned and operated by Philadelphia Gas & Electric Company ("PG&E"). T1 65.

[1] We refer to the transcript from the first hearing as "T1" and the transcript from the second hearing as "T2," and Complainant's Exhibits from both hearings are referred to as "CX."

PG&E awarded Shaw, Stone and Webster ("Shaw") a five-year contract to supply supplemental maintenance and construct support at its Hope Creek/Salem plants; and while the 2006 Hope Creek outage remained in its planning stage, Shaw was considering subcontracting the necessary I&C technician staffing to Givoo, CX 4 at 13-14. However, the staffing of I&C technicians in preparation for the outage instead commenced under a separate "short duration notice" contract Givner negotiated with PG&E, requiring Givoo to immediately provide qualified technicians to staff outgage related work. T1 66. Givoo was instructed and did all of its staffing under that contract until Givner "had a contract signed with Shaw." T2 198. Though Givoo never explained the reasons for the delay in executing its contract with Shaw, it is undisputed that Givoo's contract with Shaw was not signed by Shaw until March 29, 2006. CX 9 at p. 10. It is uncontested that Givoo staffed a substantial number of technicians for the outage between the time Givner executed its contract with PG&E and the contract with Shaw was executed. T2 205, CX 4 at p. 14, CX 10. While exclusively working under its PG&E Law had no control over the technicians Givoo hired. T2 198. Law recounted how Shaw pulled him into a meeting directed that he turn over his manpower lists to Givoo because he was not going to be involved with the staffing of the outage, T2 136-37, 142, and that he remained in that status when he received the phone calls from Bobresk . T2 149, 164; also see CX 5, pp. 3-4 ("Givoo was going to take care of everything and we were going to be managing from a hands-off type of deal" and "informed [Bobreski] that I was not doing the hiring for the upcoming outage" and "explained to him that I did not have any control over the hiring of technicians"). Bobreski confirmed that the conversations he had with Law occurred on February 27, 2006 and March 21, 2006, and that Law both times told him he had no involvement with the hiring decisions and that those decisions were up to Morgan. T2 50-51, 54-55; CX 6.

Bobreski has staffed the last six successive Hope Creek/Salem outages, including twice in 2005, and expected to be called when the hiring for the Hope Creek outage began. He was not. Boberski concluded that the only reason he was not being called to staff the outage was that, for the first time, Joel Givner, the principal of Givoo, was involved with the hiring decisions.

A. Givner's Exteme Animus Towards Boberski

The record establishes why it is that Givner harbors considerable animus towards Bobreski. His hostility is directly tied to the manner and method in which Bobreski went about blowing the whistle when he was stationed at WASA's Blue Plains facility as a Givoo contract employee. Givner had rewarded Bobreski with a long-term contract, T2. 182, and Givner expected loyalty in return. Instead, Bobreski made waves in the workplace, the extent to which Givner did not fully realize until after a front page *Washington Post* article appeared on November 5, 1999. CX 13. Bobrerski engaged in conduct Givner considered unthinkable. He surreptitiously tape recorded a Givoo supervisor stating that Givoo knew of the safety problems with the chlorine sensors but was unwilling to fix them because he feared doing so would jeopardize Givoo's contract with WASA, shared a copy of that recording with the *Post* reporter and brought the reporter onto the Blue Plains facility to take pictures and document the serious concerns Bobreski had with the manner in which WASA and Givoo had gone about resolving his concerns.[2]

The November 5, 1999 the *Washington Post* article explained how:

---

[2] It was not until after Bobreski was terminated that the true extent of Bobreski's whistleblowing came to the attention of Givner. Givner learned that a *Washington Post* reporter was working on a story on Bobreski's concerns. Givner took charge of handling the *Post* reporter and a memo was circulated to Givoo employees that all communication with the media had to be referred to Givner. T2. 191 (stipulation); CX 12; T1. 40-41.

[A] Givoo supervisor told Bobreski that he feared the firm might lose its bid for a $1 million a year contract renewal with the District if it kept badgering the city about safety flaws.

The supervisor did not know his remarks were being recorded. A copy of the recording, which was legal under D.C. Law, was obtained by the Washington Post.

'There are certain things that need fixing, such as the Chlorine Building,' Givoo supervisor Dan G. Juanillo Sr. says on the tape. Water and Sewer Authority officials 'know about it . . . we have already written it up many times. We made a mention of it. Enough Said . . .

'What I am saying here is, we are stirring up a can of worms and it is going to [mess] up somebody somewhere and somebody is going to pay for it. Juanillo says on the tape. 'And what we are looking at is Givoo right now.'

Juanillo acknowledged in an interview that he made the remarks. Top Givoo officials at the company's Cherry Hill, N.J., headquarters said yesterday that they were 'disturbed' to hear what Juanillo had said . . .

* * *

Marcotte, the chief engineer for the Water and Sewer Authority, said no one from Givoo ever approached his with safety concerns.

The company, he added, had an obligation to continue to bring any safety shortcomings to the city's attention.

'Certainly I would like to hear from our contractors and our people if there is an issue of health and safety of that magnitude,' Marcotte said. 'I am very troubled by their take on this.'

. . . Yesterday, the authority suspended consideration of Givoo's contract. renewal.

CX 13 at pp. 3, 6.

After the article appeared Givner was faxed an excerpt of the WASA Board meeting transcript, T2. 193, confirming that Bobreski's protected activity had placed Givoo's long term contractual relationship with WASA in jeopardy. As was explained by WASA's General Manager to his Board:

> [D]uring the past couple of weeks there have been some issues raised regarding the performance of [Givoo], and we would like to not enter into a long-term contract agreement until we've had an opportunity to evaluate their performance and make a determination as to whether we want to, in fact, continue to do business with this particular contractor.

CX 16 at Deposition Exhibit 3 p. 39.

WASA's Board agreed and voted not to enter into another long term contract with Givoo until WASA had sufficiently investigated Givoo's performance. *Id.* Givner then provided WASA with a sworn affidavit falsely alleging that Bobreski "knowingly breached WASA's security rules by bringing unauthorized personnel onto WASA's premises." CX 16 at Deposition Ex. 3, p. 40-41. Significantly, during both hearings in this case, Givner never disavowed his view that Boberski was a security risk for having breached WASA's security rules.

Bobreski had become *persona non grata* at Givoo. As Moore put it, Bobreski "[lacked] integrity, [he is] a person that steals, a person that violates security, and a person that records private conversations" and he is someone who is capable of "lying" and "cheating." CX 16 at Depo. Ex. 1 (Moore Aug. 17, 2001 Depo Excerpt) at pp. 34, 41. Givner ultimately lamented that he expected that the WASA case would provide him to have his day with Bobreski, but was denied that chance. T1 44 (Givner expressed continued concern that "a former employee taking [the *Post* reporter] on the facility, violating a security measure by taking him there when he was not an employee of the facility any more, and giving him a one-sided, biased opinion of what he felt were the conditions . . . I knew there would come a point in time, I would have my day – at least I thought I would have my day . . . We never had that day . . .").

B. Givner Retaliates against Bobreski

Givner went so far as reporting Bobreski to be a nuclear security risk, recognizing that a credible report to that effect would forever end Boberski's career in the nuclear industry. T1 217, 229; T2 41. Givoo's office manager, Kathy Oliveri, was responsible for routine responses to background checks. In February, 2000 she received a request for a nuclear security background check for Bobreski. That request was anything but routine, so she gave it to Givner. T2. 195. Givner thereafter told the head of security for the Niagara Mohawk nuclear generating station that Bobreski intentionally violated plant security by bringing a reporter onto the facility after his badge had been revoked. T1. 48; T2. 196. That accusation itself was false, as Boberski never violated any WASA security procedures or regulations.[3] T2. 33-34.

C. Bobreski's Employment at Hope Creek Salem NGS

A major source of employment Bobreski enjoyed after leaving Givoo's employ was working the Hope Creek/Salem outages. PG&E employed a variety of contractors to provide the I&C technicians needed to staff the outage. T1. 121. Givoo ran Hope Creek outages between 1987 to 1997, T1. 55, and hired Bobreski to staff those outages. T2. 27-28; CX 3. When Givoo lost the Hope Creek/Salem contract, Law began to function as the plant I&C general foreman responsible for hiring I&C technicians to staff outages. T2. 126. Prior to the 2006 outage, Law hired Bobreski as an I&C technician for the six prior outages in succession. T1. 137; 234-35.

---

[3] Bobreski escorted the reporter onto the Blue Plains site on or about October 5, 1999. CX 14 at p. 37. He was not terminated from his position at WASA until October 29, 1999. CX 14 at p. 2. Moreover, WASA had no security checks and persons entering the facility did not have to show identification. T1. 225, CX 14 at p. 37 ("During the first week of October, probably October 5, 1999, about 7:00 a.m., the reporter from *The Washington Post,* Mr. Lipton, accompanied Mr. Bobreski to Blue Plains. . . Mr. Bobreski did not know of any work rule prohibiting him from escorting Mr. Lipton onto the plant . . . The guard at the gate waived him through . . . [a]nd WASA did not establish that there was any rule which prohibited Mr. Bobreski's action.").

These outages were normally staffed in several waves of technicians entering at different times. T2. 46. The first wave would be the technicians called into the plant before the plant was shut down for the outage. T2. 47. Law always hired Bobreski as part of the first wave of technicians entering the plant. T2. 47-48.

D. Bobreski's Wins Against WASA

On July 11, 2005 Administrative Law Judge ("ALJ") Kraft ruled that Boberski's removal from the Blue Plains facility was unlawful and that the remedy he was entitled to included reinstatement. CX 14. Judge Kraft further ordered that the record be supplemented as to the current status of "WASA's contract with Givoo." *Id.* At 53. Word of Bobreski's victory circulated around the I&C community. Hope Creek co-workers came up to Bobreski to ask him about the case, and he was told that a copy of the news story report on his victory was posted on a Hope Creek bulletin board. T1. 233-39; T2. 38; CX 17. Contrary to Givner's and Morgan's denial, Moore admitted that the fact that Bobreski won his case "was common knowledge" within Givoo. CX 16, Dep 2. 40. When the article, which included a picture of Bobreski, was published, Givoo was still working for WASA. It is difficult to conceive that word of Bobreski's victory would not percolate up to Givoo's top management from the staff who read the paper at the site. After all, Givner had originally designated himself as point of contact for all communication having to do with the *Washington Post*. CX 17. Givner nonetheless claimed ignorance of the ruling. T2. 202.

E. Bobreski's Case Against Givoo is Remanded

On June 24, 2011, the ARB Administrative Review Board ("ARB") issued an Order of Remand ("RO") addressing shortcomings in the January 26, 2009, Decision and Order (D&O1) ALJ Janice Bullard. The ARB concluded that "the ALJ too narrowly defined Bobreski's

protected activity as an act that ended seven years before the alleged failure to hire Boberski instead of realizing that "Givoo's adverse action was engulfed by Bobreski's protected activity, which continued during the Hope Creek 2006 hiring process." RO at 10.[4]

The ARB determined that the case had to be remanded "for three independent reasons. First, the ALJ too narrowly defined Bobreski's protected activity" which necessarily "skewed" the ALJ's balancing of the evidence. "Second, the ALJ made ambiguous findings as to whether Givner's actions contributed to Givoo's adverse action" to determine whether "Givner contributed in any way to the adverse action." "Finally, the ALJ must expressly find and explain whether on not Bobreski's circumstantial evidence, *taken as a whole*, established that his protected activity contributed to Givoo's adverse action." (emphasis in original).[5] *Id.* At 10. To this end the ARB pointed out that the ALJ "fragmented the circumstantial evidence, rather than considering it as a whole under the totality of circumstances." *Id.*

The ARB observed that "[t]he ultimate conclusion could be wrong if the ALJ either mischaracterizes each piece of evidence or fails to ultimately view them as a whole on the same scale." *Id.*, at 14. The ARB further observed that the ALJ made "ambiguous findings as to whether [Joel] Givner's actions contributed in any way to the adverse action" and, if so, "whether his contribution was at all based on Bobreski's protected activity." The ARB observed that "the question is not whether Givner was 'directly' involved or whether he was involved in

---

[4] The ALJ's "skewed view of temporal proximity" was " so fundamental to the ALJ's decision that, regardless of any other errors, [that misperception] required [the ARB] to remand the case." *Id.*, at 13.

[5] The ARB further clarified that the totality of the circumstantial evidence includes "a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices" among other types of evidence. *Id.* at 14.

the 'compilation' of a list of technicians; it is whether Givner influenced the process that led to Givoo's refusal to hire Bobeski." RO at 15. The ARB directed that "[t]he ALJ must expressly find and explain whether the record as a whole does or does not support Bobreski's claim that Givner influenced the hiring decision as it pertained to Boberski." *Id.* To this end the ARB pointed out fifteen (15) factors that, among others, had to be considered to determine whether the record, as a whole, "establishes that Givner influenced the ultimate decision to reject Boberski." *Id.*

The ARB further opined that it "saw no legitimate reasons in the record that were offered by Givoo" for its failure to hire Bobresik and that, to the extent Givner "presented evidence of legitimate business reasons at the hearing the ALJ must clearly explain her findings as to what those reasons were and how they affected the ultimate question of causations when considering along with all of the circumstantial evidence presented by Bobreski. RO at 20.

The ARB offered that the resolution of these issues could be resolved based on the existing record and instructed the ALJ to do so. RO at. 21.

II. INTRODUCTION OF NEW EVIDENCE

After remand the case was reassigned to ALJ Ralph A. Romano. Although the parties requested that the case be decided on the existing record, ALJ Romano held a "re-hearing in order to clarify certain factual ambiguities underscored by the ARB directive and to make adequate witness credibility determination." September 17, 2012 Decision and Order of ALJ Romano (D&O2) at 2. The prior hearing record was incorporated into the re-hearing record. The re-heaing was completed in a single day, April 3, 2012.

During re-hearing, Givoo presented no additional documentary evidence and again produced its same three factual witnesses, Joel Givner, Thomas Morgan, and Vice Law, who

provided no further illumination on Givoo's legitimate business reasons. To this end, Givoo again claimed that the only reason why Bobreski was not selected was because when Morgan and law sat down together they went over Law's prior lists of employees who had staffed outages at Hope Creek/Salem, and when they came to Boberski's name, Law said, "no, not at this time." The complainant, however, did offer additional documentary and testimonial support for his case, some of which is mentioned above. The complainant entered into the record deposition excerpts from John Moore, Givoo's Manager of I&C Services, taken in the above-captioned case (CX 16) together with excerpts from the deposition Moore gave during the WASA case (Exhibit 1 to CX 16). Of significance is Moore's acknowledgment that "word of mouth" is important to Givoo's hiring practices, CX 16 at Tr. 19; that within Givoo it was "common knowledge" that Bobreski had won his whistleblower case against WASA, *id.*, at Tr. 40; and that Givner was the "ultimate decision" maker on Givoo hiring decisions, *id.*, Tr. 50. In the excerpts of his August 17, 2001 deposition taken in the *Bobreski v. District of Columbia Water and Sewer Authority,* case, 2001-CAA-6 ("WASA Case"), Moore voiced his view as to suitability for rehire at Givoo claiming that Bobreski "[lacked] integrity, [was] a person that steals,[6] a person that violates security, and a person that records private conversations." *Id.,* at Deposition Exhibit 1, Excerpt pp. 34. These negative attributes all pertain to Bobreski's protected activity while he was employed by Givoo at WASA's Blue Plains facitliy. *See* CX 14 at p. 37 (security risk), p. 42 (tape recording conversations with Givoo employees); CX 13 at p. 4 (WASA procedures published in the *Washington Post* article). Moore recognized Givner's reporting Bobreski as a nuclear security risk as constituting "company policy." CX 16 at Deposition Exhibit 1, Excerpt pp. 33-34.

---

[6] Law clarified that he was referring to Bobreski retaining a copy of WASA procedures. Depo. Ex. 1 at p. 35.

The complainant also submitted into the record a copy of a July 14, 2005 *Washington Post* newspaper article titled, *Judge Rules For Fired Contractor at WASA*, CX 17. The article identifies Bobreski by name, included a photograph of Boberski and identified "J. Givoo Consultants" as the employer Bobreski worked for when he was terminated. The article was published during the 2005 Hope Creek outage and was posted in and around the Hope Creek Nuclear Power station's I&C shop, and was the subject of much plant gossip.

The complainant also entered into the record Law's resume, current as of the day he testified. CX 20. Law testified that he was summarily terminated by Shaw November 2007 for improperly claiming per diem pay, T2 152. Significantly, Law admitted that prior to first testifying that he had become solely dependent on Givoo for his livelihood and remained in that status.[7]

III. ALJ ROMANO IGNORES SUBSTANTIAL EVIDENCE AND FAILED TO PROPERLY CONSIDER APPROPRIATE INFERENCES

At the conclusion of the hearing the parties submitted post-hearing briefs. Complainant set out in his brief substantial evidence in support of his claim. Yet, when ALJ Romano issued his September 17, 2012 Decision and Order (D&O2), he failed to address much of what Bobreski had to say.

A. Givoo Discriminated By Failing to Hire Boberski Under Its PG&E Contract When Law was Not Involved.

Remarkably, D&O2 did not address a detailed argument Boberski presented in his post-hearing brief that Givoo's only legitimate business reason for not selecting him, i.e., that Law

---

[7] That Law was actually employed by Givoo at the time he originally testified was not part of the hearing record before ALJ Bullard. However, Law's prior employment with Givoo before working for Shaw was known. With respect to that employment the ARB observed that it was a significant factor that required further consideration by the ALJ. RO at 15, n. 33.

said "not at this time," failed to account for Givoo's prior rejection of Boberski for employment during the point in time that Law had no involvement with the hiring decisions while Givoo staffed the Hope Creek outage under its initial contract with PG&E.[8]

Givner explained that in January 2006 Shaw obtained a five-year contract with PG&E to perform construction and maintenance work at the Salem/Hope Creek nuclear facilities and Shaw asked Givoo to formulate a plan to staff an upcoming outage at Hope Creek plant. CX 4 at 13-14. But, instead, the staffing of I&C technicians in preparation for the outage was done under a separate "short duration notice" contract Givner negotiated with PG&E, and under that contact Givner had to "scramble" to locate qualified technicians. T1 66. Givner confirmed that he was directed to "staff under that [contract] until we had a contract signed with Shaw." T2 198. For undisclosed reasons, the contract with Shaw was not signed until March 29, 2006. CX 9 at p. 10. It is undisputed that Givoo hired a substantial number of technicians between the time Givner entered into the PG&E contract and finally signed the contract with Shaw.[9] What remains most significant about this time period is Law's admission and Givner's concession that Law was uninvolved with the selection of technicians when Givoo staffed the outage under its PG&E contract. Law recounted how Shaw pulled him into a meeting and directed that he turn over his manpower lists to Givoo because he was not going to be involved with the staffing of the outage. T2 136-37, 142. Law admitted that he was unhappy about having to turn his manpower lists over to Givoo, T2 137, but that he compiled by emailing his lists to Givner. Givner immediately

---

[8] The ARB directed that evidence pertaining to Givoo's alleged legitimate business reason for not selecting Bobreski had to be reexamined, RO at 22, and enumerated that the ALJ had to consider on remand were changes in the hiring practice based on the contracts Givner secured. RO at 15.

[9] According to Givoo's listing of the start date of its technicians, 27 technicians reported for work prior to the date Shaw executed its contract was Givoo. CX 10.

saw that Bobreski had staffed the last Hope Creek/Salem outage and knew that that made Bobreski a preferred candidate. T1 60, 102. Law acknowledges that when he spoke with Bobreski by phone he either "wasn't in control or didn't think [he] was in control of the outage." T2 149, 164. As Law explained in his statement to the DOL investigator: "Givoo was going to take care of everything and we were going to be managing from a hands-off type of deal" and that when he spoke to Boberski "I informed him that I was not doing the hiring for the upcoming outage that that he needed to contact Mel Morgan about the hiring . . . I also explained to him that I did not have any control over the hiring of technicians," CX 5, pp. 3-4. Bobreski confirmed that the conversations he had with Law occurred on February 27, 2006 and March 21, 2006, and that Law both times told him he was not in had no involvement with the hiring decisions and that those decisions were up to Morgan. T2 50-51, 54-55; CX 6. After his call with Law ended on March 21, 2006 he called Morgan and eventually spoke with that evening at which time Morgan claimed there was a hiring freeze and that he needed to look elsewhere for a job. T2 55.[10]

Givner acknowledged that, under its PG&E contract, Givoo hired "20 some people or 30 some people," T2. 205, consisting of "our main guys" plus "another 20 people," CX 4 at p. 14, and that Law had no involvement with the selection of technicians during the initial hiring phase. T2 197-98 ("Q. Well, you brought in 20 or so people before Mr. Law was involved. A. That's correct"); T2 204-05 (Givner conceded that Law was telling the truth when he told Bobreski he had noting to do with the hiring technicians for the outage).[11]

---

[10] It is difficult to accept that a hiring freeze existed at that time as Givoo had only provided 27 out of the 90 technicians.

[11] While ALJ Romano notes that, "[f]or a time, Mr. Law believed that Givoo would be entirely in charge" of hiring I&C technicians to staff the outage and credited this belief as the

In sum, the initial hiring phase for the outage was done under a "short duration notice" contract Givner entered into with PG&E which required Givoo to immediately supply technicians for the outage; Givoo was scambling to locate qualified technicians; Law's initial involvement was limited to faxing documents to Givner and Morgan that included a list of the last technicians to staff a Hope Creek/Salem outage with their contact information; Givoo relied on Law's lists to initiate its the staffing of the outage; it was immediately apparent to Givner that Boberski's name was on the list, T1 60, 102; Givner had used Bobreski in the past and knew he was fully qualified to staff the outage; he understood that because Bobreski recently worked a Salem outage that Boberski would be one of the easiest and most cost effective recruits available;[12] and Givoo had no problem with Bobreski and there was no legitimate reason why Givoo should not have hired Bobreski, T 205, 207. Yet, Boberski was not contacted, let alone hired, while Givoo staffed the outage under its PG&E when Law had no say in who Givoo selected.

B. Givner contributed to the hiring process.

The ALJ failed to recognize that substantial evidence suggests that Givner's role and position in the company made it likely than not that he contributed in some way to the adverse action. Other than Givner's and Morgan's denial, there is nothing else in the record to substantiate that claim. These denial clash with the substantial evidence identified in the RO and the additional evidence the complainant entered into the re-hearing record. Givner acknowledged that one of his most important responsibilities was recruiting technicians to staff

---

sole explanation why Law forwarded the calls he received to Morgan, D&O2 at 11, The ALJ fails to consider why Givoo did not hire Bobreski when it was in charge of the hiring decisions.

12 *See* CX 4 at p. 24.

Givoo's contracts. T 30. Moore acknowledged that Givner always deciding on the final names Givoo would submit for hire. CX 16, Moore Dep. 50-51. It makes no sense that he would take a hands-off approach to staffing this one particular outage. Givner had just entered into a short duration contract with PG&E and knew that staffing the under the contract would, in Givner's own words, be "very difficult with six other nuclear outages going on around the same time" all competing for a "very limited [pool] of I&C techs that are qualified to do nuclear work." CX 4 at p. 17. And why would Givner take a hands-off approach while his second in command, Moore, was tied up on another project and claims he was unable to assist with the staffing of the Hope Creek outage? Moore2 at Tr. 21-24. This is even more so the case as Law was not helping either.[13] Givner's involvement is also consistent with him having been emailed the list of technicians by Law, and with the final hiring lists coming out of his Cherry Hill, New Jersey office while Morgan worked out of an upstate New York location. Givner's involvement is evidenced by the fact that he discussed with Morgan "who our prime management people were going to be," T1 100, with Givner personally adding Stan Mica's name to the hire list, T1 100, and with Givner requiring Morgan to tell him who he was putting on the list. T 108 ("when Mel made his picks, he would tell me who they were"). Still, the manner in which Givner describes the hiring process during his interview with the DOL investigator is consistent with him having a significant role in the hiring process. (". . . *we* had to scramble. . . *we* went to [unions] and reached out and said look, we all need to work together here. *We* had meetings with them, sat down and they said they would get on the horns and start calling the other locals . . ." CX 4 at p. 17 (emphasis added).

---

[13] Givner claimed he excluded mentioning any involvement in the hiring process by Law because he did not think it was relevant. T2 208. It was not relevant because, from Givner's perspective Law was not involved or did not explain why Bobreski was not selected by Givoo.

The record therefore establishes that Givner had substantial influence on the hiring decision when Givoo was responsible for submitting the hire lists to PG&E.

C. Ignoring and Failing to Properly Weigh Givoo's Shifting Explanations

The ALJ's evaluation of Givoo's "shifting explanations" excludes some of the most compelling evidence produced by the complainant. While the ALJ did acknowledge Law's changed story, there is no mention that the two other witness presented by the respondent, Givner and Morgan, provided statements to the Department of Labor corroborating the accuracy of Law's initial assertion that he played no role in the decision not to select Bobreski. Remarkably, The ALJ fails to weigh into the mix that Givner initially claimed in the letter he sent to the Department of Labor "that this unfortunate situation occurred as a result of a lack of communication or inaction [by] Bobreski"), CX 1, and where he mentioned Law by name eight times in the body of the letter and confirmed that he personally spoke with Law before sending it, CX 1 at p. 3, there is no mention that Law had any involvement in the decision not to hire Bobreski. The ALJ likewise ignored the statements Givner subsequently made in the transcribed interview he provide to the Department of Labor. During the course of that interview Givner claimed that "through our investigation we found that he talked to Vince Law on the job site and Vice kept on telling him call Givoo, that he had nothing to do with the hiring," CX 4 at. p. 32, and that the only reason why Bobreski was not hired was because Givoo first learned he was available after all of the technician slots were filled and that, but for timely contacting Givoo, he would have been hired. CX 4 at p. 34 ("we would have definitely put him out there because he had experience out there before. But to be quite honest with you, we had no idea he was available, it was not communicated with us").

While acknowledging inconsistencies between Law's written statement and his testimony, the ALJ conflates the reasons why Law might have been misunderstood when being interviewed by the Department of Labor investigator with false statements subsequently appearing in a separate written statement. In his written statement, Law claimed that he "was not doing the hiring for the [Hope Creek] outage," that he "did not have any control over the hiring of technicians [for that outage]," and that if it was up to him, he would have "place [Bobreski's] name on the [to be hired] list and wait[ed] for contact from the union," CX 5 at pp. 4-5. By contrast, Law asserted just the opposite; that he, in fact, made the decision not to include Bobreski on the hire list. This radical departure in testimony was dismissed by the ALJ on the basis that Law was in a parking lot when he interviewed over the phone by a Department of Labor investigator and when he gave that statement he did not want to badmouth Boberski to someone he did not know. D&O2 at 11. The ALJ's analysis conflates inaccuracies attributable to the time and place of the oral interview with inaccuracies appearing in a subsequent written statement that Law was required to (1) sign in front of a witness; (2) affirmatively state that he was provided "the opportunity to correct this statement," and (3) acknowledge that it would be "a criminal offense to knowingly make a false statement or misrepresentation in this statement." CX 5 at p.5. Law was a general foreman in the nuclear industry when he signed his statement, CX 20, and worked on and off at the Salem/Hope Creek facility for over two decades, T2 141, and he understood that his statement was part of an official investigation. T2 148. He necessarily had to know from his training that security and safety concerns in the nuclear industry made making a false statement during the course of an Energy Reorganization Act investigation impermissible. The scope and magnitude of the contradictions between Law's

written statement and hearing testimony is so incomprehensible that Law himself was forced to admit "I don't have an answer" and "I don't know why" he made them. T2 144.[14]

Most troubling is that the ALJ ignored how Law's hearing testimony directly contradicted the testimony he gave at his deposition, when there was no question that he was under oath and understood the questions being asked of him. At his deposition Law responded "no" to the question, "[d]id you take any affirmative steps such that Jim Bobreski would not be selected," T2 154, "no" to being asked "did you tell Mel Morgan not to select Mr. Bobreski," T2 155, and "no" to being asked "[d]id you ever tell Mel Morgan not to hire Mr. Bobreski." T2 157. During the first hearing, when asked, "[d]id you take any affirmative step so that Mr. Boberski would not be selected for the job?" he confirmed that he "did not," and when asked at the first hearing if he ever told Morgan "not to hire Bobreski" he responded, "[n]o, I did not," T1 164.

Morgan claimed he staffed the outage working alongside of the unions, and although mentioning Law by name and mentioning the list Law provided to him, he never begins to suggest that Law had anything to do with the hiring of technicians for the outage. CX 2 at 4-6 ("Givoo was responsible for hiring the I & C technicians for the job. I worked very closely with the IBEW and UA to staff the project . . . I was responsible in staffing the project and was in constant communication with the 2 [sic] locals, 351 and 420 . . . I know Vince Law . . . Mr. Law gave me a list of technicians that he gathered who had worked at the facility in the past . . . I want to make it perfectly clear that I was told that these lists were the names and union affiliations of people that had worked at the plant or had simply contacted Mr. law in the past

---

[14] The ARB previously observed that even differences between a signed handwritten version and a subsequent typewritten version of the same statement submitted during the course of a Department of Labor Energy Reorganization Act investigation could be "highly probative of an effort to cover up unlawful motivation." *Webb v. Carolina Power & Light Co.*, 93-ERA-42, (ARB Aug. 26, 1997) at p. 9.

and not necessarily worked at either site . . . The process that I followed was that I would receive the number of technicians that were needed and I would then contact the hall to see who was available at that time. The hall would then send me certain people that the halls want on this job"). The ALJ simply dismissed Morgan's initial failure to identify Law as having played some role in the hiring process on the basis that there is no transcript of his oral interview. D&O 2 at 13. However, the signed statement is a separate transaction from the oral interview, the investigator send Morgan the statement "in Microsoft Word-Track Changes" and asked that he correct it and call if he had any questions about the content, *Id.*, p.8, and Morgan signed his written statement after acknowledging he completed with his obligation to make any corrections needed, and only then signed it in front of a witness. Still, on re-hearing, the respondent had the opportunity to submit a transcript of the interview into the record, but failed to do so. While excusing an omission from one statement may under some circumstances be defensible, when that same omission infects multiple statements, statements in a letter sent to the DOL and in a transcribed interview statement that excuse is unavailable.

Perhaps most troubling about the ALJ's evaluation is his failure to address powerful evidence that could explain the reason behind Law's shifting explanation. Law was not asked who he worked for when he appeared at the first hearing. However, on re-hearing, he acknowledged that before he testified at the first hearing and without interruption he worked for Joel Givner. T2. 125 (Q And who is your employer? A.It is Joel Givner), T2 163 (he worked "for Joel"), and produced at the hearing a copy of his resume confirming such. CX 20. Ignoring this testimony is particularly disturbing in light of the ARB's observation that Law's employment relaitionships with Givoo were "significant" and necessarily required further consideration. RO at 15, n. 33.

ALJ Romano ultimately sought to justify the reasons for the "shifting explanation" to Law's changed role in staffing the outage. According to the ALJ, the shift in his hiring responsibilities adequately explains why Law continued to tell Bobreski to call Morgan. D&O2 at 11. It is undoubtedly true that when Givoo staffed the outage under its contract with PG&E that Law had no involvement; however, that fact does not prove that Law later gained hiring authority over Givoo to the point that he had the authority to or told Morgan "not at this time." The respondent failed to produce at re-hearing any emails or other documentary evidence that demonstrating when or if Law ever became involved. More importantly, the ALJ's ignores why Law would answer a series of questions at his deposition claiming he had no involvement whatsoever in the hiring process at any time, and does not explain why Givner would send a letter on behalf of Givoo after having investigated the situation yet exclude mention of Law's involvement, when this single fact turned into the only reason why Givoo ultimately claimed Bobreksi was not hired. While it may be undisputed that Law had no role in the hiring of technicians during a substantial portion of the hiring process, the overwhelming evidence establishes that he had no role whatsoever.

D. Knowledge of Protected Activity

ALJ Romano ignored Moore's admission that it was "common knowledge" at Givoo that Bobreski won his case against WASA. Ex 16 at Tr. 40. Givoo had a very limited permanent staff of six employees; if it was common knowledge to some, it was common knowledge to all. The ALJ also failed to consider the likelihood that Givner would have learned that WASA had been ordered to reinstate Bobreski, particularly when Givoo maintained a workforce at the WASA facility itself when the *Post* reported that Bobreski had won his case.

E. Givner's Influence Extended to Law

The ALJ also failed to properly consider Givner's obvious animus towards Bobreksi in connection with the influence that Givner had on both Law and Morgan as the top manager of Givoo. Most cases of discrimination or retaliation lack a smoking gun, *see Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989), and Bobreski does not need to show that Givner had any direct involvement in the hiring decision. RO p. 15. The proper inquiry is whether the totality of the circumstances likely establishes that "Givner *influenced* the process that led to Givoo's refusal to hire Bobreski." *Id.* As the top manager of Givoo, Givner's extreme animus toward Bobreski likely influenced the hiring decisions of Morgan and Law whether or not he directly instructed them not to hire Bobreski.

The ALJ erred in concluding that Bobreksi has failed to provide sufficient evidence that Giver had any influence on the decision to hire Bobreski for the 2006 Hope Creek outage. It its Order of Remand, the ARB listed fifteen factors for the ALJ to consider in "find[ing] and explain[ing] whether the record *as a whole* does or does not support Bobreski's claim that Givner influenced the hiring decision" ARB, p. 15 (emphasis added). Despite acknowledging that that "Mr. Givner had some influence over the hiring process" and that "Mr. Givner had both the motive and ability to influence Givoo's decision not to hire [Bobreski]," the ALJ nonetheless concluded that Bobreski's evidence is insufficient because "Mr. Morgan and Mr. Law both testified that Mr. Givner played no role in rejecting [Bobreski's] application," Bobreski "remained on the list of potential hires after Mr. Givner's review," and Bobreski "has since been offered positions staffed by Givoo." D&O2 at 11 (internal citations omitted). The denials by Morgan and Law are far from persuasive as it is rare that such "smoking gun" evidence would ever surface and are purely self-serving. The assertion that Bobreski remained on a list of

potential hires makes no sense because Givoo never produced its own list of potential hires and if Bobreski was a "potential hire" Morgan would have contacted him when Givoo was under a short duration contract with PG&E so he could at least determine his availability. Moreover, Givner did not physically remove anyone's name from the list, including retired and deceased individuals, but he did add names when Bobreksi was already available. That decision itself was adverse to Bobreski's employment opportunities at the Hope Creek outage.

Finally, the timing of when Bobreski was indirectly offered a position through the union is self-serving (Givoo did not call or speak to Bobreski to ask if he was available, which would appear to have been Givoo's past practice). Givoo had not contacted Bobreski since 1999 and indirectly submitting his name after he filed suit served other interests of Givoo, namely avoiding liability in this case and to extinguish potential future liability. The sparse reasons offered by the ALJ are insufficient when stacked up against the inferences the fifteen circumstances specifically listed by the ARB. ARB at 15.

Moreover, the record supports that Givner did influence Law's decision not to add Bobreski's name to Givoo's hire list in many ways. Law was well acquainted with Givner and had a prior employment history with Givner; Law did not see himself as an employee of Givoo, but rather as someone who worked for Joel Givner; Law knew that Givner was the ultimate authority at Givoo and that he would be the final approval over Givoo's hire list before it was submitted to PG&E, and he logically would prefer avoiding upsetting Givner if he ever expected to work for him in the future (which came to fruition); based on the phone calls he received from the complainant, Law knew that Givoo chose not to reach out to Boberski and that realization placed pressure on Law not to rock the boat if he could find enough technicians to staff the outage without having to turn to Bobreski. Based on these factors, together with Law's sudden

unexplained negative assessment of Boberski's suitability, establish that Givner exerted a substantial influence on Law.

F. Vague and Subjective Basis for Law's "not at this time" Statement

The ARB pointed out that:

> There is no evidence in the record that Morgan and Law discussed why Law said, 'not at this time.' When asked at the hearing to elaborate, Law relied on vague examples of events that allegedly happened many years before and certainly before Law hired Bobreski twice in 2005. *See* [T2] at 153. He did not explain why he was comfortable hiring him four months earlier for the Salem NGS but not the Hope Creek NGS when Givner was involved. . . Ultimately, we saw no legitimate reasons in the record that were offered by Givoo. To be clear, the burden always remains with Bobreski at a hearing on the merits to prove his claim by a preponderance of evidence. Nevertheless, to the extent that Givoo presented evidence of legitimate business reasons at the hearing the ALJ must clearly explain her findings as to what those reasons were and how they affected the ultimate question of causation when considered along with all of the circumstantial evidence presented by Bobreski.

RO at 20.

While ALJ Romano acknowledges Law stating "not at this time" was based on "vague and subjective" justifications, D&O2 at 13, he failed to consider whether the totality of the circumstances demonstrate that the justifications were unbelievable.[15] Law acknowledged that the annoyances he was aware of had increased over a timespan of fifteen to twenty years. T2, 131: 20-23. Bobreski was always selected by Law to be in the first wave of hires for the last six outages, the last of which occurred four months prior. The increased annoyance might explain dropping Bobreski to the second or third hiring wave, but cannot reasonably be expected to

---

[15] The ALJ's conclusion that Givner and Morgan did not influence Law's decision is based on Law's testimony that he would have hired Bobreski if Bobreksi was higher "on Mr. Law's list of candidates . . . [and] if there was a greater need for technicians," D&O2 at 14, only manages to beg the question of how Bobreski dropped from being high enough on Mr. Law's list in 2005 to being too low on the list four months later in 2006 when Givner was involved.

explain why his name was omitted altogether. This is particularly so when Law failed to identify a single instance between the last time Law hired Bobreski to the time he was rejected for the 2006 outage despite being asked to identify such. T2 176-178. It is equally incomprehensible when Law claimed in his signed a written statement that Bobreski was intelligent and a good worker, CX 5, and incorrectly sought to rely upon justifications he learned from other technicians when he worked at another nuclear facility after having been terminated by Shaw. T2 166. There is ample room to conclude that the predicate behind Law's "not at this time" statement is false and this necessarily calls into question the veracity of the comment itself.

G. The ALJ did Not take the Full Force of Givner's Animus into Consideration

ALJ Ramano concludes that "Givner harbored *some* animus towards Complainant and had a motive to retaliate against Complainant for his whistleblowing against WASA." D&O2 at 11 (emphasis added). But Givner's animus was more than "some," it was extreme. During the first hearing Givner blamed the publication of the *Washington Post,* CX 13, not on the reporter and where he *knew there would come a point in time, I would have my day,"* T1 44, that day first materialized Givner report Bobreski as a nuclear security risk, D&O2 at 11, but was unrealized when the head of security disregarded Givner's claim.[16] While ALJ Romano did identify that the reporting of Bobreski as a nuclear security risk, he failed to acknowledge that this report was aimed at end Boberski's career in the nuclear industry forever, T2 40-41, and that it was based on a false allegation,[17] and that Givner had never taken such action in the past. T1 148. The

[16] The first time Givner finally had his day with Bobreski was when he would exclude him from staffing the Hope Creek outage.

ALJ further omits that, after not having had any interaction with Bobreski for seven years, he was still "a pain in the ass." T1 108.

H. The ALJ erred in concluding that Bobreski failed to provide sufficient evidence that Morgan had knowledge of Bobreski's whistleblowing

The ALJ's consideration of Morgan's knowledge of protected activity misses the obvious – that Moore acknowledged that it was common knowledge at Givoo that Bobreski had won his case. "A witness's inconsistency on one point permits a factfinder to reject the entire testimony as untrustworthy, including a denial of knowledge." RO at p. 18. Morgan was untruthful about him not having received a call from Bobreski before the outage was fully staffed, he and Givoo's other witnesses changed their story and blamed the non-selection on Law, and Morgan misled Bobreski by claiming that there was a hiring freeze when he spoke to him on March 21, 2006. However, as the ARB correctly noted, "[t]he most glaring inconsistency is that Givner and Morgan said they would hire Bobreski and that he was qualified but, in fact, they did not hire him in 2006 or at any time after the Blue Plains Incident in 1999." ARB Decision, p. 18. This is particularly true because Law was not involved with Givoo's staffing decisions under the PG&E contract. Moreover, to find that Morgan did not know of Bobreski's protected acitivity ignores that Bobreski brought it to his attention when he confronted Morgan for not hiring him after he filed his case against WASA.

I. The ALJ did not Consider Givner's Past Handling of Bobreski

The record establishes that, in the past, when an issue pertaining to Bobreski emerged, it was Givner's job to handle it. He handled the *Washington Post* fiasco, and he handled

[17] CX 14 at p. 37 ("the guard at the gate waived [Boberski] through . . . [a]nd WASA did not establish that there was any rule which prohibited Mr. Bobreski's action", and is the only time he ever did so"). The head of Niagara Mohawk's nuclear security department dismissed Law's allegation and Bobreski.

responding to Bobreski's security background screening. It stands to reason that Givoo subordinates would take guidance from Givner before considering whether Bobreski would be allowed to work for the company.

III. CONCLUSION

Givoo unlawfully prevented Bobreski from obtaining employment for the 2006 Hope Creek outage because of the protected activity he engaged in against WASA, one of Givoo's clients. Bobreski had worked on the prior six outages at Hope Creek without any documented problems; he had the highest level of certification attainable for I&C technicians and made it known to Givoo that he wanted to be hired. When Givoo was "scrambling" to find technicians, he was not hired, and his protected activity is the only viable explanation.

Mr. Givner, the most dominant member of Givoo's management team, evidenced extreme animus towards Bobeski to the point where he attempted to use false allegations in an effort to ban Bobreski from the nuclear industry forever. When Law explained the reasons for Givoo not hiring Bobreski during the DOL investigation he presented a reason that was proven to be false. Morgan and Law, both current Givoo employees also cannot offer valid reasoning for not hiring Bobreski. Their prior testimony and statements undermine their current explanations. The conflicting testimonies and inconsistent statements undermine the credibility of Givoo and allow the inference that Givoo failed to hire Bobreski due to unlawful retaliation against his protected activity.

The ARB should issue an order finding liability and permitting the parties to brief the issue of damages without remanding the case, for a third time.

Respectfully submitted by:

Michael D. Kohn, mk@kkc.com
Kohn, Kohn & Colapinto, LLP
3233 P St., N.W.
Washington, DC 20007
(202) 342-6980
(202) 342-6984 (FAX)

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served by email on the following person of the following address on this 17th day of December 2012:

Alan C. Milstein
Sherman Silverstein Kohl Rose & Podolski
4300 Haddonfield Rd. Ste. 311
Pennsauken, NJ 08109
AMilstein@shermansilverstein.com

Michael D. Kohn
Attorney for Complainant