U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

HANNAH FURLONG-NEWBERRY,

COMPLAINANT,

v.

EXOTIC METALS FORMING COMPANY, LLC,

RESPONDENT.

ARB CASE NO. 2022-0017

ALJ CASE NO. 2019-TSC-00001

DATE: November 9, 2022

Appearances:

***For the Complainant*:**
Mary Schultz, Esq.; *Mary Schultz Law, P.S.*; Spangle, Washington

***For the Respondent*:**
Erik M. Laiho, Esq. and Christopher L. Hilgenfeld, Esq.; *Davis Grimm Payne & Marra*; Seattle, Washington

Before HARTHILL, Chief Administrative Appeals Judge, and GODEK and PUST, Administrative Appeal Judges

DECISION AND ORDER AFFIRMING IN PART AND VACATING AND REMANDING IN PART

PUST, Administrative Appeals Judge:

Hannah Furlong-Newberry (Complainant) filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on or about October 10, 2018. Complainant alleged that her former employer, Exotic Metals Forming Company, LCC (Respondent)[1] terminated her employment because

[1] Exotic Metals Forming Company, LLC was acquired by Parker Hannifin Corporation (Parker) on September 16, 2019, and is currently operated as a standalone

she engaged in activity protected by the Toxic Substance Control Act of 1986 and its implementing regulations (TSCA).[2] After a formal hearing, on December 6, 2021, an Administrative Law Judge (ALJ) issued two orders: (1) a Decision and Order Denying Complaint (D. & O.); and (2) an Order Closing Case and Sealing Decision and Order (Order Sealing D. & O.). In the Order Sealing D. & O., the ALJ sealed the D. & O. from public access, noting that it "contains and relies on 'technical data' within the meaning of 22 C.F.R. of 22 C.F.R. Part 120 of the International Traffic in Arms Regulations (ITAR)" and that "[a]ttempting to adequately redact the full (D. & O.) runs an unacceptable risk of an unauthorized disclosure."[3]

On December 16, 2021, Complainant petitioned the Administrative Review Board (Board or ARB) for review of both the D. & O. and the Order Sealing D. & O., plus a Protective Order issued on February 12, 2020 and two related orders giving rise to and amending the Protective Order.[4] For the reasons discussed below, we affirm the D. & O. on the merits, vacate the Order Sealing D. & O. and continue to hold in effect the Protective Order pending our remand to the ALJ for further proceedings consistent with decision in this matter.[5]

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division of Parker. See Parker's public website, accessed October 14, 2019, at *Parker Hannifin Completes Acquisition of Exotic Metals*.

[2] 15 U.S.C. § 2622 and 29 C.F.R. Part 24 (2022).

[3] Order Sealing D. & O. at 1.

[4] Complainant's Petition for Review identified the following additional orders as subjects of her appeal: Order Granting in Part and Denying in Part Motion for Protective Order and Order Modifying Protective Order and Minutes of Conference Call.

[5] The Board recognizes that the Order Sealing D. & O. directs the parties to maintain the terms of the D. & O. as confidential under the Protective Order. The Board is not bound by the terms of the ALJ's Order Sealing D. & O. *See West v. Bell Helicopter Textron, Inc.,* 2014 WL 12908077, at *4 n.1 (D.N.H. Sept. 30, 2014) (quoting 32 C.F.R. § 250.5(h)(4).):

> [ITAR] regulations place restrictions on the export of certain data. They do not classify that data or otherwise restrict its public disclosures, at least by those who are not subject to the regulations—such as this court—and, indeed, ITAR specifically allows the disclosure of protected data 'as may be required by [law or] court order.

However, given the ALJ's conclusion that his D. & O. contains information protected by ITAR, in this Decision and Order the Board will only cite to non-technical, factual, publicly available information in the D. & O. as necessary to transparently address the legal issues currently before it in this matter.

BACKGROUND

During the relevant timeframe, Respondent operated two sheet metal assembly facilities, one located in Kent, Washington, and the other in Airway Heights, Washington.[6] Complainant worked for Respondent in the Airway Heights facility as a Senior Project Manager from May 2016 until her termination from employment in September 2018.[7] She reported to Chris Schoenwald (Schoenwald), the Airway Heights Site Manager. Complainant received positive performance reviews from Schoenwald.[8]

Complainant's Earlier Compliance Reports

From March to August 2018, Complainant made multiple reports regarding safety issues relating to the Maintenance Department's work at the Airway Heights facility, including reports about the inventory management system, mislabeled paint, and barrel-sealing issues.[9] Her May 23, 2018 report of the labeling and the barrel-sealing issues resulted in a verbal confrontation with Gene Raczykowski (Raczykowski), the Maintenance Department Supervisor at Airway Heights.[10] Upon being notified of the confrontation, the Director of Human Resources, Jennifer McMasters (McMasters), directed the Human Resources Manager, John Cvitanich (Cvitanich), to investigate the matter, which he did.[11] The investigation resulted in coaching of Raczykowski regarding productive workplace communication and no action with respect to Complainant.[12]

Complainant's Involvement in the IPP Project

Sometime in mid-2018, Respondent decided to transfer two projects, the "IPP" project and the "APU" project,[13] from its Kent facility to its Airway Heights facility.[14] The IPP project involved the transfer of Respondent's production line, which Respondent produced via a subcontract with another party as part of that

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6 D. &. O. at 5.

7 *Id.* at 4-5.

8 *Id.* at 6.

9 *Id.* at 4, 6-10.

10 *Id.* at 7-8.

11 *Id.* at 8-9.

12 *Id.* at 9.

13 What the acronyms stood for was not disclosed in the admitted record.

14 D. & O. at 4.

entity's larger Department of Defense contract.[15] The parts that Respondent produced for its contract partner were required to be coated with a specified paint.[16]

After deciding to transfer a project, Respondent generally creates a communication plan describing the transfer's rollout schedule to prevent miscommunication amidst its employees.[17] Respondent enforces the confidentiality of its communication plans during the early phases of a project transfer to ensure the timing and sequence of the rollout and to prevent workers' concerns about a project's potential for future negative effects on the labor force.[18] In Respondent's communication plans, the sequence of steps is more important than the exact timing initially forecast for any specific step.[19]

Ernie Antin (Antin), Respondent's Director of Manufacturing, created the communication plans for both the IPP and APU project transfers.[20] The communication plan for the IPP project (IPP Communication Plan) consisted of an Excel spreadsheet within which each row addressed a different step of the planned communications roll-out.[21] The phrase "KEEP CONFIDENTIAL" appeared throughout the IPP Communication Plan at each step when additional people were to be informed about the project transfer. The directive to "KEEP CONFIDENTIAL" ceased to appear after the entry for September 6, 2018, at 9:30 a.m., when the IPP project transfer was to be publicly announced.[22] On August 28, 2018, Antin emailed the IPP Communication Plan to various individuals managing the transfer rollout, not including Complainant.[23] On September 4, 2018, Antin emailed the same individuals[24] and advised them to keep the details of the IPP Communication Plan confidential until 9:30 a.m. on Thursday September 6, 2018, the date and time scheduled for "the broader team [to receive] communication."[25]

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15 *Id.* at 16-17; PX 43A.

16 D. & O. at 30, 36.

17 *Id.* at 10.

18 *Id.*

19 *Id*.

20 *Id.* at 7, 10.

21 *Id* at 10.

22 *Id.*

23 *Id.* at 11.

24 One additional person was added to the email chain; Complainant was not included. PX 43.

25 D. & O. at 11.

Schoenwald decided that Complainant should be assigned to manage the IPP project transfer.[26] He did so, in part, because of her background on military projects and her attention to detail.[27]

On the morning of Wednesday, September 5, 2018, Schoenwald, Antin, and Chief Operations Officer Doug Gines (Gines) met with Complainant and Darrin Moir (Moir), Complainant's co-worker, at Airway Heights.[28] During this meeting, Complainant was assigned to be the project manager for the IPP project transfer, and Moir was assigned as the project manager for the APU project transfer.[29] Complainant asked what IPP stood for but no one at the meeting knew.[30] Throughout the meeting, Antin, Gines, and Schoenwald repeatedly stressed that Complainant and Moir were to keep the transfers confidential as set out in the communication plans; Complainant nodded in acknowledgement of her understanding of that directive.[31]

Complainant's Conversations with Olsen and Others

On Thursday, September 6, 2018, at approximately 6:30 or 7:00 a.m., Complainant called Doug Olsen (Olsen), a Project Manager at the Kent facility whom she knew from other projects.[32] During the call, Complainant asked Olsen what "IPP" stood for and was told he did not know.[33]

After his phone conversation with Complainant, Olsen went to speak to his supervisor, Ed Schatz (Schatz), Director of Capital Assets.[34] Olsen told Schatz that he had learned about the project transfers from Complainant, and Schatz confirmed that the transfers were occurring.[35] Schatz reviewed the IPP Communication Plan

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26 *Id*.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 11-12.

33 *Id.* at 11. At the hearing, Complainant testified that she had not told Olsen about the transfers of the IPP and APU projects during the call, while Olsen testified that Complainant did tell him about the IPP and APU project transfers during this phone conversation. *Id.*

34 *Id.* at 12.

35 *Id.*

with Olsen, noting that Olsen should not have learned about the project transfer until later that day at a scheduled meeting of the Asset Management Team.[36]

During the same timeframe, Complainant told Moir about her conversation with Olsen.[37] Moir told Complainant to call Olsen back and tell him to keep the contents of the first conversation confidential.[38] Within an hour of this conversation with Complainant, Moir called Olsen himself and told Olsen that what Complainant had told him was and should be kept confidential.[39]

After speaking with Moir, Complainant called Olsen a second time and asked him to keep their first phone conservation confidential.[40] Olsen agreed to do so but did not tell her that he had already spoken to Schatz and to Moir.[41]

Management Learns About Complainant's Breach of Confidentiality

Within three hours of the first call from Complainant to Olsen on September 6, 2018, Antin, Schatz, Gines, and Schoenwald engaged in multiple communications regarding the matter. At 9:52 a.m., Schatz emailed Antin, copying Gines and advising that Complainant had told Olsen about the IPP project transfer and that Schatz would have preferred for Olsen to hear about it from him.[42] One minute later Gines responded, advising that he wanted to discuss the matter further and possibly discuss it with Schoenwald, Complainant's supervisor.[43] At 10:16 a.m., Antin forwarded Schatz's 9:52 a.m. email to Schoenwald asking for his thoughts on the matter.[44]

Sometime before 11:43 a.m., Schoenwald approached Complainant and asked her about her phone conversation with Olsen.[45] Complainant acknowledged that they had talked about projects but denied that she specifically told Olsen about the

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36 *Id.* at 12-13.

37 *Id.* at 12.

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 13.

43 *Id.*

44 *Id.*

45 *Id.*

IPP or APU project transfers.[46] Complainant did not inform Schoenwald about her second phone conversation with Olsen.[47]

At 11:43 a.m., Schoenwald emailed Antin stating that he had spoken to Complainant and the situation with Olsen had been a miscommunication.[48] Schoenwald stated that Complainant spoke to Olsen about projects in general but not specific to the IPP and APU transfers.[49] Schoenwald explained that Complainant knew that the IPP project transfer was confidential until the full execution of the IPP Communication Plan.[50]

Sometime after the late afternoon of September 6, 2018, and before 6:58 a.m. on September 7, 2018, Schatz had a second conversation with Olsen.[51] Olsen told Schatz about his second phone conservation with Complainant during which she had asked Olsen to keep their first phone conversation confidential.[52]

On Friday September 7, 2018, at 6:29 a.m., Complainant sent a message to Cvitanich, Raczykowski and other IPP team members, copying Moir and Olsen, advising them that she knew about the IPP project transfer and was planning to travel to Kent later that month.[53] At 6:40 a.m., Complainant emailed Schoenwald and copied Moir, indicating that she had contacted other individuals to inform them that they could share information about the transfer of the IPP project.[54] Moir also emailed the group advising that he was planning a trip to Kent for the APU project.[55] At 10:59 a.m., Schoenwald responded via email to Complainant and Moir, telling them both that they should readjust their expectations about travel relative to the next steps of the communication plans because he wanted to give people time to understand how the transfer would move forward. He attached a highlighted copy of the IPP Communication Plan.[56] In his email, Schoenwald told Complainant and Moir that he felt they were "storming the gates," asked them to pause and

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46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 14.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 15.

regroup on the matter and to schedule a meeting for the following Monday.[57] Two minutes later, Complainant responded by scheduling a meeting and asking if she could move forward with making reservations for travel because the Kent stakeholders were available the week of September 17, 2018.[58]

At 6:58 a.m. on September 7, 2018, Schatz emailed Schoenwald, documenting what he had been told about Olsen's conversations with Complainant, including their second phone conversation and Moir's phone call to Olsen.[59] Schatz felt confident that Olsen's description of events was accurate because Olsen knew specific information about the IPU and APU projects that was not public at the time.[60] At 9:30 a.m., Schoenwald emailed Schatz stating that he was unaware of Complainant's second phone conversation with Olsen or Moir's phone call to Olsen, adding, "I got this."[61] At 2:26 p.m., Schatz forwarded Schoenwald's email to Antin and Gines.[62]

Before 12:00 p.m. on September 7, 2018, Schoenwald met with Complainant and advised her that he knew that Olsen found out about the project transfers before the public announcement and that Olsen could not have known about them unless he had heard the news from Complainant or someone else in Kent.[63] Complainant denied speaking to anyone about the IPP project transfer until September 7, 2018.[64] Schoenwald told Complainant that her version of events was inconsistent with what Olsen had known about the project transfers, and Complainant reiterated that she had not told Olsen specifics about the project transfers.[65] Complainant did not tell Schoenwald about her second phone call to Olsen.[66]

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57 *Id.*

58 *Id.*

59 *Id.* at 14.

60 *Id.*

61 *Id.* at 15.

62 *Id.*

63 *Id.* at 15-16.

64 *Id.* at 16.

65 *Id.*

66 *Id.*

Communications About Paint Availability

On Friday, September 7, 2018, Complainant learned about a paint availability issue relating to the IPP project.[67] At 10:58 a.m., Robby Robinson (Robinson), a member of the Kent IPP project team, emailed the minutes of the Kent team's weekly IPP status meeting to Complainant, which indicated that Respondent's paint supplier had estimated that the supply of the paint required for the IPP project was only available through October of 2018.[68] The status report also indicated Respondent's employees were working with their contract partner to identify and test other paint options, and that testing was expected to be completed within a month.[69] At 1:22 p.m., Complainant forwarded Robinson's email and status report to Schoenwald.[70] At 2:36 p.m., Complainant sent an email, copying Schoenwald and stating that she believed the paint used on the project was being discontinued by the manufacturer because the paint was under a state ban.[71] Complainant also stated that the Kent team was working with the contract partner to find a new source for the paint and that there would be enough paint to last through October 2018.[72]

At 1:14 p.m. on Monday, September 10, 2018, Complainant emailed the IPP team members her draft Statement of Work (SoW) for the IPP project transfer.[73] In the SoW, Complainant listed risks associated with the IPP project transfer, including a need to identify a new source for paint—referencing the issue that the Kent team had already identified.[74] From September 11 to September 13, 2018, Complainant worked on a draft IPP Project Proposal, which she emailed to Schoenwald for review on September 13.[75] Complainant's draft Project Proposal reported that there was enough IPP project paint to last through October of 2018, but that the paint's manufacture was discontinued.[76]

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67 *Id*.

68 *Id.*

69 *Id.*

70 *Id.* at 16.

71 *Id.* at 16-17.

72 *Id.*

73 *Id.* at 19.

74 *Id.* Complainant's SoW listed "[h]aving a new source for paint" as a risk associated with the IPP project transfer, not that the paint was banned. *Id.*; PX 301a.

75 D. & O. at 19.

76 *Id.*

Human Resources (HR) Investigation

In the context of the flurry of communications relaying different versions of relevant facts, at 3:00 p.m. on September 6, 2018, Antin emailed Schoenwald and Schatz, copying Gines and directing Schoenwald and Schatz to compare notes to ensure "clarity, truthfulness, and effectiveness of communication" within the Project Management team.[77] On either September 6 or 7, 2018, Schoenwald had a phone conversation with Antin and Gines, advising that Complainant had denied telling Olsen that the IPP project was being transferred.[78] Antin directed Schoenwald to engage HR staff to make sure Complainant understood Schoenwald's question.[79] Schoenwald also informed Cvitanich that he had been told that Complainant had informed Olsen of both the IPP and APU project transfers out of sequence with the communication plans, but that Complainant had denied doing so.[80]

On Friday, September 7, 2018, Cvitanich facilitated an HR investigation by looping in McMasters.[81] McMasters assigned Dawn Finlayson (Finlayson), part of Respondent's HR staff, to interview Olsen and determine whether Complainant had asked or told Olsen about the project transfers.[82] Finlayson met with Olsen in the early afternoon on September 7, 2018.[83] Olsen relayed to Finlayson that Complainant had mentioned the IPP and APU project transfers to him and that, when Olsen denied knowing about the project moves, Complainant asked him specifically about the IPP project.[84] Olsen also informed Finlayson about his conversation with Schatz, Moir's phone call to Olsen, and Olsen's second phone conversation with Complainant.[85]

At 8:09 a.m. on Monday, September 10, 2018, Finlayson emailed Cvitanich the typed notes from her investigative conversations with Olsen.[86] At 9:04 a.m., Cvitanich forwarded the notes to McMasters and Antin, copied Schoenwald, and proposed a phone conversation.[87] Both McMasters and Antin forwarded the email

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77 D. & O. at 13; PX 331.

78 D. & O. at 14.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 16.

83 *Id.* at 17.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

chain to Gines, and Gines subsequently emailed McMasters, stating that he had concerns he wanted to discuss with her.[88]

At 10:04 a.m., Cvitanich emailed himself notes he had taken of his conversation with Schoenwald a few minutes earlier during which Schoenwald had stated that Complainant had denied mentioning the transfer to Olsen in his first conversation with her.[89] Cvitanich wrote that during Schoenwald's second conversation with Complainant, on September 7, 2018, Schoenwald told her that he had gotten more information about her communications with Olsen, that Olsen knew about the project transfers before the announcement, and that Olsen would not have learned about the transfers unless someone in Kent had told him about them.[90] Complainant again denied telling Olsen about the transfers.[91] At 11:03 a.m., Cvitanich emailed himself his thoughts on disciplinary action against both Complainant and Moir.[92] Cvitanich believed Complainant's employment should be terminated because she violated confidentiality after being given specific direction not to do so and she was not forthcoming or honest with Schoenwald about her conversations with Olsen.[93] Cvitanich also believed Moir should be given a reprimand based on his poor judgment in telling Complainant to call Olsen back and instruct him not to divulge the first call.[94]

Respondent's Decision to Terminate Complainant's Employment

After a senior staff meeting that ended at approximately 11:30 a.m. on Monday, September 10, 2018, Antin, Gines, Schoenwald, Cvitanich and McMasters met and discussed Complainant's breach of confidentiality that occurred during her phone calls to Olsen, Complainant's conversations with Schoenwald, Finlayson's interviews with Olsen, and the question of appropriate discipline.[95] They did not discuss Complainant's IPP project paint reports or her earlier environmental or safety reports.[96] As Complainant's supervisor, Schoenwald was responsible for deciding how to discipline Complainant; he recommended termination because he

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88 *Id.*

89 *Id.*

90 *Id.* at 18.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

no longer felt that he could rely on Complainant to be truthful.[97] Antin and Gines indicated they would support Schoenwald's recommendation, and Cvitanich and McMasters discussed past instances when Respondent had terminated employees for similar acts of dishonesty.[98] All those in attendance unanimously agreed that termination was appropriate and that Respondent would move forward to terminate Complainant's employment.[99]

No one at the meeting discussed limiting or stopping Complainant's access to confidential information or locking her computer before the termination of her employment.[100] Respondent did not tell Complainant to stop working on the IPP project transfer.[101] Complainant was allowed to continue her work without knowledge of her pending termination while Respondent's HR team processed the action and considered severance payment options.[102]

At the end of Complainant's shift at approximately 2:30 p.m. on Friday, September 14, 2018, Schoenwald asked Complainant to come to his office.[103] Once there, Schoenwald terminated Complainant's employment.[104]

Subsequently, Moir took over as Project Manager of the IPP project transfer.[105] Moir submitted an updated Statement of Work for the IPP project, which made no mention of the potential unavailability of the required paint.[106]

Complainant Challenges Her Termination

On or about October 10, 2018, Complainant filed two complaints with OSHA, alleging that Respondent unlawfully retaliated against her for engaging in activity protected under the TSCA and under Section 11(c) of the Occupational Safety and Health Act ("OSH Act") when it terminated her employment.[107] Complainant contends that Respondent was motivated to terminate her employment because of

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97 *Id.* at 18-19.

98 *Id.* at 19.

99 *Id.*

100 *Id.* at 20.

101 *Id.*

102 *Id.* at 19-20.

103 *Id.* at 19.

104 *Id.*

105 *Id.* at 21.

106 Id.

107 *Id.* at 2.

Respondent's concerns about her raising issues related to the IPP paint prior to a scheduled Defense Contract Management Agency (DCMA) audit.[108]

Later, Complainant asked OSHA to terminate its investigation of her TSCA claim so that she could pursue the claim before the Office of Administrative Law Judges.[109] On January 14, 2019, OSHA issued a final determination letter dismissing the TSCA claim and postponing investigation of the OSH Act claim.[110] Following OSHA's dismissal of her claims of unlawful termination, Complainant timely requested a hearing before an ALJ.[111] The matter was assigned to an ALJ on March 4, 2019[112] and later set for hearing on February 18, 2020.[113]

Proceedings Before the ALJ

In discovery, Complainant requested information from Respondent, including copies of work-related email correspondence sent by Complainant to supervisors and co-workers during her final week of employment in mid-September 2018. Respondent's formal written discovery responses stated that no responsive documents had been identified, though discovery was ongoing.[114] Respondent later produced redacted copies of documents related to Complainant's communications on November 22, 2019.[115]

In anticipation of the close of the discovery period on November 29, 2019,[116] the parties commenced discussions regarding the entry of a protective order in October 2019.[117] The parties exchanged draft orders into December 2019 but were unable to agree on final language related to a restriction preventing Complainant's

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108 *Id.* at 46-47.

109 *Id.* at 2.

110 *Id.*

111 D. & O. at 2.

112 *Id.*

113 *Id.* at 3.

114 Complainant's Objection to Entry of Protective Order, at 4-7 (Jan 2, 2020).

115 Declaration of Complainant's Counsel filed in reference to Complainant's Objection to Protective Order, at 3-4 (Dec. 30, 2019).

116 *Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ALJ No. 2019-TSC-00001 (ALJ Apr. 30, 2020) (Order Amending Briefing Schedule).

117 *Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ALJ No. 2019-TSC-00001 (ALJ Feb. 10, 2020) (Order Granting in Part and Denying in Part Motion for Protective Order).

use of provided documents to file and/or prosecute future claims against Respondent.[118]

In conference calls held on both December 16, and 23, 2019, Respondent represented to the ALJ that materials withheld from discovery contained information protected by the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-30, issued under the Arms Export Control Act, 22 U.S.C. § 2278.[119] Without viewing or examining any specific information for which the protections were claimed[120] but upon motion brought by Respondent and opposed by Complainant, the ALJ issued an Order Granting in Part and Denying in Part Motion for Protective Order on February 10, 2020, adopting in part protective procedures identified in *Burt v. AVCO Corp.*[121]

On February 12, 2020, the ALJ issued a Protective Order defining as "Confidential Material" any newly produced unclassified materials and "technical data," within the meaning of 22 C.F.R. Part 120 of the ITAR, as well as excerpts or compilations of Confidential Material or testimony that might reveal such.[122] By its terms, the Protective Order requires that the party designating newly produced information as "Confidential Material" bears the burden of persuasion on any motion challenging such designation, and that challenges are not time-barred. Further, the Protective Order provides that no person can be provided access to Confidential Material without signing an "End-User Agreement - Confidential U.S. Person Acknowledgment and Agreement to be Bound" (End-User Agreement). The ALJ ordered Respondent to produce, as soon as possible and no later than February 15, 2020, the material withheld from production in discovery. Respondent produced

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118 *Id*.

119 *Furlong-Newberry v. Exotic Metals Forming Co., LCC*, ALJ No. 2019-TSC-00001, slip op. at 2 (ALJ Feb. 14, 2020) (Order Modifying Protective Order and Minutes of Conference Call).

120 *Id*. at n.1.

121 2015 WL 12912366 at *2 (C.D. Cal. Nov. 17, 2015) (The district court upheld the magistrate judge's discovery order which directed the parties, who were working together in pursuit of a protective order, "to enter into an 'end-user agreement' whereby Plaintiffs' counsel would sign an agreement acknowledging that certain documents are subject to ITAR and that Plaintiffs' counsel would be responsible for adhering to ITAR when disseminating the technical information to any third parties, namely, non-testifying expert consultants.").

122 *Furlong-Newberry v. Exotic Metals Forming Co., LCC*, ALJ No. 2019-TSC-00001, slip op. at 1-2 (ALJ Feb. 12, 2020) (Protective Order). Because the ALJ determined that no classified material, "defense articles" or "defense services" were implicated in the matter, these categories of protected information were not addressed in the Protective Order. *Id.*

56 new pages of unredacted documents marked as Confidential Material, within a larger production containing hundreds of documents.[123]

Complainant then requested a modification to the Protective Order to allow for electronic transmission of confidential material, which the Protective Order barred. Complainant also moved for a hearing continuance and requested sanctions for late discovery production. On February 14, 2020, the ALJ issued an Order Modifying Protective Order allowing electronic transmission of the newly produced documents and denying Complainant's motion for a continuance. The ALJ also ordered Respondent to produce an index of the newly produced documents, noting the discovery request to which they are responsive. The ALJ found that allowing electronic transmission and requiring an index of the 56 new pages ameliorated any prejudice from the production occurring less than a week prior to the formal hearing.

A hearing was held in the matter from February 19 to 21 and February 24-25, 2020. During the hearing, the ALJ admitted the following seven exhibits designated as confidential and sealed under the Protective Order pursuant to ITAR: PX 122b, 180b, 184b, 201a, 201b, 201c, and 206d.[124]

On December 6, 2021, the ALJ issued the D. & O. and the Order Sealing D. & O. In the D. & O., the ALJ reviewed the record and explained the basis for his conclusion that Complainant failed to show by a preponderance of the evidence that any protected activity under the TSCA was a motivating factor in the termination of her employment. In the Order Sealing D. & O., the ALJ noted that the full D. & O. contained and relied on "technical data" protected under ITAR, though the ALJ did not specify what "technical data" was included.[125]

Three of the seven exhibits designated as confidential are never cited in the D. & O. The remaining four protected exhibits are cited between three and eight times. In total, there are 19 instances on which a protected exhibit citation appears in the 53-page, 31,006-word D. & O. Nevertheless, in the Order Sealing D. & O., the ALJ found that "[a]ttempting to adequately redact the full Decision and Order runs an unacceptable risk of an unauthorized disclosure" of technical data protected under ITAR.[126] As such, even the members of the Board were required to execute an

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123 Order Modifying Protective Order and Minutes of Conference Call at 1-2.

124 D. & O. at 3.

125 *Furlong-Newberry v. Exotic Metals Forming Co., LCC*, ALJ No. 2019-TSC-00001, slip op. at 1-2 (ALJ Dec. 6, 2021) (Order Closing Case and Sealing Decision and Order); *see* 22 C.F.R. § 120.10(a).

126 Order Sealing D. & O. at 2.

End-User Agreement in order to review the D. & O. and access the record below upon which the D. & O. is based.[127]

Complainant timely appealed the ALJ's identified decisions to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to review ALJ decisions and issue agency decisions in cases arising under the Environmental Acts, including the TSCA.[128] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[129] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[130] The Board reviews an ALJ's procedural rulings under an abuse of discretion standard.[131]

DISCUSSION

Complainant raises the following issues on appeal: (1) whether the ALJ applied the correct legal causation standard in environmental whistleblower cases; (2) whether the ALJ's finding that Complainant did not establish by a preponderance of the evidence that her protected activity was a motivating factor in her termination was supported by substantial evidence; (3) whether the ALJ abused his discretion in his determinations on procedural issues; and (4) whether the ALJ abused his discretion by sealing the D. & O. We discuss each issue below.

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[127] Upon any appeal of this matter following further proceedings required by this Decision and Order, the Board will, if appropriate, address the legal authority relied upon by the ALJ in requiring the Board's assigned judges and staff to execute an End-User Agreement in order to access the sealed D. & O.

[128] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 24.110. The Environmental Acts include the TSCA, the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i), the Federal Water Pollution Control Act, 33 U.S.C. § 1367, the Solid Waste Disposal Act, 42 U.S.C. § 6971, the Clean Air Act, 42 U.S.C. § 7622, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610.

[129] 29 C.F.R. § 24.110(b); *Evans v. U.S. Env't Prot. Agency*, ARB No. 2017-0008, ALJ No. 2008-CAA-00003, slip op. at 8 (ARB Mar. 17, 2020) (citing *Kaufman v. U.S. Env't Prot. Agency*, ARB No. 2010-0018, ALJ No. 2002-CAA-00022, slip op. at 2 (ARB Nov. 30, 2011)).

[130] *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (citations omitted).

[131] *Vander Boegh v. EnergySolutions, Inc.*, ARB No. 2015-0062, ALJ No. 2006-ERA-00026, slip op. at 7 (ARB Feb. 24, 2017) (citation omitted).

1. The ALJ Applied the Correct Causation Standard

Complainant argues that the ALJ made a legal error by applying an incorrect theory of causation.[132] Initially, Complainant contends that under 22 C.F.R. § 24.109(b)(2) a whistleblower may show causation under a "mixed-motive" analysis, with the determination to be made being whether any factor, alone or in connection with other factors, tends to affect the outcome of the decision.[133] Complainant argues that once a whistleblower demonstrates the presence of an improper motive in a mixed-motive case, the prima facie case of causation has been established.[134] In her Reply Brief, Complainant modifies her argument by conceding the applicability of the standard of "motivating factor," but continues to insist that the evidence she presented regarding the paint availability issue[135] sufficiently demonstrated the presence of an improper motive and, therefore, she met her burden in establishing a prima facie case of causation.[136]

In whistleblower cases under the Environmental Acts, including the TSCA, a complainant must prove by a preponderance of the evidence that she (1) engaged in protected activity, (2) suffered an adverse action, and (3) can show that the protected activity was a motivating factor in the adverse action.[137] A complainant need only show that the protected activity was *a* motivating factor, not *the* motivating factor.[138] "A complainant must prove more when showing that protected activity was a 'motivating' factor than when showing that such activity was a 'contributing' factor."[139] This approach is consistent with courts' use of the motivating factor standard in cases arising under analogous Environmental Acts.[140]

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132 Complainant's Opening Brief at 37.

133 *Id.*

134 *Id.*

135 Complainant frames her entire motivating factor argument around her protected activity involving the paint availability issue. She does not argue before the Board that her May 2018 reports of unlabeled material and barrel-sealing issues motivated Respondent's termination of her employment in any manner.

136 *Id.* at 41.

137 29 C.F.R. § 24.109(b)(2).

138 *Id.* (emphasis added).

139 *See Lopez v. Serbaco, Inc.*, ARB No. 2004-0158, ALJ No. 2004-CAA-00005, slip op. at 4-5 n.6 (ARB Nov. 29, 2006).

140 *See* 29 C.F.R. § 24.109(b)(2) (applying the standard of "motivating factor" to the whistleblower protection provisions of the Safe Water Drinking Act (42 U.S.C. § 300j-9(i)), the Federal Water Pollution Control Act (33 U.S.C. § 1367), the Solid Waste Disposal Act (42 U.S.C. § 6971), the Clean Air Act (42 U.S.C. § 7622), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9610)).

If a complainant meets her burden of proof, a respondent may nevertheless avoid liability if it proves by a preponderance of the evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.[141]

The ALJ correctly applied this legal standard, noting that "Complainant must show by a preponderance of the evidence that her protected activity was *a motivating factor* in Respondent's adverse action."[142] After considering the proximity in time between Complainant's protected activities and her termination, the structure of Respondent's investigation, and other evidence of alleged animus, the ALJ found "Complainant ha[d] the burden to prove that her protected activity was a motivating factor in her termination by a preponderance of the evidence" but had not done so.[143] For the reasons discussed below, we hold that the ALJ properly applied the correct legal standard in this case.

2. Complainant Failed to Establish Her Protected Activity Was a Motivating Factor in her Termination

The ALJ determined that Complainant had met her burden to establish two of the required three elements of her TSCA retaliation claim. The ALJ found that Complainant engaged in activity protected under the TSCA when she reported the unlabeled paint and the unsealed barrel issues in May of 2018 and when she reported her concerns about the unavailability of the IPP project paint on September 7, 2018.[144] The ALJ also found that Complainant suffered an adverse action when her employment was terminated.[145] Complainant failed to present any arguments on appeal connecting the termination of her employment to her reporting of the labeling issue or the barrel-sealing issue in May of 2018, and thereby waived any reliance on those findings as a basis for reversing the ALJ's ultimate causation determination.[146] As such, our decision ultimately turns on whether Complainant met her burden to establish that her reporting of the IPP paint availability issue was a motivating factor in her termination.

Complainant only has to prove that her protected activity was ***a*** motivating factor in the adverse action, even if other legitimate factors also motivated the

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141 29 C.F.R. § 24.109(b)(2).

142 D. & O. at 42 (emphasis in original).

143 *Id.* at 53.

144 *Id.* at 39.

145 *Id.* at 41.

146 *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 12 (ARB May 26, 2010) (citing *Walker v. American Airlines, Inc.*, ARB No. 2005-0028, ALJ No. 2003-AIR-00017, slip op. at 9 (ARB Mar. 30, 2007) (argument not raised on appeal is waived)); 29 C.F.R. § 24.110(a).

adverse action.[147] A motivating factor is not established merely by evidence that protected activity occurred and that an employee suffered adverse action. Establishing that protected activity was a "motivating factor" requires proof, by a preponderance of the evidence, that some nexus existed between the activity and the adverse action.[148] That nexus is missing if the protected activity takes place after or is otherwise unconnected to the adverse action.[149]

Complainant contends that the ALJ erred in finding she did not establish that her reporting of the paint availability issue was a motivating factor in her termination.[150] Having reviewed the evidentiary record as a whole, the Board concludes that substantial evidence supports the ALJ's findings, as addressed below.

It is undisputed that Complainant engaged in protected activity at or about the same time Respondent investigated her breach of confidentiality, and during the time Respondent made the decision to terminate her employment. Complainant relies almost exclusively on the temporal proximity between her protected activity and her termination to establish her claim's "motivating factor" element. Temporal proximity alone is not necessarily sufficient. Although an inference of discrimination may arise when an adverse action closely follows a protected activity, an intervening event diminishes the inference.[151] Here, the ALJ gave due consideration to the proximity in time between Complainant's protected activity and her termination, but also took account of the intervening events surrounding Complainant's breach of confidentiality and her lack of truthfulness in advising the management team about her actions. Although the intervening nature of these facts may be less evident when described textually, when laid out in temporal order they reveal substantial support for the ALJ's conclusion that the only motivating factor for Respondent's decision to terminate Complainant's employment was her breach of confidentiality and associated dishonesty, discovered on September 6, 2018, and

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147 *See Lopez*, ARB No. 2004-0158, slip op. at 6-8.

148 *Beaumont v. Sam's East, Inc.*, ARB No. 2015-0025, ALJ No. 2014-SWD-00001, slip op. at 4 (ARB Jan. 12, 2017) (citing 29 C.F.R. § 24.109(b)(2) and *Jenkins v. U.S. Env't. Prot. Agency,* ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 17-18 (ARB Feb. 28, 2003)); *see also Higgins v. Alyeska Pipeline Serv. Corp.*, ARB No. 2001-0022, ALJ No. 1999-TSC-00005, slip op. at 5 (ARB June 27, 2003).

149 *See Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 1996-0173, ALJ No. 1995-CAA-00012, slip op. at 5 (ARB Apr. 8, 1997).

150 Complainant's Opening Brief at 37, 41-42, 46.

151 *See Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 6-13 (ARB Jan. 22, 2020) (Decision and Order of Remand) (analyzing temporal proximity, inference of retaliation, intervening events, and proof by a preponderance of the evidence).

that her report of paint availability, reported on September 7, 2018, did not motivate Respondent's decision.[152]

9/5		Complainant is put in charge of the IPP project transfer and told to keep the information confidential per the IPP Communication Plan.
Thurs. 9/6	6:30-7:00	Complainant calls Olsen and breaches confidentiality of project.
	9:52	Schatz reports the breach of confidentiality to Antin and Gines. Antin informs Schoenwald.
	Pre 11:43	To Schoenwald, Complainant denies breach and fails to disclose second call telling Olsen to keep breach confidential.
	11:43	Schoenwald tells Antin the matter is a "miscommunication."
	3:00	Antin directs Schoenwald and Schatz to verify truthfulness.
	Post 3:00	Schatz reports second Complainant/Olsen call to Antin, Gines; Schoenwald is directed to involve HR.
Fri. 9/7	Pre-Noon	Finlayson interviews Olsen.
	6:58	Schatz emails Schoenwald about Olsen's reveal of the second call.
	9:30	Schoenwald tells Schatz that he had been unaware and, "I got this."
	Post 9:30	Schoenwald interviews Complainant again; she again denies telling Olsen about the project transfer.
	10:58	Complainant first learns about paint availability issue.
	Noon	Complainant tells Schoenwald of paint issue during phone call.
	1:22	Complainant forwards paint availability email to Schoenwald
	2:36	Complainant informs Schoenwald that IPP paint is banned.
9/10	8:09	Finlayson reinterviews Olsen and sends notes to Cvitanich.
	9:04	Cvitanich forwards HR notes to McMasters, Antin, Schoenwald; notes are forwarded to Gines.
	11:03	Cvitanich decides to recommend termination.
	11:30	Schoenwald recommends and executives on conference call decide to terminate Complainant's employment.
	1:14	Complainant sends IPP team a draft SoW noting need for "new source of paint," reflecting issue team had already identified.
9/13		Complainant emails Schoenwald her draft IPP Project Proposal, which notes that the IPP paint's manufacture has been discontinued.
9/14		Complainant is told her employment is terminated.

[152] Because Complainant failed to establish that her reporting of the paint availability issue was a factor in her termination, there is no basis for applying a "mixed motive" analysis in this matter. *See Delaney v. U.S. Dep't of Lab.*, 69 F.3d 531, No. 95-1487, slip op. at 3 (1st Cir. 1995) (no foundation for mixed motive analysis without sufficient evidence that employer acted with a dual motive).

The ALJ found credible Respondent's witnesses' testimony that the paint availability issue was not considered during, and therefore played no role in, the decision-making leading to Complainant's termination of employment. The Board defers to those credibility decisions,[153] finding them to be consistent with the objective facts also found by the ALJ, including that:

- Through its Kent IPP team, Respondent was already aware of the paint availability issue prior to Complainant's learning of and reporting it.[154]
- It was not in Respondent's self-interest to cover up or avoid the issue given Respondent's ongoing contractual relationship which required Respondent to provide the ducts as specified and approved.[155]
- Respondent had already identified the issue to their contract partner, making it implausible that avoidance of sharing that information motivated Respondent's actions.[156]
- The paint was not in fact unavailable and caused no problems for the timely completion of the IPP project transfer.[157]

Based on these facts, the ALJ rejected Complainant's unevidenced contention that her termination was decided to avoid negative ramifications of the paint availability issue in an upcoming DCMA audit at Respondent's facilities. Considering the substantial evidence of these facts as set forth in the record, the ALJ found "Complainant ha[d] the burden to prove that her protected activity was a motivating factor in her termination by a preponderance of the evidence" but failed to meet that burden.[158] We affirm that determination.[159]

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[153] The ARB generally defers to an ALJ's credibility determinations unless they are "'inherently incredible or patently unreasonable.'" *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012) (quoting *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 2005-0101, ALJ No. 2003-SDW-00001, slip op. at 12 (ARB Oct. 31, 2008) (quotation omitted).

[154] D. & O. at 46.

[155] *Id.*

[156] *Id.* at 46-47

[157] *Id.* at 47.

[158] D. & O. at 53.

[159] Because Complainant did not meet her burden to establish that her protected activity was a motivating factor for her termination, the ALJ was not required to reach the issue of Respondent's affirmative defense "that it would have taken the same adverse action in the absence of the protected activity." 29 C.F.R. § 24.109(b)(2). Noting that it was unnecessary to reach the issue, the ALJ nevertheless addressed the issue and concluded that he would have found that Respondent had established by a preponderance of the

3. The ALJ Did Not Abuse his Discretion in Evidentiary Rulings

The ARB reviews an ALJ's determinations on procedural and evidentiary rulings under an abuse of discretion standard.[160] "ALJs have wide discretion to set or limit the scope of discovery and will be reversed only when such evidentiary and discovery rulings are arbitrary or an abuse of discretion."[161] To meet this standard, at a minimum Complainant is required to identify "'with some precision'" the information she should have received and how that information would have altered the evidence submitted at hearing.[162] "Mere speculation" is insufficient.[163]

Complainant argues that the ALJ abused his discretion in denying her request during the formal hearing for the production of additional documents. Specifically, Complainant argues that the ALJ's ruling denied her due process because she did not have access to materials under the ALJ's February 12 Protective Order until a week before the formal hearing commenced. She asserts that this untimely production prevented her from investigating, developing, organizing, or requesting more documents from Respondent relating to what had just been revealed to her in the February 12 materials.[164]

Importantly, Complainant does not address the fact that she failed to bring a motion to compel production during the discovery period but instead waited until during the hearing to request such relief. The fact that the parties had been negotiating regarding the issuance of a protective order at length after the close of discovery is not a sufficient reason to find error in the ALJ's ruling. Complainant had an obligation to diligently seek the discovery she needed, and her failure to earlier seek to compel production rebounds to her peril.

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evidence that it would have terminated Complainant's employment due to her breach of confidentiality and lack of honesty, even if she had never engaged in protected conduct. See D. & O., at 53 n.82. The Board concludes that substantial evidence supports the ALJ's determination that Respondent would have decided to terminate Complainant for her confidentiality breach and her lack of truthfulness about the breach even if no protected activity had taken place. The Board affirms that determination.

160 *James v. Suburban Disposal, Inc.*, ARB No. 2010-0037, ALJ No. 2009-STA-00071, slip op. at 4 (ARB Mar. 12, 2010).

161 *Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 21 (ARB Oct. 5, 2020).

162 *See Bucalo v. United Parcel Serv., Inc.*, ARB No. 2010-0107, ALJ Nos. 2008-SOX-00053, 2008-STA-00059, slip op. at 4 (ARB Mar. 21, 2012) (quoting *Moore v. U.S. Dep't of Energy*, ARB No. 1999-0047, ALJ No. 1998-CAA-00016, slip op. at 4 (ARB June 25, 2001)).

163 *Nieman*, ARB No. 2018-0058, slip op. at 21.

164 Complainant's Opening Brief at 58-61.

Complainant has not established that the ALJ abused his discretion in denying her motion to compel further production of documents during the hearing. Thus, the Board finds no abuse of discretion in the ALJ's rulings issued during the hearing.

Even if Complainant had sought to compel production in a more diligent and timely manner, it is not apparent that the result would have been different. The only specific information that Complainant identifies as unprovided and necessary to her case is the actual name of the IPP project paint. Given the ALJ's determination that Complainant's reporting related to the paint issue was protected activity but not a motivating factor for Respondent's termination decision, and the Board's current affirmance of those determinations, it is difficult to envision that the production of the paint's formal name would have had any impact on the result in this case. Complainant's insistence to the contrary is the "mere speculation" which is insufficient to establish an abuse of discretion by the ALJ.

Complainant also assigns as error the ALJ's credibility determinations related to "Respondent's executives," presumably including Gines, Antin, Schatz, McMaster, Cvitanich, and Schoenwald. Because an ALJ observes all witnesses throughout a hearing, the Board will uphold an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable."[165] If a "'decision is based on testimony that is coherent and plausible, not internally inconsistent, and not contradicted by external evidence,'" the Board will defer to an ALJ's credibility determinations.[166]

In this case, the ALJ issued a thorough and well-reasoned D. & O. in which he made and relied upon specific credibility determinations for each witness, including Complainant and Respondent's executives. We find these determinations to be consistent with the record and well within the ALJ's discretion to make. As such, Complainant has failed to establish any abuse of discretion.

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[165] *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 2006-0035, ALJ No. 2004-AIR-00030, slip op. at 13 (ARB Feb. 29, 2008)); *see also Negron v. Vieques Air Link, Inc.*, ARB No. 2004-0021, ALJ No. 2003-AIR-00010, slip op. at 5 (ARB Dec. 30, 2004).

[166] *Jenkins v. U.S. Env't Prot. Agency*, ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 39 (ARB Mar. 1, 2018) (quoting *Bobreski v. J. Givoo Consultants*, ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 26 (ARB Aug. 29, 2014)).

4. The ALJ Abused His Discretion in Sealing the Entire D. &. O. and Issuing the Protective Order Without Sufficient Factual Record

In the Order Sealing D. & O., the ALJ sealed the D. & O. from public access, noting that it "contains and relies on 'technical data' within the meaning of ITAR and that "[a]ttempting to adequately redact the full (D. & O.) runs an unacceptable risk of an unauthorized disclosure."[167] Relying on ITAR, the ALJ had issued the Protective Order a week before the hearing commenced. For the reasons discussed below, we remand to the ALJ for further proceedings.

A. ITAR

The Arms Export Control Act (AECA)[168] "regulates the export and import (i.e. disclosure or transfer) of "defense articles" and "defense services" (and any "technical data" thereto) out of and into the United States."[169] The purpose of the AECA is to "restrict the international market in defense articles by closely controlling the flow of such articles out of this country."[170]

ITAR, the implementing regulations for AECA, defines the United States Munitions List (USML),[171] made up of 21 categories of identified defense articles and defense services which, with related "technical data," require compliance with specified licensing controls absent an authorized exception.[172] ITAR specifically defines "technical data" with respect to each of the 21 USML categories relying upon the baseline definition of the term, as follows:

> Information, other than software as defined in § 120.40(g), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawing, photographs, plans, instructions or documentation.[173]

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167 Order Sealing D. & O. at 1.

168 22 U.S.C. § 2778; 22 C.F.R. §§ 120.6, 120.9(a)(2).

169 *Burt*, 2015 WL 12912366, at *2-3.

170 *Kuhali v. Reno*, 266 F.3d 93, 109 (2d Cir. 2001).

171 22 C.F.R. Part 121.

172 22 C.F.R. §§ 121.1; 123-125.

173 22 C.F.R. § 120.33(a)(1); *see* 22 U.S.C. § 2778(a)(1) ("The items so designated shall constitute the United States Munitions List."); 22 C.F.R. § 120.10(a) ("The articles . . . and related technical data designated as defense articles . . . constitute the U.S. Munitions List.").

ITAR provides that any party that is appropriately licensed "is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the defense article, which includes technical data, has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article abroad."[174] Being "responsible" under ITAR does not equate to being liable for another party's unauthorized disclosure in violation of the statute.[175] ITAR requires that a discloser maintain a list of persons to whom disclosure is made and that those persons be United States citizens or of other identified status.[176] For purposes of the current matter, the Board concludes that Respondent is responsible for complying with the terms of ITAR, which in turn makes it responsible for the handling of any technical data entrusted to Complainant.[177]

Even so, the mere invocation of ITAR does not cloak all of Respondent's actions in secrecy. "[T]he purpose of ITAR is to further 'world peace and security,' not to permit parties to avoid their discovery duties."[178] Neither is the purpose of ITAR to shield from the public's view information that does not constitute protected "technical data" or is already in the public domain.[179] The ALJ relied on ITAR as the basis for issuing both the Protective Order and the Order Sealing D. & O. Given the overlap and interplay between the Protective Order and the ALJ's Order Sealing D. & O., the Board finds it necessary to address each separately in order to clarify the factual record and legal authorities in this case.

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174 *Id.* at § 127.1(c).

175 *Burt*, 2015 WL 12912366, at *3.

176 22 C.F.R. § 120.15.

177 While Respondent may be "responsible" for any unauthorized disclosure, that does not equate to Respondent being "liable" for any of Complainant's actions in violation of ITAR. *See Burt*, 2015 WL 12912366, at *3.

178 *Id.* at *4.

179 *See* 22 C.F.R. § 120.33(b) (explaining that technical data "does not include information concerning information . . . in the public domain" as defined in 22 C.F.R. § 120.34).

B. Order to Seal D. & O.

Unlike the standard required for issuance of a protective order, the law requires much more to support the sealing of judicial records from public view. A court must identify "compelling reasons supported by specific factual findings" in order to outweigh the strong public policies favoring disclosure.[180] "A party seeking to seal judicial records must specify facts that causally connect the documents at hand to sufficiently compelling reasons that justify overriding the strong presumption favoring public access."[181] "The trial court must weigh relevant factors including the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets."[182] The fact that a protective order has issued does not present sufficient compelling reasons to seal the record.[183]

In the present case, the ALJ issued an Order Sealing D. & O. without identifying or applying the compelling reasons standard. In the entirety of its relevant parts, the Order Sealing D. & O. reads as follows:

> The full Decision and Order contains and relies on "technical data" within the meaning of 22 C.F.R. Part 120 of the International Traffic in Arms Regulations (ITAR). The ITAR implement the Arms Export Control Act (AECA), which contains disclosure-limiting provisions that are a recognized exception to the Freedom of Information Act. *Council for a Livable World Educ. Fund v. U.S. Dep't of State*, No. CV 96-1807 (HHK), 1998 WL 36034416, at *3-4 (D.D.C. Jan. 21, 1998) (discussing FOIA Exemption 3).
>
> The technical data in this case was subjected to special handling under a protective order I issued on February 12, 2020 to limit its disclosure. *See generally* 22

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180 *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir.2010) (quoting *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

181 *Tokarski v. Med-Data, Inc.*, 2022 WL 683250, at *1-2 (W.D. Wash. Mar. 8, 2022).

182 *Pintos*, 605 F.3d at 679 n.6 (quoting *Hagestad v. Tragesser,* 49 F.3d 1430, 1434 (9th Cir. 1995)).

183 *See Chaney v. Auto Trackers & Recovery N., LLC*, 2021 WL 6137298, at *1-2 (E.D. Wash. Mar. 25, 2021) ("[T]he existence of a private Protective Order is not a compelling reason to seal a document in the Court Record."); *Ponomarenko v. Shapiro*, 2017 WL 3605226, at *3 (N.D. Cal. Aug. 21, 2017) (Where, as here, a protective order has been entered, "an agreement among the parties to keep a document confidential does not establish a compelling reason to seal.")

> C.F.R. Part 127; *see also* 22 C.F.R. § 125.2(c) (prohibiting unlicensed transfer of unclassified technical data to a "foreign person"). Attempting to adequately redact the full Decision and Order runs an unacceptable risk of an unauthorized disclosure. I therefore find that sealing the full Decision and Order is the only adequate means to protect the interest in non-disclosure and outweighs the presumption of public access to the full Decision and Order. *See* 29 C.F.R. § 18.85. I note that the public's interest is at least in part satisfied by disclosure of the ultimate result in this case, as set out above.[184]

In effect, the ALJ's only basis for issuing the Order Sealing D. & O. is the fact that the Protective Order had been issued earlier based on ITAR-related concerns. That, in and of itself, is not sufficient under the law.

Instead, like every other application of statutory authority, ITAR requires the consideration of the components of the statute in light of the specific information at issue in order to determine whether and where the bar to public transparency should be set. ITAR's multi-pronged test is best described in *West v. Bell Helicopter Textron, Inc.*,[185] which examined an attempt to seal trial exhibits on the basis that the helicopter at issue in that product liability case contained technology restricted from export under ITAR.

> [ITAR] prevents the disclosure of only that technical data which <u>both</u> 'disclose[s] critical technology with military and space application' <u>and</u> appears on the Munitions List, and the relevant provisions of the List cover only that data which itself <u>both</u> 'directly related to the manufacture and production' of certain 'specifically designed' components of the [helicopter] a<u>nd</u> 'required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification' of those articles.
>
> Thus…, obtaining relief from the disclosure of documents based on ITAR requires them to explain "how **<u>each document</u>** (1) discloses critical technology with military or space application, (2) directly relates to the manufacture of specifically designed components of the [helicopter], and (3) is required for the design, development, production, manufacture, assembly,

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184 Order Sealing D. & O. at 1-2.

185 2014 WL 12908077 (D.N.H. Sept. 30, 2014).

> operation, repair, testing, maintenance, or modification of those components, all of which is necessary to bring a document within the scope of [ITAR].[186]

The *West* court found that it was insufficient to conclude that, because one engine model subjected to testing described in a specific exhibit was installed in a military aircraft covered by ITAR, "[a]ny technical data related to the design, development, production, manufacture, assembly, operation, repair [*sic*] of the Kiowa, its engine, and its ECU is restricted under ITAR."[187] The court found that "[t]his assertion does not match up to the requirements of ITAR, i.e., that the data "directly relate[ ] to the manufacture of specifically designed components" of critical military technology (rather than simply "relate" to components "installed in" military technology), nor that the data be "required" for "the design, development, production, manufacture, assembly, operation, repair, maintenance, or modification" of those articles (rather than simply "related to" those tasks).[188]

As in *West*, nothing in the record before the Board establishes that the ALJ applied the required legal standard for sealing the entire D. & O. Neither does the factual record support the ALJ's action. It is apparent that many of the facts set forth in the D. & O., even many of the facts referenced in the seven specifically identified exhibits designated as confidential, are not technical data. For example, the fact that Complainant sent an email to a co-worker and copied her supervisor on a specific date, absent discussion of the content, in no way "discloses critical technology with military or space application, (2) directly relates to the manufacture of specifically designed components of the [product at issue], and (3) is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of those components," all of which is necessary to bring a document within the scope of [ITAR].[189] Although the content of the email may, or may not, meet the ITAR test, that determination was never specified by the ALJ, nor was it impossible to redact whatever information the ALJ may have determined did meet the statutory definition in this instance.

In addition, a vast majority of the facts stated in the D. & O. were already within the public domain at the time this case was commenced, and thus are

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186 *Id.* at *4-5 (internal citations omitted; bolding added; other emphasis in original).

187 *Id.* at 5.

188 *Id*.

189 *Id*.

specifically excluded from the scope of both ITAR[190] and the Protective Order[191] including the following:

- Names of the parties, including the Respondent's current name
- Fact that Respondent manufactures "high-temperature, high-pressure air and exhaust management solutions for aircraft and engines," and can "engineer, manufacture, and provide aftermarket support on vital systems and components for virtually every commercial airliner and military aircraft in active service today," which is noted on its website at *https://www.exoticmetals.com/about-us*
- Names of relevant employees
- Supervisory relationship(s) between employees
- Employment responsibilities of various supervisors and coworkers, including reference to "IPP Project" available on *LinkedIn*
- Fact that Respondent produces certain generically described products, see *https://www.parker.com/us/en/search?searchbox=duct* and *https://www.exoticmetals.com/catalog/our-products*.
- Fact that Respondent uses "paint" and "coatings" in various manufacturing processes, see *https://ph.parker.com/us/en/emi-shielding-paints*
- Complainant's allegations that she reported to Respondent's decision-makers that a necessary paint might be unavailable for a specific project to which she had been assigned, an allegation made in her complaint to OSHA in October 2018, well before the issuance of the Protective Order in February 2020 and referenced throughout the proceedings below well before any ITAR-related concerns were advanced by Respondent

Even so, the ALJ determined, without any identified and thus reviewable basis in the record, that "attempting to adequately redact the full Decision and Order runs an unacceptable risk of an unauthorized disclosure [of technical data.]"[192] We have exhaustively combed the entire record, including but not limited to the seven specifically identified and protected exhibits, and been unable to identify sufficient "technical data" that supports the suppression of the entire D. & O. Although there may, or may not, be technical data included in the descriptions of and references to projects, processes or substances addressed in the

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190 *See* 22 C.F.R. § 120.33(b) (explaining that technical data "does not include information concerning information . . . in the public domain" as defined in 22 C.F.R. § 120.34).

191 Protective Order at 2 ("However, the protections conferred by this agreement do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.").

192 D. & O. at 2.

seven specific exhibits marked as Confidential Material within the D. & O., it is unreasonable to conclude that those few references could not have been redacted and/or otherwise anonymized. As other courts have found, while "portions of the documents [may] contain ITAR and EAR controlled information, that fact is not a compelling reason to seal the documents in their entirety."[193]

If the protected technical data resides in the seven specified exhibits or in other documents used as exhibits at hearing or in depositions, the law may support a determination that those specific exhibits should be sealed while the D. & O. should not. At this point in the proceeding, the Board is unable to examine that issue due to the ALJ's failure to identify—even by high-level category—what "technical data" supports the imposition of ITAR-related protections in this matter. The ALJ made no findings of a compelling reason to seal and left no record of having engaged in such examination—neither of the seven specifically cited exhibits marked as Confidential Material during the hearing nor of the entire 53-page D. & O. Without such, the Board is left with no factual basis upon which to uphold the ALJ's determination, and thus finds such to be an abuse of discretion.[194] As such, the Board remands this matter to the ALJ with the direction to make specific findings of sufficiently compelling reasons to maintain a seal over limited components of entire documents in the record and as cited in the resulting D. & O. after conscientiously balancing the competing interests of the public in having access to judicial records. [195]

C. Protective Order

An ALJ has authority to grant a protective order "to protect against undue disclosure of privileged communications, or sensitive or classified matters."[196] To appropriately do so, the ALJ must determine "whether 'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.'"[197] We review *de novo* whether the

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193 *TSI Inc. v. Azbil BioVigilant Inc.*, 2014 WL 880408, at *3 (D. Ariz. Mar. 6, 2014).

194 *See United States v. Doe*, 662 F. App'x 515, 516 (9th Cir. 2016) (court's failure to identify and apply correct legal standard provides sufficient grounds to find abuse of discretion).

195 *See Comphy Co. v. Amazon.com, Inc.*, 371 F. Supp. 3d 914, 929-30 (W.D. Wash. 2019) (noting that failure to provide necessary specification "leaves the Court with no factual basis for maintaining [] allegedly confidential material under seal.").

196 29 C.F.R. § 18.85(a).

197 *Pintos*, 605 F.3d at 678 (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)).

ALJ used the correct legal standard when granting the Protective Order, and we review the application of that correct legal standard for abuse of discretion.[198]

In this case, the ALJ specifically found that "the restrictions on export of technical data established by ITAR . . . and recordkeeping obligations attendant to those restrictions, provide good cause for granting a protective order."[199] Although Complainant challenges that finding in this appeal, we find that the ALJ cited to the correct standard in issuing the Protective Order in the case. We affirm this aspect of the ALJ's action.

The critical issue is whether the ALJ correctly applied the good cause standard. The law is clear that "[a] party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted."[200] For the same reasons as set forth above regarding the lack of a record upon which the ALJ's determination of ITAR-related protections was based with respect to the Order to Seal D. & O., we find that the ALJ abused his discretion in failing to make an adequate record with regard to his application of the good cause standard. Accordingly, we remand the Complainant's challenges to the Protective Order and the two identified related orders to the ALJ for further action. We note that the Protective Order itself contains provisions defining procedures for challenging confidentiality designations, and to the extent that those provisions restrict the right to challenge to the Respondent alone,[201] for reasons of comity and fairness to the parties we direct the ALJ to accept and act upon motions brought by either party. To be clear, we direct the ALJ to apply the good cause standard, not the compelling reasons standard, to the necessary analysis relevant to the Protective Order and related orders. We do not now vacate the Protective Order but instead hold it in full force and effect until the completion of the directed further analysis by the ALJ. Our decision reflects an

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198 *Petitt, v. Delta Air Lines, Inc.*, ARB No. 2019-0087, ALJ No. 2018-AIR-00041, slip op. at 2 (ARB Aug. 26, 2020); *see also In re Midland Nat. Life Ins. Co. Annuity Sales Pracs. Litig.,* 686 F.3d 1115, 1119 (9th Cir. 2012) (citing *Phillips ex rel. Estates of Byrd,* 307 F.3d at 1210).

199 *Furlong-Newberry v. Exotic Metals Forming Co., LLC*, ALJ No. 2019-TSC-00001, slip op. at 2 (ALJ Feb. 10, 2020) (Order Granting in Part and Denying in Part Motion for Protective Order).

200 *Foltz v. State Farm Mut. Auto. Ins. Co.,* 331 F.3d 1122, 1130-31 (9th Cir. 2003).

201 The Protective Order limits judicial intervention to situations where "the designating party may file and serve a motion to retain Confidentiality." In this case, Respondent was the party that designated the material as confidential, and thus by the terms of the Protective Order Respondent is the only party authorized to file a relevant motion. *See* Protective Order at 4 ("If the parties cannot resolve a challenge without the presiding judge's intervention, the designating party may file and serve a motion to retain Confidentiality.").

effort to maintain the status quo while providing the ALJ the opportunity to further address the issue in a manner that protects the parties and prevents any inadvertent violation of law.

CONCLUSION[202]

The Board **AFFIRMS** the ALJ's determination that substantial evidence in the record supports the conclusion that Complainant failed to establish that her protected conduct was a motivating factor in Respondent's decision to terminate her employment. Finding that the ALJ abused his discretion by failing to identify a factual record in support of a compelling reason to seal the entire D. & O., the Board **VACATES** the ALJ's Order Sealing D. & O. and hereby **REMANDS**, directing the ALJ to reexamine and reissue the D. & O. and the Protective Order, if necessary, with redactions or other anonymizing edits as necessary to ensure compliance with both ITAR and the requirements of the applicable law as set forth in this Decision and Order.

SO ORDERED.

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

[redacted]

SUSAN HARTHILL
Chief Administrative Appeals Judge

[redacted]

STEPHEN M. GODEK
Administrative Appeals Judge

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202 In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.