UNITED STATES DEPARTMENT OF LABOR

ADMINISTRATIVE REVIEW BOARD

JAMES J. BOBRESKI, **ARB Case No. 13-001**

Complainant, OALJ Case No. 2008-ERA-003

against,

J GIVOO CONSULTANTS, INC.

Respondent.

COMPLAINANT'S REPLY BRIEF TO THE ADMINISTRATIVE REVIEW BOARD

Complainant James J. Bobreski, by and through counsel, hereby responds to respondent J. Givoo Consultants, Inc.'s Reply Brief to the Administrative Review Board, which is dated January 11, 2013.

I. GIVOO FAILED TO EXPLAIN WHY MR. BOBRESKI WAS NOT HIRED UNDER ITS PSE&G CONTRACT.

On page 22 Givoo incorrectly asserts that on page 11 of his Decision and Order Judge Romano rejected Mr. Bobreski's argument that Givoo, rather than Shaw, hired technicians before Mr. Law became involved. While it is true that Mr. Bobreski raised this argument to Judge Romano, it is equally true that he failed to consider it. The quotation from page 11 of Judge Romano's 2012 Decision and Order cited in respondent's brief is Judge Romano's finding that Mr. Law, in fact, had no involvement with the hiring decisions when he spoke with Mr. Bobresk during the second phone discussion they had which occurred on March 21, 2006, T2 54-

55; CX 6. In other words, all of the technicians hired or offered a job as of March 21, 2006 were necessarily hired by Givoo under its separate contract with PSE&G with Mr. Law having no involvement with those hiring decisions. Givoo remains unable to explain why Mr. Bobreski was not hired during the time period when Givoo alone was responsible for staffing the outage. This is not surprising because Mr. Bobreski's prior work experience at Salem made him one of the easiest and most cost effective recruits Givoo could have possibly hired to staff that outage. CX 4 at p. 24. Givoo's failure to have hired Mr. Bobreski under its PSE&G contract is an incurable flaw in its defense.

II. MISSSTATEMENTS, OMMISIONS AND FLAWED ANALYSIS

The respondent chooses to depict Mr. Bobreski as a disruptive personality who was unsuitable for rehire by Mr. Law for the 2006 Hope Creek outage. This depiction stands in stark contrast to Mr. Bobreski's decades-long successful career as a highly skilled and highly certified nuclear instrument and control (I&C) technician. In the nuclear industry I&C technicians are valued based on their expertise, qualifications and experience. Mr. Bobreski's extensive experience and professional certifications placed him at the top of the hiring pyramid in his field so much so that nuclear jobs came to him and he rarely found it necessary to seek employment opportunities on his own. T2. 69 ("I was called. I really didn't apply for any jobs. I just got calls. I really didn't go out actively looking for [work]").

Mr. Bobreski's prior Hope Creek experience, his Hope Creek security clearance status, and his Level III certification made him one of the most desirable candidates to staff the Hope

Creek outage.[1] Had Mr. Bobreski truly been such a disruptive influence to overshadow the substantial experience and qualifications he offered there would be at least one concrete example of effects of his disruption as well as some corroborating evidence in the form of testimony from a co-worker or foreman or an email or other document of complaint or workplace disharmony. But there is nothing. Givoo was unable to present a relevant concrete example,[2] unable to present a single corroborating witness, unable to produce a single document, unable to present testimony that Mr. Bobreski was even counseled about his work conduct, or placed on notice or asked to alter whatever unspecified attribute was so disruptive to the workplace to bar his return. All that exists is Mr. Law's subjective and vague assertion that he believed Mr. Bobreski to be too disruptive to be able to return to staff a Hope Creek outage. Perhaps most problematic is that Mr. Law's testimony on this point stands in direct contradiction to his signed statement, where he acknowledged "Bobreski was a good worker and very intelligent . . . If I was the person doing the hiring I would tentatively place his name on the [hire] list and wait for contact from the union." CX 5.

It has long been recognized that subjective hiring criteria, standing alone, are entitled to little weight. *See, U.S. v. Hazelwood School Dist., 534 F.2d 805 (8th Cir. 1976)*("employment

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1 Mr. Givner admitted as much during his transcribed. 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").

2 The single incident Law was able to cite occurred after two years after the hiring decisions for the 2006 Hope Creek outage was made and after Mr. Law was fired by Shaw and found work as a technician at the Limerick nuclear power station in 2008. First, the incident had no effect on his employability at Limerick as he continued to work there after the incident and was called back into the plant after the incident. T2. 71. Moreover, that incident arose from Mr. Bobreski engagement in protected activity at that facility. T2. 70-71 (reporting the failure of other technicians to follow nuclear surveillance procedure). The only relevance of this incident is that Mr. Law would be discussing Mr. Bobreski with a Limerick employee in 2008. This only confirms the breadth in which Mr. Bobreski continued to be the subject of discussion within the nuclear industry after winning his whistleblower case against WASA.

decisions based on subjective standards carry little weight in rebutting charges of discrimination"*); Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3rd Cir.1990)("Subjective evaluations are more susceptible of abuse and more likely to mask pretext"); *Tomasso v. Boeing Co.* 445 F.3d 702, 706 (3rd Cir. 2006)("low evaluation scores may be a pretext for discrimination, especially where, as here, an employer uses subjective criteria such as 'attitude' and 'teamwork' to rate its employees"). This is particularly true "where the job in question involves skills which are primarily physical or mechanical, or are tangible or objective in nature, such as that of an I&C technician, because it these situations "[i]t is more likely that subjective criteria can be used as an excuse for discrimination." *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981). Beyond the pure subjective nature of the reasons given, Law's assessment (1) contradict his signed written statement; (2) was only identified after Mr. Law became dependent of Givner for his livelihood; (3) is inconsistent with Mr. Law having just brought Mr. Bobreski in with the first wave of technicians to staff the last outage; (4) he placed Mr. Bobreski's name near the very top of his IBEW hire list (18th out of 111 names listed, *see* CX 1 at pp. 25-27); (5) not a single concrete example that could have been relied upon by Mr. Law as part of his assessment is identified in the record; (6) there is no corroborating testimony from a co-worker; (7) there is no corroborating testimony from a foreman; and (7) not even the name of a co-worker or foreman who is claimed to be unwilling to work with Mr. Bobreski is identified. In the nuclear industry it is the technician's experience and credentials that matter most. Being one of the most credentialed and experienced I&C technicians in the nuclear industry, purely subjective and unsubstantiated reasons does not meet the respondent's clear and convincing evidentiary burden.

On Page 8 the respondent misleadingly asserts that "Mr. Bobreski conceded, between

sixty and one hundred perfectly qualified technicians were not hired to work the job." Mr. Bobreski was not involved in the staffing for the outage and had no knowledge of anyone qualified technician available were was not hired for the outage. As the record stands, other than Mr. Bobreski, Mr. Morgan and Mr. Law failed to identify the name of any other technician they knew to be available for hire who was not offered an opportunity to staff the outage. Mr. Givner admitted that locating qualified technicians proved difficult because "six other nuclear outages" scheduled to commence simultaneously and there was a "very limited" pool of qualified technicians available to staff those outages. CX 4 at p. 17.

On page 19 Givoo misleadingly claims "it is uncontroverted Mr. Morgan offered Mr. Bobreski jobs *after* 2003" (emphasis in original). Mr. Morgan actually claimed to have only added Mr. Bobreski's name to a hire list he submitted to a utility *after* Mr. Bobreski sued Givoo.[3] More importantly, Mr. Morgan's testimony that he was free to add Mr. Bobreski's name to hire lists he submitted to staff a nuclear outage significantly impacts the testimony he made concerning the Fitzpatrick outage he staffing in 2003 but failed to submit Mr. Bobreski's name to the utility for that outage. Mr. Bobreski found Mr. Morgan's failure to submit his name so out of the ordinary that he concluded the omission of his name occurred because Mr. Morgan knew about his whistleblowing activity at WASA and for that reason alone did not submit his name. Mr. Bobreski decided to confront Mr. Morgan with his concern and did so by phone. Mr. Morgan claimed that the only reason he did not reach out to Mr. Bobreski was because his name was not on the list submitted to him by the union hiring hall. T2. 88. Mr. Morgan' explanation ignores that he was free to add Mr. Bobreski's name to a hire list on his own choosing – just as

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[3] On its face, this claim is self-serving and lacks proof (Givoo would have had copies of the lists it submitted for its jobs and produced nothing indicating that Mr. Bobreski's name was submitted for a job).

he claimed to have done after he learned that Mr. Bobreski had sued Givoo. As such, the full underlying reason why Mr. Morgan did not include Mr. Bobreski's name on the hire list he submitted to the Fitzpatrick plant in 2003 remains unexplained. More troubling is Mr. Morgan assertion that he was unable to understand from the substance of the phone communication he had with Mr. Bobreski that Mr. Bobreski was upset because he believed Mr. Morgan refusal to hire him for the Fitzpatrick 2003 outage was due to his whistleblowing at WASA. However, Mr. Morgan claims he tape recorded this communication. Mr. Morgan listened to the tape and would logically have replayed it if he missed what it was that made Mr. Bobreski so upset the first time he listened to it. It is equally likely that he would not have carefully listened to the tape before deciding to claim that Mr. Bobreski had threatened him on tape before he reported this to the union.[4]

On page 20 Givoo claims that "perhaps most outlandishly, Mr. Bobreski suggested that, early on in the hiring process, Mr. Law stated, 'I got nothing against you. I have no issue with you' but that at this point Mr. Bobreski has abandoned this outlandish assertion" because it is at odds with Mr. Bobreski's deposition testimony and his prior hearing testimony. This argument is laughable as Mr. Law admitted to this discussion in the statement he provided to the Department of Labor. *See* CX 5 at p. 4 (during the second phone call "I explained to him that I

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[4] At page 28 Givoo claims that Judge Romano found "credible Mr. Morgan's testimony that he did not remember the substance of the call." The basis for assessing credibility is unexplained. More importantly, it is undercut by Mr. Morgan's claim that he had a tape recording of the conversation. It would be human nature to listen to the recording several times before using it to level a claim that Mr. Bobreski had threatened him. Because Mr. Bobreski's only reason for placing the call was to confront Mr. Morgan with his concern that his whistleblowing was the reason why Mr. Morgan failed to submit his name it is difficult to accept that Mr. Morgan was unable to decipher this when he listened to a recording of the call. Mr. Morgan never explained why Mr. Bobreski was not hired under the PSE&G contract when Mr. Bobreski's name appeared near the top of the IBEW hire list he received from Mr. Law. An inference of knowledge on the part of Mr. Morgan should be drawn from the unexplained failure to hire Mr. Bobreski under Givoo's PSE&G contract when Mr. Law had no involvement.

did not have any problems or issues with him, but I was not the person in charge of doing the hiring for the outage"), CX 5 at p. 4.

On page 20 Givoo asserts that "[i]t is plain that Mr. Bobreski was simply one of dozens of possible hires who, like many potential hires, ended up below the cutoff line for reasons having nothing to do with whistleblowing." The record does not include the identity of any other technician who either called Mr. Law or Mr. Morgan looking for a job was not hired. Givner admitted that Givoo had to scramble to locate technicians and there is no suggestion that during the scramble that any qualified technicians with prior work experience at Hope Creek were turned down for employment.

On page 23 Givoo argues that "the biggest wopper in Mr. Bobreski's entire brief: 'Givner ultimately lamented that he expected that the WASA case would provide him to have his day with Bobreski, but was denied that chance.'" Givoo instead claims that Mr. Givner was simply stating that he had hoped to have had the opportunity to tell the other side of the safety story. This argument conflicts with the stipulation Givoo's council made during the first hearing: "I'll stipulate WASA was terrible, Bobreski was a hero." T1. 190. It also conflicts with Mr. Givner's earlier attempt to end Mr. Bobreski's career in the nuclear industry by reporting him to be a nuclear security risk.[5]

On page 24 Givoo observes that Mr. Law hired Mr. Bobreski after Mr. Bobreski won the WASA case in July 2005 and rhetorically asks, "Why would Mr. Law retaliate in the spring of 2006, but not the fall of 2005?" We agree with the respondent that the evidence does not suggest

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[5] Givoo also claims at page 23 of its brief that the issue of whether "Mr. Bobreski breached plant security by bringing the *Post* reporter onto the [Blue Plains] premises . . . was not litigated." This is incorrect. The claim was considered and dismissed by Administrative Law Judge Kraft during the WASA case, who found no bases to claim, and the facts establishing the falsity of the assertion are likewise included in the record of this case. Tl. 225, CX 14 at p. 37.

that Mr. Law would have retaliated against Mr. Bobreski on his own, it rather suggests the influence Mr. Givner had over him. Mr. Law was not involved in the hiring decision when Givoo initially rejected Mr. Bobreski and by Mr. Morgan asking Mr. Law what to do with Mr. Bobreski at a point in time when Mr. Law already knew that Givoo had rejected him he simply sidestepped the matter by stating "not at this time." He knew that the time for Givoo to have hired Mr. Bobreski had long since past. The writing was on the wall and Mr. Law knew better than interfere with Givoo's prior decision not to bring Mr. Bobreski into the plant.

On pages 26-27 Givoo argues that the credibility determinations of Judge Romano should be accepted. But Judge Romano made no adverse credibility findings against any witness, including Mr. Bobreski and, in particular, did not discredit Mr. Bobreski's testimony about the substance of the 2003 phone call with Mr. Morgan concerning the failure to hire Mr. Bobreski for the Fitzpatrick outage. If Judge Romano was going to make credibility determinations he was required to consider all of the evidence and otherwise explain he reasons for any credibility determinations he chose to make. He did neither. The Board should reevaluate credibility based on the totality of the record. With respect to the record as a whole, Givoo argues that because it won at the investigative stage it "is not a situation in which a claimant proves his or her case at the investigation stage, and the respondent is trying to 'run away' from statements made during the investigation." Missing from this analysis is that the reason for the false statements was to influence the outcome of the investigation. Givoo won at the OSHA phase because it blamed the failure to hire Mr. Bobreski on the unions. When Mr. Bobreski provided this to be false that defense was dropped. Givoo anticipated that its lies would win the day and that Mr. Bobreski would be forced to walk away because the damages he suffered were limited and the cost of pursing litigation high. If anything, this conduct warrants an award of exemplary damages.

III. CONCLUSION

The ARB should issue an order finding liability and permitting the parties to brief the issue of damages, including exemplary damages, without remanding the case to the Office Of administrative Law Judges.

Respectfully submitted by:

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

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Complainant James Bobreski's Reply Brief to the Administrative Review Board was served by email on the following person on this 18th day of January, 2013:

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