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May 12, 2014

Administrative Review Board
200 Constitution Avenue, NW. #S-5220
Washington, DC 20210

Re: In the Matter of Bobreski v.
J. Givvo Consultants, Inc.
ARB Case No.: 13-001
ALJ Case No.: 2008-ERA-003

Dear Sir/Madam:

Enclosed please find an original and one copy of Respondent J. Givoo Consultant, Inc's Supplemental Brief to the Administrative Review Board and Certificate of Service in connection with the above-referenced matter. Please file the original of record with the Board, returning a time stamped copy in the envelope provided.

Thank you for your attention to this matter. Should you have any questions, feel free to contact me.

Very truly yours,

SHERMAN, SILVERSTEIN, KOHL, ROSE & PODOLSKY, P.A.
A Professional Corporation

Alan C. Milstein

ACM/md
Enclosure
cc: J. Givoo Consultants, Inc. - w/ Enclosure
Michael D. Kohn, Esquire w/ Enclosure
Chief Administrative Law Judge w/ Enclosure
Associate Solicitor w/ Enclosure
US DOL, Assistant Secretary for OSHA w/ Enclosure

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
SUPPLEMENTAL 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 supplemental brief.

42 U.S.C.A. § 5851(b)(3)(D) provides that, in considering a whistleblowing complaint pursuant to the Energy Reorganization Act ("ERA"), the Secretary of Labor may not order relief in favor of the claimant "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." The practical application of such a provision during the adjudicative process is that, even where a claimant proves all of the elements of a retaliation case by a preponderance of the evidence, an employer can still avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."[1]

On March 20, 2014, this Board requested supplemental briefs on "whether [it] may consider the clear and convincing issue discussed at ... 5851(b)(3)(D) and whether evidence of record supports a finding under that same statutory provision." This Board does not need to "consider the clear and convincing issue" because Claimant James Bobreski failed to prove the most basic elements of his case by the preponderance of the evidence.[2] Nevertheless, the record is overflowing with clear and convincing evidence that Givoo did nothing wrong and, in any event, the same actions would have been taken regardless of Mr. Bobreski's whistleblowing.

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[1] Cf. In the Matter of Frank L. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (January 31, 2006) (emphasis in original) (observing that the "clear and convincing standard" under a similarly worded statute only comes into play "if, and only if, [a claimant] has proven discrimination by a preponderance of the evidence").

[2] See 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"); see also Dysert v. United States Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997) (making clear that a claimant must prove his or her entire 42 U.S.C.A. § 5851 claim by a "preponderance of the evidence").

Mr. Bobreski failed to prove by preponderant evidence that Melvin Morgan (the only Givoo employee who consulted on the hiring decision) was aware of Mr. Bobreski's protected activity, or that Givoo acted with "retaliatory motive."[3] In fact, Mr. Bobreski even failed to prove that Givoo made the hiring decision in the first place. Rather, the decision was made by Vincent Law of Shaw/Stone and Webster ("Shaw"), an entity that Mr. Bobreski chose not to make a claim against. Mr. Bobreski's claims against Givoo fail for this reason alone.

Moreover, even where a claimant can make such a showing, this merely shifts the burden to the employer "to articulate a legitimate non-retaliatory reason for the adverse action."[4] This Givoo has more than done. Indeed, it is undisputed in the record that there were far more applicants for the subject outage at Hope Creek ("Hope Creek Outage") than places to fill, Mr. Law believed that foremen and gang workers did not want to work with Mr. Bobreski if they did not have to because of his very difficult personality, and Mr. Bobreski was therefore not high up on Mr. Law's list of potential hires. To the extent that Melvin Morgan of Givoo consulted on the decision, Mr. Morgan had absolutely no knowledge of Mr. Bobreski's whistleblowing, and any decisions made by Mr. Morgan were therefore by definition non-retaliatory.

Finally, where an employer articulates a non-retaliatory reason for its actions, the employee is then required to prove, by a preponderance of the evidence, "that the employer's proffered reason for its action is a mere pretext for unlawful retaliatory conduct."[5] In doing so, a claimant must prove "*both* that the [stated] reason was false, *and* that discrimination was the real reason."[6] As the Supreme Court has repeatedly noted, under this burden-shifting framework,

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[3] See Doyle v. United States Sec'y of Labor, 285 F.3d 243, 249-50 (3d Cir. 2002); accord Hasan v. United States Dep't of Labor, 545 F.3d 248 (3d Cir. 2008).

[4] See Doyle, 285 F.3d at 250.

[5] See id.

[6] See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515-16 (1993) (emphasis in original) (citation omitted).

"[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."[7] Mr. Bobreski admitted under oath that he had no direct evidence of retaliation, and Givoo's reply brief more than rebuts Mr. Bobreski's transparent and ever-shifting attempts to conjure circumstantial evidence out of thin air.

Because Mr. Bobreski failed to meet his burden of proving his case by a preponderance of the evidence, Givoo was not required to demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." Nevertheless, clear and convincing evidence supports a finding that Givoo did not retaliate, and even if it did (which, to be absolutely clear, it did not), the same hiring decision would have been made in the absence of Mr. Bobreski's protected activity. Should this Board wish to, it is empowered to affirm on this alternative ground.[8]

LEGAL ARGUMENT

1. This Court Does Not Need to Reach the "Clear and Convincing" Issue Because Mr. Bobreski Failed to Prove His Claims

In Doyle v. United States Secretary of Labor, the Third Circuit Court of Appeals joined numerous other circuits in holding that the "burden shifting regime" set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), applies to claims brought under the ERA.[9] Thus, the employee in the first instance must demonstrate, by a preponderance of the evidence, "(1) his engagement in protected activity; (2) [the employer's] awareness of his engagement in

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[7] See Doyle, 285 F.3d at 254 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[8] See, e.g., In the Matter of George Blackie, Jr. v. Smith Transport, Inc., ARB Case No. 11-054 (November 29, 2012) (Royce, Corchado, and Edwards, Administrative Appeals Judges) ("We affirm the ALJ's order dismissing the complaint, but on different grounds.").

[9] See generally Doyle, 285 F.3d at 243. Though Mr. Bobreski brought claims under other federal statutes, Judge Bullard and Judge Romano, as well as this Board, have essentially treated those claims as variations on his ERA claim.

protected activity; (3) an adverse employment action; and (4) a sufficient inference of retaliatory motive."[10] With regard to the fourth prong, Mr. Bobreski was required to prove that the reason for the adverse action was his protected activity.[11]

Mr. Bobreski was unable to demonstrate that Mr. Morgan was aware that Mr. Bobreski had engaged in protected activity, or that the protected activity contributed to Mr. Bobreski not being hired, and thus this Board does not need to reach "the clear and convincing issue."

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 the plant was unsafe.[12] WASA demanded that Mr. Bobreski's employment at Givoo be terminated, and Givoo complied.[13] 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.[14] Thereafter, Mr. Bobreski continued to get jobs within the field,[15] though he did not apply to Givoo for any work.[16]

As of 2003, Melvin Morgan was employed at Sun Technical Services.[17] That year, Mr. Morgan was staffing a planned outage at the FitzPatrick Nuclear Power Plant.[18] For reasons unknown to Mr. Morgan, Mr. Bobreski's name was not on the list of people eligible to work the

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[10] See id. at 249-50; accord Hasan, 545 F.3d at 248 (confirming that, under Doyle, a claimant must initially prove "(1) he engaged in a protected activity; (2) the employer was aware of that activity; (3) the employer took some adverse action against him; and (4) the circumstances were sufficient to permit the inference that the protected activity was a contributing factor for the adverse action").

[11] See, e.g., Pike v. Public Storage Companies, Inc., ARB Case No. 99-071, ALJ Case No. 1998-STA-35 (August 10, 1999).

[12] See 2012 Hearing Transcript, 31:15-32:4 (Bobreski Direct), 61:2-7 (Bobreski Cross).

[13] See 2012 Hearing Transcript, 34:23-35:7 (Bobreski Direct), 61:2-7 (Bobreski Cross).

[14] See 2012 Hearing Transcript, 61:2-7 (Bobreski Cross).

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

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

[17] See 2012 Hearing Transcript, 86:24-88:12 (Morgan Direct).

[18] See 2012 Hearing Transcript, 86:24-88:12 (Morgan Direct).

outage.[19] Upon learning of this, Mr. Bobreski telephoned Mr. Morgan and left an "erratic" and "threatening" message. Mr. Bobreski claimed he spoke with Mr. Morgan and revealed the whistleblowing. Judge Romano found credible Mr. Morgan's testimony that he did not remember such a call, and Judge Romano unassailably 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 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]

In October 2005, Givoo hired Mr. Morgan.[24] In early 2006, Givoo was awarded a subcontract to assist with staffing for a planned outage at Hope Creek (previously defined as 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] 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]

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[19] See 2012 Hearing Transcript, 88:4-9 (Morgan 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).
[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).

Subsequently, 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.[30] Indeed, Givoo did not have final hiring authority; this was retained by Shaw.[31] As Mr. Law testified, the decision whether to hire or not hire somebody was ultimately his.[32] Givoo's role was to consult with Mr. Law, and put the workers ultimately hired onto Givoo's payroll.[33]

Joel Givner of Givoo did not "exert any influence ... at all as to whether or not to hire Mr. Bobreski."[34] 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.[35] 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.[36]

At this time, Mr. Morgan did not know anything about Mr. Bobreski's whistleblowing activities.[37] Although Mr. Law knew about them, his knowledge was extremely limited.[38] In any event, at the time, Mr. Law was a Shaw employee, not a Givoo employee.[39]

When Mr. Law and Mr. Morgan arrived at Mr. Bobreski's name, Mr. Law stated, "No, not at this time."[40] 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.[41]

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[30] See 2012 Hearing Transcript, 136:10-138:12 (Law Questioning).
[31] 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).
[32] See 2012 Hearing Transcript, 134:24-135:21 (Law Direct).
[33] 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).
[34] See 2012 Hearing Transcript, 135:16-18 (Givner Direct).
[35] See 2012 Hearing Transcript, 90:10-17 (Morgan Direct), 129:9-130:7 (Law Direct).
[36] See 2012 Hearing Transcript, 90:10-17 (Morgan Direct).
[37] See 2012 Hearing Transcript, 92:12-22 (Morgan Direct).
[38] See 2012 Hearing Transcript, 132:1-22 (Law Direct).
[39] See 2012 Hearing Transcript, 90:4-6 (Morgan Direct).

Ultimately, ninety individuals were hired for the Hope Creek Outage.[42] Mr. Law testified that if he had more positions to fill, he would have hired Mr. Bobreski, but he did not.[43] No one ever took Mr. Bobreski's name off of the list.[44]

At the close of his cross-examination, Mr. Bobreski conceded that he lacks evidence suggesting that either Mr. Law, Mr. Morgan, or Mr. Givner retaliated against him because of his whistleblowing activities.[45] 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

In this case, the burden never had to shift because Mr. Bobreski failed to prove the most elemental portion of his case. Nevertheless, the record is clear that Givoo articulated "a legitimate non-retaliatory reason" for Mr. Bobreski not being hired. For this reason as well, this Board does not need to reach "the clear and convincing issue."

Indeed, 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.[46] If an individual had previously worked with Mr. Bobreski, that individual did not want to work

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[40] See 2012 Hearing Transcript, 92:23-93:3 (Morgan Direct).
[41] See 2012 Hearing Transcript, 130:20-24 (Law Direct), 174:25-175:10 (Law Re-Direct).
[42] See 2012 Hearing Transcript, 121:5-17 (Morgan Questioning).
[43] See 2012 Hearing Transcript, 173:9-17, 174:25-175:10 (Law Re-Direct).
[44] See 2012 Hearing Transcript, 174:17-24 (Law Re-Direct).
[45] See 2012 Hearing Transcript, 58:20-59:3, 70:5-17 (Bobreski Cross).
[46] See 2012 Hearing Transcript, 130:25-131:25 (Law Direct).

with Mr. Bobreski again, and foremen had told Mr. Law that they did not want Mr. Bobreski in their gangs.[47] 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."[48] 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]."[49] He further conceded that his supervisor at the Limerick nuclear power plant once told him that "nobody would work with [him]."[50]

Moreover, as Mr. Bobreski conceded, between sixty and one hundred perfectly qualified technicians were not hired to work the Hope Creek Outage.[51] It is plain that Mr. Bobreski was simply one of many 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 Shaw not hiring everyone who applied is simply that there were more applicants than places to fill. Again, Mr. Bobreski was not high up on Mr. Law's list of potential hires, and Mr. Law believed that foremen and gang workers did not want to work with Mr. Bobreski.

Moreover, Mr. Bobreski failed to prove "*both* that the [stated] reason was false, *and* that discrimination was the real reason"[52] – in other words, he failed to prove that the articulated business reason was actually a pretext – by a preponderance of the evidence. For this reason as well, it is unnecessary for this Board to reach "the clear and convincing issue."

Mr. Bobreski conceded that he lacked direct evidence of retaliation.[53] In an event to conjure up some circumstantial evidence, Mr. Bobreski first suggested that he and Mr. Morgan

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[47] See 2012 Hearing Transcript, 174:4-12 (Law Direct).
[48] See 2012 Hearing Transcript, 131:14-23 (Law Direct).
[49] See 2012 Hearing Transcript, 62:6-22 (Bobreski Cross).
[50] See 2012 Hearing Transcript, 64:17-19 (Bobreski Cross); accord 2008 Hearing Transcript, 261:13-24 (Bobreski Cross).
[51] See 2012 Hearing Transcript, 68:23-69:3 (Bobreski Cross).
[52] See Hicks, 509 U.S. at 515-16 (1993) (emphasis in original).
[53] See 2012 Hearing Transcript, 58:20-59:3, 70:5-17 (Bobreski Cross).

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. Judge Romano credited this testimony and resolved this issue in Givoo's favor. "[S]pecial 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.[54]

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. 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

[54] 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)).

> 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.[55]

Finally, 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 Judge Romano to draw is that Mr. Law would have hired Mr. Bobreski, but Mr. Morgan stood in the way. This incredible testimony was directly at odds with Mr. Bobreski's deposition testimony, his testimony at the first hearing, his testimony at the more recent hearing, Mr. Law's testimony, and Mr. Morgan's testimony. Tellingly, Mr. Bobreski abandoned this outlandish assertion in his appellate brief.

Ultimately, Judge Romano 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

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

> 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.

Indeed, the person principally if not exclusively 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 outage.

As Mr. Bobreski presented no evidence, let alone a preponderance of evidence, to suggest that Givoo intentionally retaliated against him because of his whistleblowing activities at WASA, this Board should affirm on this ground alone, and does not need to further address "the clear and convincing issue discussed at ... 5851(b)(3)(D)."

2. The Record Contains "Clear and Convincing Evidence" that the Staffing Decision for the Hope Creek Outage Had Nothing to Do With Mr. Bobreski's Whistleblowing, and the Very Same Personnel Action Would Have Been Taken in the Absence of Whistleblowing Activities

In his September 17, 2012, Decision and Order, Judge Romano recognized that a claimant must prove each and every element of his case (which includes proving that "the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action") by a preponderance of the evidence, and until he or she does so a respondent is only obligated to "articulate a legitimate business reason for its action." He further recognized that,

additionally, a claimant is not entitled to relief under the ERA where a respondent "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant."[56] This is in essence an additional defense available to respondents once a claimant proves every element of his or her case.[57] Presumably, this defense must be proven by clear and convincing evidence because it allows respondents that took action based on protected activity to avoid liability if they would have taken the same action anyway.

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[56] Specifically, in his September 17, 2012, Decision and Order, Judge Romano observed as follows: "When a case is tried on the merits, it is not necessary to determine whether Complainant has established a prima facie case of discrimination. See, Burdine, 450 U.S. at 253, 256. Instead, Complainant must prove the same elements as required for the prima facie case, with the exception that Complainant must prove them by a preponderance of the evidence and not by mere inference. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11 Cir. 1997). Until Complainant meets his burden of proof, Respondent need only articulate a legitimate business reason for its action. Clemmons v. Ameristar Airways. Inc., ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). The onus falls on Complainant to prove that the proffered legitimate reason is a pretext rather than the true reason for the challenged employment action." Later in his Decision and Order, he observed: "Complainant is not entitled to relief under the ERA if Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action absent protected activity by Complainant. [U]nder the other six environmental whistle blower statutes, Complainant is not entitled to relief if Respondent demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action absent protected activity." See 2012 Decision and Order, page 8.

[57] In Brune, supra, a case brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, this Board observed as follows: "The distinction, then, between standards applied for purposes of investigation and adjudication of a complaint concerns the complainant's burden. To secure an investigation, a complainant merely must raise an inference of unlawful discrimination, i.e., establish a prima facie case. To prevail in an adjudication, a complainant must prove unlawful discrimination. This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it 'demonstrates by clear and convincing evidence' that it would have taken the same adverse action in any event."

Judge Romano correctly determined that Mr. Bobreski had failed to prove his case by a preponderance of the evidence, and set forth a careful analysis that is entitled to great deference on appeal.[58] Because Judge Romano held that Mr. Bobreski had failed to prove the basic elements of his claim, it was unnecessary for Judge Romano to determine whether Givoo had proven that "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."[59] And because there is absolutely no basis for overturning Judge Romano's decision, it is unnecessary for this Board to consider the issue.

Nevertheless, clear and convincing evidence supports a finding that Givoo did not take action to retaliate against Mr. Bobreski, and even if it did (which, to be absolutely clear, it did not), the same hiring decision would have been made in the absence of Mr. Bobreski's protected activity. Should this Board wish to, it is empowered to affirm on this alternative ground.[60]

First of all, Mr. Law, as opposed to anyone at Givoo, made the decision not to hire Mr. Bobreski. Moreover, even if Givoo made the decision not to hire Mr. Bobreski, which it did not, that decision would have been made by Melvin Morgan. Mr. Morgan joined Givoo just months before the outage, worked from a home office in Syracuse, and was unaware that Mr. Bobreski was a whistleblower. Tellingly, after the Hope Creek Outage, Mr. Morgan offered numerous jobs to Mr. Bobreski on behalf of Givoo. Finally, though Joel Givner knew about the whistleblowing, he had nothing to do with the decision not to hire Mr. Bobreski.

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[58] 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). 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." 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).

[59] Cf. Brune, supra (emphasis in original) ("[An employer's] burden of *proof* arises if, and only if, [a claimant] has proven discrimination by a preponderance of the evidence.").

[60] See, e.g., Blackie, supra.

It is plain as day that, whistleblowing or no whistleblowing, Mr. Law was not going to go out of his way to vault Mr. Bobreski over the cutoff line.

Mr. Law believed that, due to personality conflicts that had absolutely nothing to do with Mr. Bobreski's whistleblowing activities, neither foremen nor co-workers wanted to work with Mr. Bobreski.[61] 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.[62] 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."[63] (And, it also bears noting, he had previously left an threatening message for Mr. Morgan.) Mr. Bobreski admitted that he "had some relationship problems" with the people he worked with, that some people "just don't like [him]," and one supervisor told him that "nobody would work with [him]."[64] He also admitted that "this was *not* because [he was] a whistle blower and *not* because of what happened at WASA."[65] He further conceded that between sixty and one hundred perfectly qualified technicians were passed over when the Hope Creek Outage was staffed.[66]

The clear, convincing, and in fact overwhelming evidence in the record demonstrates that there were far more applicants for the Hope Creek Outage than positions, and, whistleblowing or no whistleblowing, Mr. Law was not going to select Mr. Bobreski to staff the outage when he had between sixty and one hundred other qualified individuals to choose from. This is the paradigmatic situation in which a hiring party "would have taken the same unfavorable personnel action absent protected activity by Complainant."

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[61] See 2012 Hearing Transcript, 130:25-131:25 (Law Direct).
[62] See 2012 Hearing Transcript, 174:4-12 (Law Direct).
[63] See 2012 Hearing Transcript, 131:14-23 (Law Direct).
[64] See 2012 Hearing Transcript, 62:6-22, 64:17-19 (Bobreski Cross); accord 2008 Hearing Transcript, 261:13-24 (Bobreski Cross).
[65] See 2008 Hearing Transcript, 261:13-24 (Bobreski Cross) (emphasis added).
[66] See 2012 Hearing Transcript, 68:23-69:3 (Bobreski Cross).

CONCLUSION

Mr. Bobreski's thesis – the 2000 termination which ended Mr. Bobreski's tenure with Givoo was not retaliatory, but the 2006 hiring decision by Shaw which temporarily delayed his reemployment with Givoo was – remains untenable. Unsurprisingly, the Regional Administrator of the Occupational Safety and Health Administration concluded that Mr. Bobreski had failed to prove a *prima facie* case, and two different Administrative Law Judges who conducted two separate hearings nearly four years apart concluded that Mr. Bobreski had failed to prove a case by a preponderance of the evidence. And, though it was not required to, Givoo certainly adduced clear and convincing evidence that its hiring decision would have been the same regardless of the whistleblowing – least of all because Givoo did not even make the hiring decision, and the person at Shaw who did make the hiring decision was going to choose among the many other available options, whistleblowing or no whistleblowing, because he had no desire to vault Mr. Bobreski over the cutoff line. It is hard to imagine any evidence on these issues that could be clearer or more convincing. This Honorable Board should adopt Judge Romano's Decision and Order, and dismiss the complaint.

Dated: Monday, May 12, 2013

Respectfully submitted,

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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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