UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of JAMES J. BOBRESKI, Complainant, v. J. GIVOO CONSULTANTS, INC., Respondent.	ARB Case No. 13-001 ALJ Case No. 2008-ERA-003 Sat Below: The Honorable Ralph A. Romano, Administrative Law Judge

RESPONDENT J. GIVOO CONSULTANTS, INC.'S
REPLY BRIEF TO THE ADMINISTRATIVE REVIEW BOARD

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INTRODUCTORY STATEMENT

Respondent J. Givoo Consultants, Inc. ("Givoo"), by and through its counsel, Alan C. Milstein of Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., respectfully submits this memorandum of law in reply to Complainant James J. Bobreski's initial brief.

At this point, Mr. Bobreski has had so many bites at the apple that all that remains is the core.

THE FIRST BITE:

On May 2, 2006, Mr. Bobreski filed a complaint against Givoo with the United States Department of Labor ("Department"). Mr. Bobreski claimed that, in early 2006, Givoo did not hire him to staff an outage at the Hope Creek nuclear reactor ("Hope Creek Outage") in order to retaliate against him for making a whistleblower complaint against the Washington, D.C. Water and Sewer Authority ("WASA") back in 2000. (Mr. Bobreski blew the whistle by revealing that, in his opinion, one of WASA's sewage treatment plants was unsafe.) After investigating, the Department dismissed the complaint. Mr. Bobreski appealed.

THE SECOND BITE:

On July 29, 2008, the Honorable Janice K. Bullard, A.L.J. conducted a hearing ("2008 Hearing"). On January 26, 2009, Judge Bullard issued a detailed Decision and Order holding that Mr. Bobreski had failed to prove his claims and dismissing Mr. Bobreski's complaint in its entirety ("2009 Decision and Order").

On June 24, 2011, this Honorable Board ("Board") issued an Order of Remand asking the ALJ to supplement her decision by considering a few factual questions. The Board made clear that Mr. Bobreski would continue to bear the burden of proof on all aspects of his claim.

THE THIRD BITE:

Following remand, the Honorable Ralph A. Romano, A.L.J. was assigned to the case, as Judge Bullard had transferred to another agency. On October 20, 2011, Judge Romano entered an Order providing that, because the case had been assigned to a new judge, a new hearing would be held in order to resolve the issues raised by the Board.

On April 3, 2012, Judge Romano conducted the hearing ("2012 Hearing"). On September 17, 2012, Judge Romano issued a detailed Decision and Order considering the questions posed by the Board and holding, just as Judge Bullard did back in 2009, that Mr. Bobreski had failed to prove his claims ("2012 Decision and Order"). This appeal followed.

THE FOURTH BITE:

On appeal, Mr. Bobreski does not claim that Judge Romano committed legal error; indeed, Judge Romano followed the legal framework set forth by the Board. Instead, Mr. Bobreski argues that Judge Romano's factual findings were arbitrary and capricious. This argument lacks merit.

The evidence at both hearings showed that (1) Vincent Law of Shaw/Stone and Webster ("Shaw"), as opposed to Givoo, decided not to hire Mr. Bobreski; (2) even if Givoo made the decision not to hire Mr. Bobreski, that decision would have been made by Melvin Morgan, who joined Givoo just months before the outage, worked from a home office in Syracuse, and was unaware that Mr. Bobreski was a whistleblower; (3) though Joel Givner knew about the whistleblowing, he had nothing to do with the decision not to hire Mr. Bobreski; and (4) there were legitimate business reasons not to hire Mr. Bobreski, including the fact that foremen and gang workers alike did not want to work with him because of his very difficult personality, and many qualified instrument and control technicians did not get hired.

Mr. Bobreski, of course, did blow the whistle at WASA and, through the same counsel as appeared at the hearing, successfully prosecuted a retaliation claim before the Department of Labor. As was made clear at both hearings, that activity and that victory obviously are watershed moments for both Mr. Bobreski and his counsel, even if long forgotten or even completely overlooked by others in the industry. Respectfully, both must face the fact that their WASA moment had nothing to do with the staffing at Hope Creek.

Because Judge Bullard was no longer available following remand, Mr. Bobreski enjoyed two opportunities to put on a case before an Administrative Law Judge. He failed both times. Clearly, the actual facts of this matter have not done the trick for him. It is unsurprising, then, that the statement of facts section of Mr. Bobreski's initial brief is both argumentative and misleading. What follows is a counter-statement of the facts that is actually supported by the record.

COUNTER-STATEMENT OF THE FACTS

1. Mr. Bobreski Blows the Whistle at WASA

At scheduled intervals, a nuclear plant undergoes a planned "outage" that lasts between twenty-one days and a few months.[1] During these outages, the plant goes offline in whole or in part, and maintenance work is performed.[2] Givoo is a company with expertise in "staff augmentation in the power industry"; it staffs these outages at nuclear plants, as well as outages at other plants such as WASA's Blue Plains sewage treatment plant ("Blue Plains").[3]

In 2000, while Mr. Bobreski was a temporary Givoo employee working on an outage at Blue Plains, Mr. Bobreski brought a *Washington Post* reporter onto the premises, believing that

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[1] See 2012 Hearing Transcript, 85:3-15 (Morgan Direct).
[2] See 2012 Hearing Transcript, 84:14-85:2 (Morgan Direct).
[3] See 2012 Hearing Transcript, 83:21-84:7 (Morgan Direct), 108:12-14 (Morgan Cross), 179:1-17 (Givner Direct).

the plant was in violation of certain safety regulations and standards.[4] WASA demanded that Mr. Bobreski's employment at Givoo be terminated, and Givoo complied.[5]

Mr. Bobreski brought a successful retaliation claim against WASA, but did not sue Givoo, because he (correctly) did not believe that Givoo had retaliated against him for his whistleblowing activities.[6] Mr. Bobreski testified:

> Q After you blew the whistle on WASA, you did not sue Givoo, correct?
>
> A That's correct.
>
> Q And you did not sue Givoo because you did not believe Givoo had retaliated against you, correct?
>
> A That's correct.[7]

Thereafter, Mr. Bobreski continued to get jobs within the field,[8] though he did not apply to Givoo for any work.[9] Indeed, he testified as follows:

> Q The next seven years you continued to get jobs in your field, right?
>
> A Yes.
>
> Q But you did not try to work for Givoo, right?
>
> A That's correct.[10]

2. The FitzPatrick Outage

As of 2003, Melvin Morgan was employed at Sun Technical Services ("Sun").[11] That year, Mr. Morgan was staffing a planned outage at the FitzPatrick Nuclear Power Plant

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[4] See 2012 Hearing Transcript, 31:15-32:4 (Bobreski Direct), 61:2-7 (Bobreski Cross).
[5] See 2012 Hearing Transcript, 34:23-35:7 (Bobreski Direct), 61:2-7 (Bobreski Cross).
[6] See 2012 Hearing Transcript, 61:2-7 (Bobreski Cross).
[7] See 2012 Hearing Transcript, 61:8-12 (Bobreski Cross).
[8] See 2012 Hearing Transcript, 61:8-12 (Bobreski Cross).
[9] See 2012 Hearing Transcript, 61:8:12 (Bobreski Cross).
[10] See 2012 Hearing Transcript, 61:2-12 (Bobreski Cross).

("FitzPatrick Outage").[12] Mr. Morgan had a prior history with Mr. Bobreski. In the late 1990's, while performing marketing and staffing functions for Sun,[13] Mr. Morgan knew Mr. Bobreski, and the two occasionally shared rides together.[14] Due to personality conflicts, Mr. Morgan decided that he did not want to share rides with Mr. Bobreski anymore.[15]

For reasons unknown to Mr. Morgan, Mr. Bobreski's name was not on the list of people eligible to work the FitzPatrick Outage.[16] Upon learning of this, Mr. Bobreski telephoned Mr. Morgan and left an "erratic" and "threatening" message.[17] Among other things, Mr. Bobreski said something to the effect of, "You have no idea what I am capable of."[18] Mr. Bobreski himself conceded that he called Mr. Morgan a "bastard," that he asked, "What the fuck is the shit with FitzPatrick?", and that he was "ranting and raving."[19] Mr. Bobreski claimed he actually spoke with Mr. Morgan and revealed the whistleblowing; the ALJ found credible Mr. Morgan's testimony that he did not remember such a call, and concluded that, even if such a call occurred, Mr. Morgan would have focused on Mr. Bobreski's tone, rather than the substance of the call.[20]

Mr. Bobreski was not hired to work the FitzPatrick Outage.[21] Mr. Morgan did not know of Mr. Bobreski's whistleblowing activities, and these activities had no relationship to the fact that he was not hired.[22] Subsequently, Mr. Morgan offered jobs to Mr. Bobreski.[23]

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[11] See 2012 Hearing Transcript, 86:24-88:12 (Morgan Direct).
[12] See 2012 Hearing Transcript, 86:24-88:12 (Morgan Direct).
[13] See 2012 Hearing Transcript, 81:21-24, 83:5-20, 86:17-23 (Morgan Direct).
[14] See 2012 Hearing Transcript, 82:19-24 (Morgan Direct).
[15] See 2012 Hearing Transcript, 82:25-83:4 (Morgan Direct).
[16] See 2012 Hearing Transcript, 88:4-9 (Morgan Direct).
[17] See 2012 Hearing Transcript, 86:24-88:12 (Morgan Direct), 115:8-15 (Morgan Cross), 122:2-17 (Morgan Questioning).
[18] See 2012 Hearing Transcript, 87:25-88:3 (Morgan Direct).
[19] See 2012 Hearing Transcript, 65:2-7 (Bobreski Cross); see also 2008 Hearing Transcript, 233:22-24 (Bobreski Direct).
[20] See 2012 Decision and Order, page 13.
[21] See 2012 Hearing Transcript, 87:25-88:3 (Morgan Direct).
[22] See 2012 Hearing Transcript, 88:4-21 (Morgan Direct).

3. The Hope Creek Outage

In October 2005, Givoo hired Mr. Morgan.[24] In early 2006, Givoo was awarded a subcontract to assist with staffing for the Hope Creek Outage.[25] As Mr. Morgan explained, "[T]hat was a Shaw job, and at the last minute [Shaw] asked us to help support it."[26] Contrary to Mr. Bobreski's repeated assertions in his initial brief, Hope Creek is operated by Public Service Electric & Gas (PSE&G), rather than Philadelphia Gas and Electric Company (PG&E).

Initially, Vincent Law of Shaw was under the impression that Mr. Morgan might be responsible for making hiring decisions.[27] During this time frame, Mr. Bobreski called Mr. Law to inquire about working the Hope Creek Outage.[28] Mr. Law advised Mr. Bobreski that he would have to speak with Mr. Morgan.[29]

During the 2012 Hearing, in an attempt to conjure a "smoking gun," Mr. Bobreski asserted that, during this call, Mr. Law said, "I got nothing against you. I have no issues with you."[30] This statement is utterly inconsistent with both Mr. Bobreski's deposition testimony and Mr. Bobreski's testimony at the 2008 Hearing.[31] This statement is also inconsistent with Mr. Law's credible testimony regarding the substance of the conversation.[32] In any event, this testimony was so unreliable that Mr. Bobreski's attorneys do not even mention it in their appellate brief, much less argue that Judge Romano should have credited it. This testimony is a

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[23] See 2012 Hearing Transcript, 122:11-17 (Morgan Questioning).

[24] See 2012 Hearing Transcript, 83:21-84:7 (Morgan Direct), 108:12-14 (Morgan Cross), 179:1-17 (Givner Direct).

[25] See 2012 Hearing Transcript, 89:9-18 (Morgan Direct), 118:10-119:4 (Morgan Questioning).

[26] See 2012 Hearing Transcript, 89:19:90-1 (Morgan Direct).

[27] See 2012 Hearing Transcript, 136:10-138:12 (Law Questioning).

[28] See 2012 Hearing Transcript, 133:19-134:12 (Law Direct).

[29] See 2012 Hearing Transcript, 135:4-12 (Law Direct), 136:10-137:24 (Law Questioning).

[30] See 2012 Hearing Transcript, 55:1-4 (Bobreski Direct).

[31] See 2012 Hearing Transcript, 66:11-68:10 (Bobreski Cross).

[32] See 2012 Hearing Transcript, 135:4-12 (Law Direct).

classic "poker tell" that, during the 2012 Hearing, Mr. Bobreski did not think that his claim was strong enough, and thought he needed to embellish the facts.

In any event, subsequent to advising Mr. Bobreski that he would have to speak with Mr. Morgan, Mr. Law learned that Shaw was retaining the decision making power as to hiring, and that he (as opposed to Mr. Morgan) would be making the final decisions.[33] Indeed, Givoo did not have final hiring authority; this was retained by Shaw.[34] As Mr. Law testified, he had "full ownership" of the outage, and the decision whether to hire or not hire somebody was ultimately his.[35] Givoo's role was to consult with Mr. Law, and put the workers ultimately hired onto Givoo's payroll.[36]

Mr. Morgan, who worked for Givoo out of a home office in Syracuse, was the Givoo employee responsible for assisting with the Hope Creek Outage.[37] When Mr. Morgan met with Mr. Law, Mr. Law presented Mr. Morgan with a spreadsheet setting forth the names of 200 individuals who had worked previous outages at Hope Creek; Mr. Bobreski was among the numerous instrument and control technicians on this list.[38] This spreadsheet was actually introduced into evidence by Mr. Bobreski as part of Complainant's Exhibit 1.

At this time, Mr. Morgan did not know anything about Mr. Bobreski's whistleblowing activities.[39] Although Mr. Law knew about them, his knowledge was extremely limited.[40] In any event, at the time, Mr. Law was a Shaw employee, not a Givoo employee.[41]

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[33] See 2012 Hearing Transcript, 136:10-138:12 (Law Questioning).

[34] See 2012 Hearing Transcript, 97:1-9 (Morgan Cross), 120:4-121:4 (Morgan Questioning), 128:9-129:7, 134:24-135:3 (Law Direct).

[35] See 2012 Hearing Transcript, 134:24-135:21 (Law Direct).

[36] See 2012 Hearing Transcript, 59:11-13 (Bobreski Cross), 90:10-93:19 (Morgan Direct); see also 2008 Hearing Transcript, 120:3-121:13 (Givner Direct).

[37] See 2012 Hearing Transcript, 90:10-17 (Morgan Direct), 129:9-130:7 (Law Direct).

[38] See 2012 Hearing Transcript, 90:10-17 (Morgan Direct).

[39] See 2012 Hearing Transcript, 92:12-22 (Morgan Direct).

[40] See 2012 Hearing Transcript, 132:1-22 (Law Direct).

When Mr. Law and Mr. Morgan arrived at Mr. Bobreski's name, Mr. Law stated, "No, not at this time."[42] Mr. Law placed Mr. Bobreski's name low on the list of possible hires because of "prior issues" that Mr. Law had experienced with regard to Mr. Bobreski.[43] Specifically, due to personality conflicts that again had nothing to do with Mr. Bobreski's whistleblowing activities, neither foremen nor co-workers wanted to work with Mr. Bobreski.[44] If an individual had previously worked with Mr. Bobreski, that individual did not want to work with Mr. Bobreski again, and foremen had told Mr. Law that they did not want Mr. Bobreski in their gangs.[45] Mr. Law himself had previously worked with Mr. Bobreski and found things that he said and did during a job to be "annoying" and a "distraction."[46] On cross-examination, Mr. Bobreski readily conceded that he "had some relationship problems" with the people he worked with, and that some people "just don't like [him]."[47] He further conceded that his supervisor at the Limerick nuclear power plant once told him that "nobody would work with [him]."[48]

Ultimately, ninety individuals were hired for the Hope Creek Outage.[49] Thus, as Mr. Bobreski conceded, between sixty and one hundred perfectly qualified technicians were not hired to work the job.[50] Mr. Law testified that if he had more positions to fill, he would have hired Mr. Bobreski, but he did not.[51] No one ever took Mr. Bobreski's name off of the list.[52]

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[41] See 2012 Hearing Transcript, 90:4-6 (Morgan Direct).
[42] See 2012 Hearing Transcript, 92:23-93:3 (Morgan Direct).
[43] See 2012 Hearing Transcript, 130:20-24 (Law Direct), 174:25-175:10 (Law Re-Direct).
[44] See 2012 Hearing Transcript, 130:25-131:25 (Law Direct).
[45] See 2012 Hearing Transcript, 174:4-12 (Law Direct).
[46] See 2012 Hearing Transcript, 131:14-23 (Law Direct).
[47] See 2012 Hearing Transcript, 62:6-22 (Bobreski Cross).
[48] See 2012 Hearing Transcript, 64:17-19 (Bobreski Cross); accord 2008 Hearing Transcript, 261:13-24 (Bobreski Cross).
[49] See 2012 Hearing Transcript, 121:5-17 (Morgan Questioning).
[50] See 2012 Hearing Transcript, 68:23-69:3 (Bobreski Cross).
[51] See 2012 Hearing Transcript, 173:9-17, 174:25-175:10 (Law Re-Direct).
[52] See 2012 Hearing Transcript, 174:17-24 (Law Re-Direct).

Mr. Law credibly testified that his reasons for placing Mr. Bobreski low on the list of possible hires had nothing to do with Mr. Bobreski's whistleblower suit against WASA.[53] Mr. Morgan credibly testified as follows:

> Q And did the decision to hire or not hire Mr. Bobreski have anything to do with his 1999 whistleblowing activity?
>
> A No.
>
> Q Or the proceedings following his whistleblowing activity?
>
> A No.
>
> Q If Mr. Law had said to you when you went through that list, Bobreski, yeah, let's hire him, would you have had any objection to that?
>
> A Absolutely not, would have hired him immediately if he had been available.[54]

Joel Givner of Givoo had no involvement in the staffing of the Hope Creek Outage, save for asking that a particular individual be given the job of tip tubing.[55] During the staffing process, Mr. Givner did not give one thought to whether Mr. Bobreski was going to be hired to work the job; indeed, Mr. Givner had not thought about Mr. Bobreski in seven years.[56] As Mr. Morgan credibly testified, Mr. Givner did not instruct Mr. Morgan not to hire Mr. Bobreski for the job.[57] Mr. Law confirmed that Mr. Givner did not exert "any influence ... at all" in connection with the decision to hire or not hire Mr. Bobreski for the Hope Creek Outage.[58]

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[53] See 2012 Hearing Transcript, 132:1-22, 135:19-136:8 (Law Direct).
[54] See 2012 Hearing Transcript, 93:9-19 (Morgan Direct).
[55] See 2012 Hearing Transcript, 180:5-23 (Givner Direct).
[56] See 2012 Hearing Transcript, 181:2-13 (Givner Direct).
[57] See 2012 Hearing Transcript, 133:2-7 (Law Direct).
[58] See 2012 Hearing Transcript, 135:16-18 (Morgan Direct).

Indeed, Mr. Givner had no role at all in either Mr. Morgan or Mr. Law's decision making regarding who would be hired for the job.[59]

In his statement of the facts on appeal, Mr. Bobreski misleadingly suggests that Mr. Givner was waiting for a day to get revenge on Mr. Bobreski, and that day came in 2006 when the Hope Creek Outage was being staffed. As Mr. Bobreski misleadingly puts it in his brief:

> Bobreski had become *persona non grata* at Givoo. … Givner ultimately lamented that he expected that the WASA case would provide him to have his day with Bobreski, but was denied that chance. TI 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 … ").[60]

In actuality, Mr. Givner testified as follows about having his day:

> THE WITNESS: I read an article. I felt that the facts weren't in order. I felt that this was a reporter doing a job based on an former employee taking him 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 of a power -- of a water and sewer authority. That's all I felt.
>
> I knew there would come a point in time, I would have my day -- at least I thought I would have my day <u>to try to say what I thought or we thought was on the site. We never had that day.</u> But, am I upset to hold it against him? No. In fact, Mr. Bobreski called Mr. Moore and I was on speaker phone and Mr. Bobreski said, I'm not going to sue you. I'm going to sue the district, cause they have all the money. So, why would I be upset with Mr. Bobreski?[61]

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[59] <u>See</u> 2012 Hearing Transcript, 91:23-92:5 (Morgan Direct).
[60] <u>See</u> "Complainant's Brief to the Administrative Review Board," page 5.
[61] <u>See</u> 2008 Hearing Transcript, 44:2-22 (Givner Direct) (emphasis added).

Thus, Mr. Givner testified that he had nothing against Mr. Bobreski (which is especially credible considering that Mr. Bobreski did not include Givoo in his whistleblower suit), and was only waiting for his day to explain the other side of the allegations that the plant was unsafe. This is but one example of Mr. Bobreski's shiftiness, and willingness to contort the facts to suit his claims, which was not lost on either Administrative Law Judge.

At the close of his cross-examination, Mr. Bobreski conceded that he lacks evidence suggesting that either Mr. Law or Mr. Morgan retaliated against because of his whistleblowing activities:

> Q And you have no evidence that Vince Law did not hire you for the Hope Creek plant because of your whistleblowing activities, correct?
>
> A No direct evidence, no.
>
> Q You have no evidence that Mr. Morgan didn't choose to hire you tor the spring 2006 Hope Creek job because of your whistleblowing activities, correct?
>
> A I have no statement from him or anything like that that says that he did.[62]

Mr. Bobreski virtually conceded that he lacks any such evidence regarding Mr. Givner:

> Q You had no direct evidence at all that Mr. Givner in any way influenced the decision of Mr. Morgan and Mr. Law not to hire you for the 2006 Hope Creek outage, correct?
>
> A Direct evidence meaning that he was the hiring agent, he would make the final decision.
>
> Q Or that he said anything to Mr. Morgan or he said anything to Mr. Law that would have essentially said I don't want to hire Bobreski for Givoo, don't hire him. You didn't have any evidence to that effect, correct?
>
> A No, we didn't.

[62] See 2012 Hearing Transcript, 70:5-17 (Bobreski Cross).

> Q And you don't have any evidence of that effect now, do you?
>
> A As I recall Mr. Moore's deposition, he said that Mr. Givner was the final hiring decision.[63]

In actuality, at John Moore's deposition, Mr. Moore testified that, with regard to the Hope Creek Outage, he was out of the office during the first six months of 2006, and did not speak with Mr. Givner during that time.[64] Indeed, Mr. Moore lacked any knowledge regarding Mr. Givner's role with respect to hiring for the Hope Creek Outage:

> MR. MILSTEIN: Mr. Moore, with respect to Hope Creek, you do not know who made the decision to hire or not hire, is that correct?
>
> THE WITNESS: I have no knowledge whatsoever.
>
> MR. MILSTEIN: You don't know whether Mr. Givner had any role or knowledge of who was being hired or not hired, is that correct?
>
> THE WITNESS: That is correct.[65]

The Hope Creek Outage has long come and gone, and Mr. Bobreski has received some jobs, and not received some others.[66] Mr. Bobreski does not believe that, every time he does not receive a job, it is because of his whistleblowing activities.[67] The plain truth is neither Mr. Bobreski nor any other employee in his field receives every job sought for a variety of reasons that have nothing to do with unlawful retaliation. His failure to get the Hope Creek job had nothing to do with his activities many years before at WASA. Mr. Bobreski admitted that Givoo's decision to terminate in 2000 had nothing to do with whistleblowing; for the same reasons, Givoo's decision not to hire in 2006 had nothing to do with whistleblowing.

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[63] See 2012 Hearing Transcript, 58:20-59:3 (Bobreski Cross).
[64] See CX-16 (Transcript of January 3, 2012 Deposition of John Moore), 22:1-12, 24:8-9.
[65] See CX-16 (Transcript of January 3, 2012 Deposition of John Moore), 52:14-23.
[66] See 2012 Hearing Transcript, 69:4-15 (Bobreski Cross).
[67] See 2012 Hearing Transcript, 69:13-24 (Bobreski Cross).

In sum, the uncontroverted evidence demonstrated the following:

	Employed by Givoo in 2006?	Aware of Mr. Bobreski's Whistleblowing?	Involved in hiring decision?	Why did he not hire Mr. Bobreski?
Vincent Law	NO *(fatal to Mr. Bobreski's claim)*	A LITTLE BIT	YES	DIFFICULT TO WORK WITH, OTHER CHOICES
Melvin Morgan	YES	NO *(fatal to Mr. Bobreski's claim)*	PARTIALLY	FOLLOWED MR. LAW'S LEAD
Joel Givner	YES	YES	NO *(fatal to Mr. Bobreski's claim)*	N/A

STATEMENT OF PROCEDURAL HISTORY

1. Judge Bullard's 2009 Decision and Order

In 2009, Judge Bullard held that Mr. Bobreski had failed to establish that the failure to hire Mr. Bobreski to work the Hope Creek Outage occurred "in retaliation for his protected activity." She analyzed the evidence and determined that (1) Shaw (through Mr. Law) was responsible for hiring or not hiring Mr. Bobreski, and Shaw's actions could not be imputed to Givoo; (2) Mr. Morgan, the Givoo representative who consulted with Mr. Law, had recently joined Givoo, working remotely from Syracuse, and had no knowledge of Mr. Bobreski's whistleblowing activity; (3) Mr. Givner was not involved in staffing the Hope Creek Outage, and did not exert any influence over that staffing; and (4) Givoo had a legitimate business reason for its actions (especially considering the fact that numerous instrument and control technicians with experience at Hope Creek were not hired for the Hope Creek Outage).

2. The Board's 2011 Order of Remand

In its 2011 Order of Remand, the Board set forth the following framework for remand:

> In this case, the issues of protected activity and adverse action are settled, but we remand the issue of causation for further findings on several grounds. With respect to protected activity,

> substantial evidence of record supports the ALJ's fact findings that Bobreski engaged in ERA protected activity, but that protected activity continued into September 2006. With respect to adverse action, it is established that Bobreski experienced adverse employment when Givoo failed to hire him for the Hope Creek 2006 outage. On the issue of causation, the ALJ must make additional and sufficient findings based on the circumstantial evidence as a whole and consistent with our opinion, that: (1) the temporal proximity between the protected activity and the adverse action was overlapping and not a seven-year gap; (2) Givner's influence, if any, on the ultimate adverse action must be determined by viewing all of the circumstantial evidence; (3) Morgan's knowledge or lack of knowledge of Bobreski's protected activity must be analyzed based on all of the circumstantial evidence as a whole; (4) further clarification is needed as to Givoo's legitimate business reasons; and (5) the issue of pretext must be weighed along with all of the circumstantial evidence.
>
> If the ALJ finds that the overlapping temporal proximity and/or the record as a whole establishes that Bobreski's protected activity was a contributing factor to the adverse action, then the ALJ must provide additional reasons and bases explaining whether Givoo has sufficiently demonstrated that it would have taken the same action in the absence of the protected activity.

In other words, this Board remanded so that the finder of fact could further carefully analyze factual issues including: (1) what if any knowledge did Mr. Morgan have about Mr. Bobreski's whistleblower complaint against WASA; (2) what if any influence did Mr. Givner have over the decision not to hire Mr. Bobreski for the Hope Creek Outage; and (3) what were Givoo's business reasons for not hiring Mr. Bobreski. The Board was clear that "the burden of proof always remains with Bobreski at a hearing on the merits to prove his claim by a preponderance of the evidence." Mr. Bobreski simply did not meet this burden.

3. Judge Romano's 2012 Decision and Order

Following this Board's remand, Judge Romano afforded Mr. Bobreski the opportunity to present his claims anew (and also rely upon the record of the initial hearing to the extent he wished to). Mr. Bobreski's evidence again fell flat.

In his Decision and Order, Judge Romano concluded (after thoroughly analyzing all evidence, direct and circumstantial) that Mr. Morgan did not know of Mr. Bobreski's protected activity prior to staffing the Hope Creek Outage, and set forth detailed findings of fact supporting his conclusion. Judge Romano further concluded (after thoroughly analyzing all evidence, direct and circumstantial) that Mr. Bobreski "has not provided sufficient evidence that Mr. Givner actually influenced [the] decision" not to hire Mr. Bobreski, and set forth detailed findings. Judge Romano pointed to, among other things, the fact that Mr. Bobreski was subsequently offered jobs staffed by Givoo (which never would have occurred if Mr. Givner truly acted with a discriminatory animus towards Mr. Bobreski). Judge Romano further ruled as follows:

> I have considered the Board's directive, and find that Givoo offered a legitimate business reason and that no pretext occurred. I have already found that Complainant put forth evidence insufficient to establish Mr. Givner's role in rejecting Complainant or that Mr. Morgan knew of Complainant's whistleblowing. While Mr. Law did give "vague and subjective" reasons for rejecting Complainant and had hired Complainant other projects as late as 2005, I have already weighed this circumstantial evidence together with all of the other evidence of record and found that it did not weigh in Complainant's favor. Moreover, Complainant has not brought suit against Shaw, so Mr. Law's reasons for rejecting Complainant are irrelevant to the extent that I have found that he was not influenced by Messrs. Givner and Morgan. The evidence in this case indicates that Givoo and Shaw worked in partnership to select technicians to work at the Hope Creek facility, but that Mr. Law retained final authority to either accept or reject applicants. The evidence further indicates that Mr. Law rejected Complainant because Complainant was not high enough on Mr. Law's list of candidates and that Complainant would have been hired if there was a greater need for technicians. ... He did so without input from any party to this case. I credit Mr. Law's testimony on this point because Complainant was not the only rejected applicant who had previously staffed Hope Creek and has, in fact, been offered other Givoo jobs after the Hope Creek outage. Therefore, Givoo's reliance upon Mr. Law to accept or reject applicants was reasonable and legitimate. This evidence also establishes that Givoo's reliance upon Mr. Law was not pretextual.

STANDARD OF REVIEW

In reviewing cases arising under the Energy Reorganization Act ("ERA") and related statutes, this Board reviews the factual determinations of the ALJ under the substantial evidence standard set forth in the Administrative Procedure Act.[68] The ALJ's decision should be adopted as the decision of the Board unless the ALJ's decision "is unsupported by substantial evidence or if it is arbitrary/capricious/an abuse of discretion, or otherwise not in accordance with law."[69] Although the Board may review the entire record to determine if the decision reached is reasonable and supported by substantial evidence, it does not substitute its factual conclusions for those of the trial judge who saw and heard the witnesses.[70]

Moreover, "special deference is owed to a credibility finding" made by an Administrative Law Judge, because he or she has the opportunity to observe the demeanor of a witness.[71] Judge Romano specifically found the testimony of Mr. Law and Mr. Morgan on disputed issues of fact to be credible.

LEGAL ARGUMENT

1. Controlling Legal Standards

The ERA's employee protection provisions, 42 U.S.C. § 5851, require a complainant to prove, among other things, "he was an employee (or prospective employee) who engaged in protected activity, that the employer knew about this activity and took adverse action against

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[68] See 29 C.F.R. § 24.110(b) ("The ARB will review the factual findings of the ALJ under the substantial evidence standard."). The substantial evidence test is consistent with the application of the "arbitrary and capricious" standard. See, e.g., Atlanta Gas Light Co. v. FERC, 140 F.3d 1392, 1397 (11th Cir. 1998).

[69] See 5 U.S.C. § 706(2); accord Fields v. U.S. Dep't of Labor Admin. Review Bd., 173 F.3d 811, 813 (11th Cir. 1999).

[70] See Fields, 173 F.3d at 814.

[71] See In the Matter of John Spencer v. Hatfield Electric Company, ARB Case No. 86-ERA-33 (October 24, 1988) (citing Beavers v. Secretary of Health Education and Welfare, 577 F.2d 383 (6th Cir. 1978)).

him, and that his protected activity was a contributing factor in the adverse action the employer took."[72] At the hearing stage, a complainant is required to prove the case by a preponderance of the evidence, and not by mere inference.[73] Indeed, "it is an accepted rule of evidence" in ERA cases that "more than a prima facie showing [is] required," and "the party with the burden of persuasion must establish the elements of its case by a preponderance of the evidence."[74]

If a respondent can demonstrate a legitimate, non-retaliatory purpose for its decision, it is incumbent upon the claimant to prove pretext by a preponderance of the evidence; the Supreme Court has made clear that, in doing so, a claimant must prove "*both* that the [stated] reason was false, *and* that discrimination was the real reason."[75] As the Supreme Court has repeatedly noted, under this burden-shifting framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[76]

2. Judge Romano's Factual Findings and Legal Conclusions are Unassailable

This Board has ruled that, as of the spring of 2006, Mr. Bobreski was a potential employee of Givoo who had engaged in protected activity, which was ongoing. Beyond this,

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[72] See, e.g., In the Matter of Syed M. A. Hasan v. Enercon Services, Inc., ARB Case No. 05-037 (May 29, 2009); In the Matter of William Peters v. Renner Trucking & Excavating, ARB Case No. 08-117 (December 18, 2009); In the Matter of Peter Spelson v. United Express Systems, ARB Case No. 09-063 (February 23, 2011) ("To prevail on his claim, Spelson must prove several elements: (1) he engaged in protected activity; (2) UES knew of his protected activity; and (3) UES took adverse employment action against him because of the protected activity."); accord Carroll v. U.S. Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996); Kahn v. US. Sec'y of Labor, 64 F.3d 271, 277-78 (7th Cir. 1995).

[73] See, e.g., In the Matter of Frank L. Brune v. Horizon Air Industries, Inc., ARB Case No. 04-037 (January 30, 2006); Dysert v. U.S. Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997).

[74] See Dysert, 105 F.3d at 609-10.

[75] See id. at 515 (emphasis in original).

[76] See id. at 507 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) (emphasis added); accord In the Matter of James Bobreski v. J. Givoo Consultants, Inc., ARB Case No. 09-057 (June 24, 2011) (making clear that "the burden of proof always remains with Bobreski at a hearing on the merits to prove his claim by a preponderance of the evidence").

Mr. Bobreski utterly failed to prove, whether by direct evidence or circumstantial evidence, that Mr. Morgan knew about Mr. Bobreski's protected activity and, even if he did, retaliated against him for that activity, or that Mr. Givner (who did know about Mr. Bobreski's protected activity) had any involvement in the decision to hire or not to hire Mr. Bobreski.

This Board asked the ALJ to further consider the issue of what, if any, influence Mr. Givner had over the decision not to hire Mr. Bobreski for the Hope Creek outage. Mr. Bobreski had two chances to try and prove his case, but the answer remained "absolutely none." Indeed, when asked what evidence he had, the very best Mr. Bobreski could say is that Mr. Moore testified at his deposition that Mr. Givner had influence over the Hope Creek Outage. But Mr. Moore gave no such testimony. Mr. Moore was out of the office during the first six months of 2006, did not speak with Mr. Givner at all during that time, and lacked any knowledge regarding Mr. Givner's role with respect to hiring for the Hope Creek Outage. The ALJ had the opportunity to observe the demeanor of Mr. Givner, Mr. Morgan, and Mr. Law, all of whom credibly testified that Mr. Givner had no role in hiring for the Hope Creek Outage (beyond recommending one individual for tip tubing). Even given two separate chances, Mr. Bobreski failed to meet the burden that he carries with regard to this issue.

This Board also asked the ALJ to consider the issue of what, if any, knowledge Mr. Morgan had about Mr. Bobreski's whistleblower complaint against WASA. Mr. Morgan very clearly did not know about, and did not care about, the whistleblowing.

At the hearing, Mr. Bobreski attempted to attack Mr. Morgan's motives and actions in three ways, none of which was successful.

First, Mr. Bobreski suggested that he and Mr. Morgan were close during the 1990's, with the implication being that Mr. Morgan would have hired Mr. Bobreski but for the protected activity that occurred in 2000. As Mr. Morgan made clear, the two were far from friends.

Rather, the two shared occasional rides to work together and, long before the protected activity, Mr. Morgan decided to stop sharing rides with Mr. Bobreski due to personality conflicts. The ALJ credited this testimony and resolved this issue in Givoo's favor.

Second, Mr. Bobreski suggested that Mr. Morgan learned about the protected activity in 2003, during what Mr. Bobreski claims was a phone call (but was actually a voice mail message). Mr. Morgan credibly testified that he did not know about, and did not care to know about, the whistleblowing, and all he remembers about the voice mail message was that Mr. Bobreski was inappropriate to the extreme. Moreover, even if what Mr. Bobreski is saying is true (which it is not), it is uncontroverted that Mr. Morgan offered Mr. Bobreski jobs *after* 2003. If Mr. Morgan retaliated against Mr. Morgan in 2003, why did he cease retaliating against him in the following years, and then begin retaliating again when the Hope Creek Outage was being staffed? Such back-and-forth makes no logical sense and is inconsistent with Mr. Morgan's own credible testimony. The ALJ agreed, holding as follows:

> As for Complainant's 2003 phone call, the testimonial evidence is contradictory. Complainant testified that he spoke directly to Mr. Morgan, angrily called him a "bastard," and accused Mr. Morgan of discriminating against him for his whistleblowing, (Tr. pp. 43 44.) On the other hand, Mr. Morgan testified that be received an angry voicemail (Id. p. 87.) Even if I credit Complainant's testimony, I also find credible Mr. Morgan's testimony that he did not remember the substance of the call. Again, at the time of the call, Mr. Morgan was working for a party uninterested in the WASA claim. Further, as Judge Bullard noted, the circumstances of the call make it reasonable to conclude that Mr. Morgan focused on the call's tone rather than its substance.
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> After reviewing this and all of the aforementioned evidence as a whole, I find that Complainant has not put forth preponderant evidence indicating that Mr. Morgan knew of Complainant's whistleblowing at the time of the adverse action.[77]

[77] See 2012 Decision and Order, page 13.

Third, and perhaps most outlandishly, Mr. Bobreski suggested that, early on in the hiring process, Mr. Law stated, "I got nothing against you. I have no issues with you." The implication that Mr. Bobreski wanted the ALJ to draw is that Mr. Law would have hired Mr. Bobreski, but Mr. Morgan stood in the way. This incredible testimony is directly at odds with Mr. Bobreski's deposition testimony, his testimony at the first trial, his testimony at the recent hearing, Mr. Law's testimony, and Mr. Morgan's testimony. Tellingly, Mr. Bobreski has at this point abandoned this outlandish assertion.

Finally, this Board asked the ALJ to consider what Givoo's business reasons for not hiring Mr. Bobreski were. It 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. Indeed, the "business reason" for not hiring everyone who applied is simply that there were more applicants than places to fill.

Uneventfully, when Mr. Law (who was ultimately in charge of hiring) and Mr. Morgan (who was consulting) arrived at Mr. Bobreski's name, Mr. Law stated, "No, not at this time" and placed Mr. Bobreski's name low on the list of possible hires. Mr. Law did so because of "prior issues" that Mr. Law had experienced with regard to Mr. Bobreski (personality conflicts that Mr. Law experienced firsthand, foremen who did not want Mr. Bobreski on their gangs because of repeated personality conflicts, and workers who did not want to work with Mr. Bobreski because of his personality). Mr. Bobreski readily conceded that he "had some relationship problems" with the people he worked with, some people "just don't like [him]," and his supervisor once told him that "nobody would work with [him]." Mr. Morgan credibly testified that Mr. Bobreski said something to the effect of, "You have no idea what I am capable of." For his part, Mr. Bobreski conceded that he called Mr. Morgan a "bastard," used extremely foul language, and ranted and raved.

The individual in charge of hiring, Mr. Law of Shaw, was disinclined to hire Mr. Bobreski if others were available (though Mr. Law was not unwilling to hire him) because of personality issues. Even if Mr. Law acted improperly, which he did not, Judge Bullard expressly determined that Givoo is not responsible for the actions of Shaw, a determination left undisturbed by the Board on Mr. Bobreski's first appeal. For reasons absolutely unrelated to whistleblowing, Mr. Morgan did not interfere with Mr. Law's decision. If Mr. Bobreski had never blown the whistle at WASA or sued WASA for retaliation, Mr. Morgan and Mr. Law would have made the same choices they actually made in staffing the outage at Hope Creek. Indeed, Mr. Bobreski was subsequently offered jobs by Givoo.

In sum, Mr. Bobreski presented no evidence, let alone a preponderance of evidence, to suggest that the reason he did not get the Hope Creek job was because Givoo through its representatives intentionally retaliated against him because of his whistleblowing activities at WASA. The person principally responsible for the hiring, Mr. Law, was not a Givoo employee and, in any event, had legitimate reasons for not including Mr. Bobreski and numerous others in the staffing of the outage. Mr. Morgan, the Givoo employee who participated in the hiring process, was new to Givoo and did not know of Mr. Bobreski's whistleblowing activities, and such activities played no part in any role Mr. Morgan had in staffing the job. Lastly, Mr. Givner played no role whatsoever in the decision to hire or not hire Mr. Bobreski. Mr. Bobreski presented no evidence other than his fervent hope that discriminatory animus motivated the routine decision not to use him to staff the Hope Creek outage, which it did not.

3. Mr. Bobreski's Statement of the Facts Is Almost 100 Percent Argument

In the statement of facts section of his appellate brief, Mr. Bobreski attempts to advance a hodgepodge of arguments in the guise of facts. They include, but are not limited to, the following.

1. **Mr. Bobreski Argues that Givoo, Rather than Shaw, Did the Hiring.** On pages 1-2 of his brief, Mr. Bobreski cites Mr. Law's testimony that he was initially confused about who would be in charge of hiring, and asserts that Mr. Law was not in charge of hiring or not hiring Mr. Bobreski. Judge Romano rejected this factual argument, based upon substantial, credible evidence. He held as follows:

> While true that Mr. Law and Mr. Morgan provided Complainant with "shifting explanations about the hiring process" (ARB at 15), I find that the "shifting explanations" are understandable given the circumstances surrounding the Hope Creek project. Mr. Law credibly testified that Shaw was originally awarded the staffing contract, but that Givoo was later subcontracted to staff instrument and control technicians. (Tr. pp. 128-29.) For a time, Mr. Law believed that Givoo would be entirely in charge of that component of the staffing project. (Id.) Thus, when Complainant called Mr. Law to inquire about a potential position, it was reasonable for Mr. Law to forward Complainant to Mr. Morgan.[78]

Relatedly, Mr. Bobreski argues that Givoo never demonstrated why its contract with Shaw was not signed until March 29, 2006. It was up to Mr. Bobreski, not Givoo, to demonstrate that this fact was of any significance (which it was not).

Moreover, even if Givoo was in charge of making staffing decisions (which it was not), the substantial, credible evidence, as carefully weighed by the ALJ, demonstrated that Mr. Morgan did not know about Mr. Bobreski's whistleblowing activities, and Mr. Givner did not participate in the hiring decision.

2. **Mr. Bobreski Argues that The Only Reason He Wasn't Hired to Staff the Hope Creek Outage Was that Mr. Givner Was Involved.** On page 3 of his brief, Mr. Bobreski asserts as follows: "Bobreski … expected to be called when the hiring for the Hope Creek outage began. He was not. Bobreski 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

[78] See 2012 Decision and Order, page 11 (emphasis added).

involved with the hiring decisions." Tellingly, these statements lack any citation to the record. It is clear that Mr. Bobreski merely hopes that the reason he was not hired was that Mr. Givner "was involved with the hiring decisions." This hope is apparent in Mr. Bobreski's blatant mischaracterization of Mr. Givner's hearing testimony about having his day, as well as Mr. Bobreski's equally blatant mischaracterization of Mr. Moore's deposition testimony about Mr. Givner's role in the hiring process. But this hope is unsupported by a single citation to the record (much less reality).

3. **Mr. Bobreski Argues that Mr. Givner "Harbors Considerable Animus" Towards Mr. Bobreski.** Mr. Bobreski, again armed with hope but not facts, then attempts to argumentatively spin the evidence to support his theory that Mr. Givner "harbors considerable animus" towards Mr. Bobreski. Included in this argument is the biggest whopper 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." As discussed above, Mr. Givner said no such thing. Rather, Mr. Givner testified that, while he believed there was another side to the story about safety, and wanted the opportunity to share that side of the story (which never came), he harbored no resentment towards Mr. Bobreski, especially because Mr. Bobreski was not suing Givoo. Moreover, even if Mr. Givner harbored this "considerable animus" towards Mr. Bobreski (which, to be clear, he did not), the ALJ concluded, based upon substantial, credible evidence, that Mr. Givner did not influence the hiring decision.

4. **Mr. Bobreski Argues that Givoo Made a "False" Report About Him Breaching Plant Security.** Mr. Bobreski proceeds to argue that, back in 2000, Givoo made a false report about him breaching security at Blue Plains. Mr. Bobreski is correct in saying that Givoo reported that Mr. Bobreski had breached plant security by bringing the *Post* reporter onto the premises. The issue of whether this report was "false" (which it was not) was not litigated.

5. **Mr. Bobreski Argues that He had Worked Six Straight Prior Outages at Hope Creek.** On page 6 of his brief, Mr. Bobreski argues as follows: "Prior to the 2006 outage, Law hired Bobreski as an I&C technician for the six prior outages in succession." TI. 137; 234-35." In support of this argument, Mr. Bobreski cites the testimony of Mr. Law on page 137 of the transcript of the 2008 Hearing, and the testimony of Mr. Bobreski on pages 234-35 of that same transcript. On page 137, Mr. Law actually testified that he was "not sure" how many prior outages Mr. Bobreski had been selected for. Moreover, Mr. Bobreski was far from clear on whether he worked the six prior outages in succession.

Mr. Bobreski is certainly correct about one thing: Mr. Law absolutely hired him to work the outage that began on September 26, 2005. Mr. Bobreski conveniently fails to mention that this outage occurred *after* the ALJ's July 11, 2005 decision in his whistleblower case against WASA was announced and became known.[79] Why would Mr. Law retaliate in the spring of 2006, but not the fall of 2005? Moreover, Mr. Bobreski's argument that he was hired by Mr. Law to staff six straight previous outages cuts both ways, to say the least. As Mr. Law testified, the more outages Mr. Bobreski worked, the more Mr. Law had the opportunity to learn how foremen and gang workers alike were disinclined to work with Mr. Bobreski because of his difficult personality.[80] Along these lines, he testified as follows:

> The problem I had with Jim is I can't get a partner to stay with him. If he's worked with him on a prior outage, he won't work with him again. … And, I can't keep him in the same gang because I have foremen that have told me that they don't want him in … their gang. You know, they have eight guys in their gang, then it's a problem.[81]

6. **Mr. Bobreski Argues that Mr. Moore Inculpates Mr. Givner.** Beginning on page 10 of his brief, Mr. Bobreski cites Mr. Moore's testimony and argues that this testimony

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[79] See 2008 Hearing Transcript, 238:4-239:23.
[80] See 2008 Hearing Transcript, 152:12-155:3 (Law Questioning).
[81] See 2008 Hearing Transcript, 152:12-155:3 (Law Questioning).

inculpates Mr. Givner. There is no dispute that Mr. Moore was uninvolved in the subject hiring decision. Similarly, Mr. Moore made clear that he was completely unaware of whether Mr. Givner was involved in the hiring decision:

> MR. MILSTEIN: Mr. Moore, with respect to Hope Creek, you do not know who made the decision to hire or not hire, is that correct?
>
> THE WITNESS: I have no knowledge whatsoever.
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> MR. MILSTEIN: You don't know whether Mr. Givner had any role or knowledge of who was being hired or not hired, is that correct?
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> THE WITNESS: That is correct.[82]

4. Mr. Bobreski's Appellate Arguments All Fail

a. Mr. Bobreski's Argument that Givoo, Not Shaw, Was Responsible for the Hiring Decision Fails

Mr. Bobreski begins the legal argument section of his brief by again contending that Givoo, rather than Shaw, was responsible for the hiring decision. That Shaw was in charge of the job, and that Mr. Law decided that Mr. Bobreski would not be hired unless more positions opened up, was resolved in Givoo's favor in the 2009 Decision and Order and again resolved in Givoo's favor in the 2012 Decision and Order. Mr. Bobreski plainly regrets not naming Shaw, and is again going to great lengths to try and make Givoo responsible for what he feels Shaw did. Of course, the record shows that Shaw did not do anything wrong either.

In any event, this argument is a classic "red herring"; even if Givoo was in charge of hiring, the only Givoo representative who worked on the hiring was Mr. Morgan, who was hired by Givoo months before the Hope Creek Outage, worked out of his home in Syracuse, and had no knowledge of the whistleblowing.

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[82] See CX-16 (Transcript of January 3, 2012 Deposition of John Moore), 52:14-23.

b. Mr. Bobreski's Argument that Mr. Givner Contributed to the Adverse Action Fails

Mr. Bobreski then argues that "Givner's role and position in the company made it likely than not [sic] that he contributed in some way to the adverse action." Tellingly, this statement is unsupported by any citation to the record, and the rest of the argument relies upon rank speculation and Mr. Moore's irrelevant deposition testimony. Something is not proved by the preponderance of the evidence simply because the complainant needs it to be true. The ALJ carefully weighed all of the evidence, direct and circumstantial, and determined, based upon substantial, credible evidence, that Mr. Givner did not contribute to the adverse action:

> Complainant cannot prevail on this point because he has not provided sufficient evidence that Mr. Givner actually influenced the decision. Mr. Morgan and Mr. Law both testified that Mr. Givner played no role in rejecting Complainant's application (Tr. pp. 93, 135), and Complainant's name remained on the list of potential hires after Mr. Givner's review. (Id. p. 92.) In fact, Complainant has been listed for subsequent projects and Complainant has since been offered positions staffed by Givoo. (Id. p. 55.)[83]

c. Mr. Bobreski's Argument that Judge Romano Should Have Assessed the Credibility of Givoo's Witnesses Differently Fails

Mr. Bobreski devotes a substantial portion of his legal argument to the contention that Judge Romano should have determined that Mr. Law, Mr. Morgan, and Mr. Givner lacked credibility because of certain statements given during the Department's investigation, and that Mr. Morgan in particular lacked credibility. This argument fails as well.

To be clear, these statements are hardly smoking guns. Mr. Bobreski makes much of the fact that Mr. Law told the Department that Mr. Bobreski was intelligent, and he personally did not have any problems or issues with Mr. Bobreski. This statement that Mr. Bobreski was intelligent is consistent with the fact that Mr. Bobreski was indeed among the many intelligent

[83] See 2012 Decision and Order, page 11.

technicians qualified to work the Hope Creek Outage, and the remaining part of the statement is consistent with the fact that *foremen and gang workers* had repeatedly reported to Mr. Law that they did not want to work with Mr. Bobreski. Moreover, as Mr. Law credibly explained to Judge Romano, the statement was being recorded in a parking lot, and he did not want to badmouth Mr. Bobreski to an individual with a tape recorder who he did not know.[84] Judge Romano further noted that Mr. Bobreski had only introduced portions of the transcript of Mr. Law's interview into the record, and the interview was not subject to cross-examination.[85]

Similarly, the fact that, in his statement, Mr. Morgan did not emphasize Shaw's involvement is of no moment. As Judge Romano correctly observed, the evidence of Shaw's role in the hiring process was overwhelming, and cannot possibly be in dispute. Judge Romano further determined that, because Mr. Bobreski failed to provide transcripts of the questions that Mr. Morgan was asked, it was difficult to discern the context of Mr. Morgan's answers.[86]

This 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. To the contrary, Givoo prevailed at the investigation stage. It would have no reason to intentionally alter testimony.

Moreover, as previously stated, "special deference is owed to a credibility finding" made by an ALJ, because he or she has the opportunity to observe the demeanor of a witness.[87] We respectfully suggest that this is doubly true when two separate ALJ's observe witnesses' demeanors and come to the same exact conclusion. Judge Romano, like Judge Bullard before him, personally observed the hearing testimony of Mr. Law, Mr. Morgan, and Mr. Givner, and

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[84] See 2012 Hearing Transcript, 143:5-17, 147:20-148:6 (Law Cross).
[85] See 2012 Decision and Order, page 11.
[86] See 2012 Decision and Order, page 13.
[87] See Spencer, supra, Case No. 86-ERA-33; see also Beavers, 577 F.2d at 383.

found it to be credible. With regard to the particular argument that Mr. Morgan had to know about Mr. Bobreski's whistleblowing activity, Judge Romano found as follows:

> As for Complainant's 2003 phone call, the testimonial evidence is contradictory. Complainant testified that he spoke directly to Mr. Morgan, angrily called him a "bastard," and accused Mr. Morgan of discriminating against him for his whistleblowing, (Tr. pp. 43 44.) On the other hand, Mr. Morgan testified that be received an angry voicemail (Id. p. 87.) Even if I credit Complainant's testimony, I also find credible Mr. Morgan's testimony that he did not remember the substance of the call. Again, at the time of the call, Mr. Morgan was working for a party uninterested in the WASA claim. Further, as Judge Bullard noted, the circumstances of the call make it reasonable to conclude that Mr. Morgan focused on the call's tone rather than its substance.
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> After reviewing this and all of the aforementioned evidence as a whole, I find that Complainant has not put forth preponderant evidence indicating that Mr. Morgan knew of Complainant's whistleblowing at the time of the adverse action.[88]

d. Mr. Bobreski's Argument that Mr. Givner Improperly Influenced the Hiring Decision Fails

Mr. Bobreski next argues that Mr. Givner improperly influenced the hiring decision, and relatedly argues that the ALJ failed to take the "full force" of Mr. Givner's animus into consideration.

In support of this thin argument, Mr. Bobreski contends, without any citation to the record, "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." He proceeds to argue numerous "facts" that purportedly support his position. For example, he argues that Mr. Law knew that Mr. Givner would be the final hiring authority. Not only is this nowhere in the record, it is contradicted by everything in the record.

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[88] See 2012 Decision and Order, page 13 (emphasis added).

For another example, he argues that Mr. Law did not want to upset Mr. Givner because this would lead to decreased chances of future employment. This is nonsensical speculation not to be found anywhere in the record.

Tellingly, this entire argument is unsupported by any citations to testimony or documentary evidence. And for good reason. As previously stated, Mr. Givner did not have an "extreme animus" towards Mr. Bobreski. Moreover, it was undisputed in the record that Mr. Givner did not influence the hiring decision. Simply because Mr. Bobreski wishes that he did does not make it so.

e. Mr. Bobreski's Argument Regarding Mr. Law's "Not at this Time" Statement Fails

As this Board will recall, when Mr. Law and Mr. Morgan arrived at Mr. Bobreski's name, Mr. Law stated, "No, not at this time." Mr. Bobreski contends, "There is ample room to conclude that the predicate behind Law's 'not at this time' statement is false."

Judge Romano found, based on substantial, credible evidence, that Mr. Law placed Mr. Bobreski's name low on the list of possible hires because of prior issues with regard to Mr. Bobreski. Specifically, due to personality conflicts that again had nothing to do with Mr. Bobreski's whistleblowing activities, neither foremen nor co-workers wanted to work with Mr. Bobreski.[89] If an individual had previously worked with Mr. Bobreski, that individual did not want to work with Mr. Bobreski again, and foremen had told Mr. Law that they did not want Mr. Bobreski in their gangs.[90] Mr. Law himself had previously worked with Mr. Bobreski and found things that he said and did during a job to be "annoying" and a "distraction."[91] Mr. Bobreski readily conceded that he "had some relationship problems" with the people he worked with, and

[89] See 2012 Hearing Transcript, 130:25-131:25 (Law Direct).
[90] See 2012 Hearing Transcript, 174:4-12 (Law Direct).
[91] See 2012 Hearing Transcript, 131:14-23 (Law Direct).

that some people "just don't like [him]."[92] He further conceded that his supervisor at the Limerick nuclear power plant once told him that "nobody would work with [him]."[93] And, to understand this, Judge Romano did not need to look any further than Mr. Bobreski's own admission that, back in 2003, he called Mr. Morgan a "bastard," that he asked, "What the fuck is the shit with FitzPatrick?", and that he was "ranting and raving."[94] As discussed, it was only logical that there might be a time when Mr. Bobreski would fall below the cutoff line, and this was one such time.

CONCLUSION

In the year 2000, after Mr. Bobreski blew the whistle, and Givoo terminated him at WASA's insistence, Mr. Bobreski "did not sue Givoo because [he] did not believe Givoo had retaliated against [him]."[95] The thesis of this case – the 2000 termination which ended Mr. Bobreski's tenure with Givoo was not retaliatory, but the 2006 hiring decision which temporarily delayed his reemployment with Givoo was – has always been untenable. Mr. Bobreski's blatant attempts to stretch the facts beyond reason are emblematic of how imaginary his claim has always been. Two Administrative Law Judges have conducted a full, fair, and open-minded hearing on the merits, and both have come to the same exact conclusion based upon substantial, credible evidence: Givoo's decision not to hire Mr. Bobreski for the Hope Creek Outage was not caused by his protected activity. Judge Romano took into account the full scope of this Honorable Board's prior decision, and his factual findings are unassailable. This Honorable Board should adopt Judge Romano's Decision and Order, and dismiss the complaint.

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[92] See 2012 Hearing Transcript, 62:6-22 (Bobreski Cross).

[93] See 2012 Hearing Transcript, 64:17-19 (Bobreski Cross); accord 2008 Hearing Transcript, 261:13-24 (Bobreski Cross).

[94] See 2012 Hearing Transcript, 65:2-7 (Bobreski Cross); see also 2008 Hearing Transcript, 233:22-24 (Bobreski Direct).

[95] See 2012 Hearing Transcript, 61:8-12 (Bobreski Cross).

Dated: January 11, 2013

Respectfully submitted,

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STIPULATION REGARDING APPENDIX

Pursuant to the Administrative Review Board's Order of October 3, 2012, the undersigned attorney hereby stipulates that the appendix submitted on behalf of Complainant James Bobreski is satisfactory.

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CERTIFICATE OF SERVICE

I, Alan C. Milstein, herby certify that, on the date indicated below, I caused a copy of the foregoing reply brief to be served upon the following counsel of record via Federal Express-Overnight Delivery:

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