UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

JAMES J. BOBRESKI,	
Complainant,	ARB No. 13-001
v.	ALJ No. 2008-ERA-003
J. GIVOO CONSULTANTS, INC.,	
Respondent.	

COMPLAINANT'S SUPPLEMENTAL BRIEF

In accordance with the Amended Notice of Oral Argument, Complainant, James Bobreski, through counsel, submits his supplemental brief addressing the clear and convincing evidentiary standard discussed at 42 U.S.C. §5851(b))(3)(D) and the applicable record support establishing that the Respondent, J. Givoo Consultants, Inc., (Givoo) failed to satisfy this evidentiary standard.[1]

I. Evidentiary Standard Under 42 U.S.C. §5851(b))(3)(D).

Our Administrative Review Board recently clarified the §5851(b)(3)(D) evidentiary analysis in *Speegle v. Stone & Webster Const., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 p. 11 (ARB Apr. 25, 2014). Although the fact pattern in that case concerned a termination, the evidentiary burdens under §5851(b)(3)(D) remain the same. Applied to the facts in this case, *Speegle*, explains that "the plain language of the ERA

[1] The trigger for application of the clear and convincing evidentiary standard is a finding that the protected activity was a contributing factor to the adverse action. For the purposes of this brief we assume the contributing factor test was satisfied.

whistleblower statute makes clear that the employer must prove by "clear and convincing evidence" that it "would have" (not "could have")" hired Mr. Bobreski for the outage "in the "absence of protected activity."

> The plain meaning of the phrase "clear and convincing" means that the evidence must be "clear" as well as "convincing." "Clear" evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." The burden of proof under the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), the Supreme Court defined "clear and convincing evidence" as evidence that suggests a fact is "highly probable" and *"immediately tilts" the evidentiary scales in one direction.* We find that the Court's description in *Colorado v. New Mexico* provides additional useful guidance for the term "clear and convincing" evidence, and we incorporate it into our application of the ERA whistleblower statute.

Id., at 11 (emphasis added).

If Givoo's original story about why it didn't hire Mr. Bobreski immediately tilted the evidentiary scales in Givoo's favor, which it did during the OSHA investigation, it is difficult to conclude how a 180 degree change in direction can meet the "immediately tilts" standard.[2]

II. Givoo Cannot Meet the Clear and Convincing Evidentiary Standard.

A. Givoo cannot adequately explain its change story.

When the case began, the company's position statement, signed by Mr. Givner, claimed that Mr. Bobreski's non-selection for the job was inadvertent. The statement claimed that Mr. Morgan "worked very closely" with the unions to locate available

[2] It is long settled that a major contradiction to the employer's explanation for the adverse action is sufficiently potent evidence pretext to prevail under the far lesser preponderance of the evidence standard. *See, e.g., Hobby v. Georgia Power Co.*, 1990-ERA-030, slip op. at 9 (Sec'y Aug. 4, 1995).

technicians and the only reason he was not selected was because "Bobreski failed to follow the proper protocol through the IBEW referral system as to his interest in the job," and only communicated his availability to Givoo after the job was fully staffed. CX. 1 at pp. 4-5.[3] It explained that Mr. Law's role was limited to turning over past hire lists and referring technicians to "Mr. Morgan's office and cell phone telephone numbers." *Id.* The company literally underscored as the only reason why Mr. Bobreski was not selected was because during the staffing process Givoo didn't realize that Mr. Bobreski was available or looking for work. *Id.* Mr. Givner explained the company's position during the course of his transcribed OSHA interview, claiming that "through our investigation we found that [Bobreski] 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," and insisted that, but for Mr. Bobreski's failure to timely contact the company, "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." CX 4 at pp. 33-34. The company's position was thereafter cemented in by corroborating statements made under the pains and penalty of perjury by Mr. Law and Mr. Morgan. Mr. Law asserted 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." CX 5 at pp. 4-5. Mr. Morgan claimed that he "worked very closely with the IBEW and UA to staff the project," and "[t]he process that I followed was that I would receive the number of technicians

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[3] Givoo's position statement was prepared *after* Mr. Givner "spoke directly with Vince Law," CX 1 at p. 3, and after he discussed the reasons why Mr. Bobreski was not selected with Mr. Morgan. I

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." *See* CX 2 at 4-6.

Givoo's story underwent a radical change once Mr. Bobreski debunked blaming the unions and debunked the claim that he had not timely notified Mr. Morgan that he wanted to staff the outage. So, Givoo came up with a different reason altogether that ran contradictory to core statements initially made. Givoo asserted for the first time at the 2008 hearing that the reason why Mr. Morgan did not hire Mr. Bobreski was because Mr. Law was in charge of the hiring and when Mr. Morgan reached Mr. Bobreski's name on the list of potential hires Mr. Law said "no, not as this time." T2 at 93.[4]

It difficult to imagine that Givoo's case can "immediately tilt" in one direction where Mr. Law had no involvement in the decision, and miraculously tilt again in its direction when it claimed that Mr. Law alone was responsible. The hurdle Givoo necessarily must cross is explaining why all three of its witnesses made radically inconsistent statements in response to complainant demonstrating that the original reason for the adverse action was false.

The only justification ALJ Romano presented to justify Mr. Law's inconsistent statement he did not want to badmouth Mr. Bobreski or might have been misunderstood by the investigator. Romano D&O at 11. Both rationalizations do little alter the fact that

[4] Moreover, by the time of the second hearing, Givoo no longer pursued its reliance on the union hiring process defense. Following the conclusion of the first hearing, ALJ Bullard concluded that claims Givoo had made about the requirement that Mr. Bobreski submit a copy of his resume to the union in order to be considered for hire was untrue. "The ALJ specifically found that application requirement did not exist." ARB Remand Order at 18. That Givoo lied in the first hearing about the resume requirement is potent evidence that its initial defense was based on known falsehoods. ALJ Romano did not consider this factor in his evaluation of the evidence.

Mr. Law held a relatively high position as a nuclear facility; that he understood his statements were being made in the course of a proceeding brought under the Energy Reorganization Act, T2 at 141, 148, and that he was specifically given "the opportunity to correct the statement before signing" and that making a "false statement or misrepresentation" was "a criminal offense." CX 5 at p. 5.[5] Further complicating respondent's reliance on Mr. Law's changed story is that it also directly contradicted the prior sworn testimony he gave at his deposition at the beginning of the case.[6] Mr. Law's radical change in testimony incomprehensible even to Mr. Law, who had to admit "I don't have an answer" and "I don't know why" it happened. T2 at 144. It would appear to be more than coincidental that the change in story coincides with him becoming completely dependent on Mr. Givner for his livelihood.[7]

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[5] Changing a material term contained in a statement prepared during the course of a Department of Labor Energy Reorganization Act investigation is "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.

[6] 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. ALJ Romano improperly dismissed the inconsistencies between Mr. Law's deposition testimony and hearing testimony because "the "deposition was not subject to cross-examination and because the full transcript is not part of the record." D&O at 12. However, Mr. Law was subject to cross examination at the deposition by respondent's counsel who chose not to do so, and respondent's counsel was offered the opportunity question the witness on why he made the statements he did at his deposition and was free to introduce any portion of Mr. Law's deposition testimony respondent's counsel wished to introduce to mollify the conflict.

[7] It appears that ALJ Romano's approach to the evidence was to weight each piece of evidence separately, find a justification to ignore it, and give it no further weight. For example, he simply cast aside Mr. Morgan's signed statement on the speculation that it might not be an accurate reflection of what he orally told the OSHA investigator. D&O 2 at 13.

Turning to Mr. Morgan's changed explanation, the only basis attributed to Mr. Morgan omitting anything having to do with Mr. Law telling him not to hire Mr. Bobreski is his self-serving statement that the OSHA investigator didn't ask him about the reason why Mr. Bobreski was not selected. Romano D&O at 13. This is ludicrous as the purpose of the interview was to obtain Givoo's explanation for its non-selection of Mr. Bobreski and in the unlikely event the investigator did not inquire the company's representative would have volunteered that information. It is equally ludicrous because not mentioning Mr. Law's involvement in Morgan's OSHA statement was consistent with the omission from the company's position statement.

Mr. Givner's explanation why he excluded mentioning any involvement of Mr. Law's involvement in the hiring process was because he didn't think it was relevant. T2 208. To the contrary, what made Mr. Law's alleged involvement in the hiring process "relevant" was that the complainant proved that the original reasons stated by the company for not selecting Mr. Bobreski were completely false.

On this record it is difficult to see how the evidentiary scales can be said to immediately tip in respondent's favor.

B. Even if Givoo's radically changed story was believable it does not explain why Givoo failed to hire Mr. Bobreski when it staffed the outage under its original contract with PG&E.

The record establishes that in the beginning of the staffing of the outage Givoo entered into a separate "short duration notice" contract with PG&E because, in Mr. Givner's own words, he knew it was going to be "very difficult with six other nuclear outages going on around the same time" to locate "I&C techs that are qualified to do

nuclear work." CX 4 at p. 17. Mr. Law and Mr. Givner both conceded that Mr. Law was uninvolved with the initial selection of technicians Givoo hired to 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. Mr. Givner immediately saw that Mr. Bobreski had staffed the last Hope Creek/Salem outage and knew that this made Bobreski a preferred candidate. T1 60, 102. When Mr. Law spoke with Bobreski by phone and told him to contact Mr. Morgan "wasn't in control or didn't think [he] was in control of the outage," T2 149, 164, because "Givoo was going to take care of everything and we were going to be managing from a hands-off type of deal." CX 5, pp. 3-4. Givoo further admits that it hired a substantial number of technicians during the period of time it staffed the outage under its PG&E contract and finally signed the contract with Shaw. Indeed, Mr. Givner admitted to hiring "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 (Law was telling the truth when he told Bobreski he had noting to do with the hiring technicians for the outage).[8] Mr. Givner admitted being involved with the first wave of hiring, acknowledged that he understood that Mr. Bobreski had worked the last outage at Salem and that brining Mr. Boberski back would be one of the easiest

[8] ALJ Romano acknowledged 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 , while credited this belief as the sole explanation why Law forwarded the calls he received to Morgan, Romano D&O at 11, he never explains why Givoo did not hire Bobreski when it was undisputed that Mr. Law had no involvement with the initial hiring decisions.

and most cost effective recruiting move Givoo could make; CX 4 at p. 24. Previously, for the last six consecutive Salem refuling outages the last of which had occurred just four months prior, Mr. Bobreski was always brought in during the first wave of hiring. T2. 47-48. Givoo was faced with hiring techs that had never worked at the Salem plant before. T. 197, and Mr. Givner acknowledged that Givoo was forced to calling techs just to see if they knew anyone who was available to staff the outage. T. 60. Givoo's failure to explain why Mr. Bobreski was not contacted, let alone hired, during the company's initial "scramble" to locate qualified technicians, is equally fatal to its case. T1 66.

C. Other Factors

The ARB also observed in *Speegle* that 42 U.S.C. §5851(b))(3)(D) requires that a combination of at least three factors should be evaluated on a case-by-case basis "1) how 'clear and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and (3) the facts that would change in the 'absence of' the protected activity. *Id.*, at 12. While the discussion of the record in sections II.A and II.B above address all three factors to some degree, they predominately focus on the clear and convincing evidence factor. Because it is long settled that a major contradiction to the employer's explanation for the adverse action is sufficiently potent evidence pretext to prevail under the far lesser preponderance of the evidence standard, *See, e.g., Hobby v. Georgia Power Co.*, 1990-ERA-030, slip op. at 9 (Sec'y Aug. 4, 1995), the remaining

factors would appear to be intended to further heighten the bar the respondent must clear as opposed to lowering it.[9]

With respect to the second factor, the ARB concluded that "[t]here must be evidence in the record that demonstrates in a convincing manner why the employer would have fired [] a longtime employee, for a single outburst in a staff meeting." *Speegle*, at 11. In the context of this case, this factor requires Givoo to convincingly demonstrate that it would have refused to hire Mr. Bobreski. With respect to the third factor, the ARB concluded that:

> To properly decide what would have happened in the 'absence of" protected activity, one must also consider the facts that would have changed in the absence of the protected activity. In other words, like this case, if the protected activity created tension and animosity before an employee was fired for a lawful reason, then the absence of the protected activity means the absence of the related animosity and tension. Similarly, if the protected activity gave meaning and clarity to an outburst, then the fact-finder must keep in mind that the outburst may become ambiguous in the "absence of" protected activity that provided context to the outburst.

Speegle, at 12.

The record is thick with reasons why both of these factors clearly tip in Mr. Bobreski's favor. They include:

1) the temporal proximity to the protected activity.[10]

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[9] *Speegle* " expressly notes: "In *addition* to the high burden of proof, the express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done" not simply what it "could have" done. Therefore, it is not enough to show that Speegle's conduct provided a sufficient independent reason to suspend and fire him, but that the employer would have done so. . ." *Id.*, at 11.

[10] On remand, ALJ Romano found "that Complainant's protected activity lasted through September 2006 and temporally overlapped the adverse action at issue in this case." ALJ September 17, 2012 Decision and Order at 10.

2) that Mr. Bobreski's whistleblowing at Blue Plains was a big deal; it was the lead story in the *Washington Post's* front page, Ex. 13, and came close to causing Givoo to loose its Blue Plains contract.[11]

3) that it was "common knowledge" within Givoo that Bobreski had won his case, Ex 16 at Tr. 40, and that with a permanent staff of just six employees what is common to one is common to all.

4) it is unlikely that knowledge of the outcome of Mr. Bobreski's WASA case would elude the most prominent person in the office, Mr. Givner, who the company's point person when it came to handling issues related to Mr. Bobreski.

5) that Mr. Bobreski had a long working relationship with Givoo before he became a whistleblower and was never again contacted by Givoo to staff another job.

6) Givoo's second in command, John Moore, claimed that Mr. Bobreski was no longer welcome at Givoo after he blew the whistle at WASA because he suddenly "[lacked] integrity, [was] a person that steals, a person that violates security, and a person that records private conversations." CX 16. at Exhibit 1, pp. 34-35.[12]

7) Mr. Givner providing WASA with an affidavit falsely accusing Mr. Bobreski of "knowingly breached WASA's security rules by bringing unauthorized personnel onto WASA's premises." CX 16 at Deposition Ex. 3, p. 40-41. Ex. 13.

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[11] Givner obtained a copy of the WASA Board meeting transcript discussing WASA's decision to rethink its contractual relationship with Givoo in response to the *Washington Post* article. T2. 19; CX 16 at Deposition Exhibit 3 p. 39.

[12] These negative attributes all pertain to Bobreski's protected activity while he was employed by Givoo at WASA's Blue Plains facitliy. 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).

8) Mr. Givner acknowledged that maintaining Givoo's reputation was its "top corporate priority." T. 29, and Bobreski was ultimately responsible for giving Givoo a black eye from a front page *Washington Post* news article (Givoo cared more about maintaining its contract than fixing life-threatening safety concerns) CX 13 at p. 2.

9) Mr. Givner personally sought to blacklist Bobreski in the nuclear industry by initiating a security investigation carried out the head of security of another licensed nuclear facility, Niagara Mohawk, based on Mr. Givner's personal report.

10) that the only person Givoo ever reported as a nuclear safety threat was Mr. Bobreski.

11) Mr. Bobreski had an earlier falling out with Mr. Morgan in 2004 when he accused Mr. Morgan of not hiring him when on a job because of he was aware of Mr. Bobreski's protected activity at Blue Plains.

12) at some point, Givner, Morgan and Law all claimed that if the decision was theirs to make that Mr. Bobreski would not been hired; (Givner: "I have no reason why he should have been rejected," T. 91; "no problem hiring Jim Bobreski for a job." T. 81)(Morgan: "I have no reason not to have hired him," T. 193)(Law: no reason not to bring Bobreski back, T. 140, line 4; "I would have hired him," T. 154; and CX 5, p. 5 (if the decision was Law's to make he would have placed Bobreski on the list and waited for the referral from the union).

13) the "not at this time" comment was based on "vague and subjective" justifications. Romano D&O at 13' and 14) Where Givner and Morgan claimed they would hire Bobreski and that he was qualified but, in fact, they did not hire him in 2006

or at any time else after the Blue Plains Incident. ARB June 24, 2011 Order of Remand Decision, p. 18.

14) as noted in footnote 4 above, Givoo made-up an application requirements that simply did not exist.

III. Conclusion

For the foregoing reasons, the ARB should issue an order finding liability and awarding damages.

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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 15th day of May, 2014:

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