



Issue Date: 19 December 2014

In the Matter of
NEIL D. CLARK,
Complainant

Case No.: 2013 CFP 5

v.

FARMERS INSURANCE EXCHANGE,
Respondent

Appearances: Mr. Neil D. Clark
Pro se (representing himself)

Mr. Kevin S. Hendrick, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
DISMISSAL OF COMPLAINT &
DENIAL OF EMPLOYER’S REQUEST FOR ATTORNEY FEES**

This case arises under the employee protection provisions of the Consumer Financial Protection Act of 2010 (“CFPA” and “Act”), Title 12 U.S.C. § 5567,¹ as implemented by 29 C.F.R. Part 1985.² In general, Section 5567 provides protection to a “covered employee” against retaliation because he: a) provided information to their employer, the Bureau of Consumer Financial Protection (“Bureau”), or any other Federal, State, or local government authority or law enforcement agency relating to any violation, or any act or omission that the employee reasonably believes to be a violation, of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau; b) testified, or will testify in any proceeding resulting from the administration or enforcement of the Act or other provision of law subject to the jurisdiction of the Bureau; c) filed, or caused to be filed, or instituted any proceeding under any Federal consumer financial law; or d) objected to, refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be a violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.

¹The CFPA was enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376, on July 21, 2010.

²Interim Final Rule, 79 FR 18639 (April 3, 2014).

Procedural History

On June 27, 2013, Mr. Clark filed a complaint, with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”) under the CFPA employee protection provisions. In a July 12, 2013 supporting statement, JX 6,³ Mr. Clark asserted that he was placed on a Performance Improvement Plan (“PIP”) on June 25, 2013 as a preliminary step towards termination in retaliation for his complaints to management and the State of Michigan from February 2013 to June 19, 2013 regarding violations of the CFPA. Specifically, Mr. Clark reported that customer calls concerning the filing of insurance claims were either being inappropriately rerouted or going unanswered, which violated Section 5531 of the Act that prohibits unfair, deceptive, or abusive acts or practices.

On August 15, 2013, the OSHA Regional Investigator dismissed Mr. Clark’s complaint on the basis that he did not engage in a protected activity because Section 5531 required that customers suffer substantial harm; whereas a customer with a claim who experienced rerouted or unanswered calls could either call again or submit a claim by mail, JX 7. On September 10, 2013, Mr. Clark submitted an objection to the adverse determination and dismissal of his CFPA complaint.

Pursuant to a Second Revised Notice of Hearing dated December 20, 2013, (ALJ III), I conducted a hearing in Grand Rapids, Michigan with Mr. Clark and Mr. Hendricks. My decision in this case is based on the hearing testimony and the following documents: JX 1 to JX 11, and EX 1.

Parties’ Positions

Complainant⁴

Mr. Clark reported issues to both the Employer and regulatory agencies. In response, the Employer commented on his actions and took adverse action against him for reporting the issues.

Although the CFPA whistleblower provision defines a covered employee as an individual performing tasks related to consumer financial products, the section is nevertheless a part of Dodd-Frank, which has other provisions related to insurance. Additionally, in the course of his duties, Mr. Clark handled financial transactions, which included ordering and view consumer credit reports and bank account information. And, Mr. Clark asserts “insurance is a financial product.”

³The following notations appear in this decision to identify exhibits: ALJ – Administrative Law Judge exhibit; JX – joint exhibit; EX – Employer exhibit; and TR – Transcript.

⁴TR, pp. 38, 39, and February 15, 2014 closing brief.

The CFPA whistleblower provision protects employees who engage in protected activities by providing information to his employer, and regulatory agencies. Consistent with that provision, Mr. Clark reported his concerns to the Respondent, the California Department of Insurance, the National Association of Insurance Commissioners (“NAIC”), and Michigan Department of Insurance and Financial Services. He interacted with affected consumers and held a reasonable belief that their issues represented violations of Section 5531, which prohibits unfair, deceptive, or abusive acts or practices such that consumers have no feasible way to avoid harm. The NAIC’s response to his concerns substantiates that the issues also represent violation of state laws. The Respondent’s claim handling practices further violates federal and state Fair Claim Reporting Acts.

Mr. Clark’s protected activities occurred prior to his receipt of the PIP. His supervisor, Ms. Marchena, was aware of his reports in 2012 and PIP included comments about his reporting activities, when she addressed his breaking a chain of command and using accusatory language in his emails about customer issues.

Mr. Clark also notes that Ms. Marchena subsequently praised his action in escalating to a member of management a consumer complaint, which reflects her agreement with his actions.

Consequently, Mr. Clark has established that his protected activities were a contributing factor in the adverse personnel action – his placement on a PIP.

In terms of the Employer’s affirmative defense, Ms. Marchena could not substantiate that Mr. Clark had violated any company policy or HR procedure. Notably, one company policy encourages employees to openly discuss non-compliance concerns, and permits contact with a vice president. Thus, the Respondent has failed to prove by clear and convincing evidence that it would have placed him on a PIP absent his reporting activity.

Mr. Clark’s complaint is not frivolous, has merit, and involves valid protected reporting activities. He held a reasonable belief that the consumer issues he reported involved violations of consumer protection acts. He is a bona fide whistleblower, and consumers benefitted by his good faith willingness to step up and report unresolved issues. Into 2013, Mr. Clark had been recognized as a great agent. He and his growing family should not be placed in fear that he may lose his job.

Mr. Clark seeks abatement of the PIP, encouragement that the parties reconcile their differences and permit a positive working environment, and other appropriate relief.

Respondent⁵

Mr. Clark's CFPA complaint should be dismissed because he cannot establish any of the elements necessary to invoke the CFPA whistleblower protection provisions.

Mr. Clark is not a covered employee as specifically defined by the CFPA because as an insurance customer representative, his work does not involve a consumer financial product or service. Notably, the statute specifically excludes insurance of the definition of a consumer financial product or service. Other sections of the CFPA also demonstrates Congress' intention to restrict the authority of the Bureau to regulate the insurance industry which is already heavily regulated by state law. And, Section 5517(m) specifically prohibits the Bureau from defining as a financial product or service, by regulation or otherwise, engaging in the business of insurance. Mr. Clark testified that he is a licensed insurance professional and acknowledged that he was not engaged in financial matters.

Even if the CFPA whistleblower provisions are applicable, Mr. Clark's complaints are not protected activities because the CFPA bars actions that are abusive, unfair, or likely to cause substantial harm to consumers. Mr. Clark's concerns involve insurance customers who may have experienced frustration in initiating their insurance claims due to transferred or dropped calls, which does not rise to the level of substantial harm, particularly considering that the consumer could always call again. Mr. Clark acknowledged that many of the misdirected phone calls were due to technical issues that were quickly resolved. Additionally, many of the phone calls in his complaint did not involve individuals who intended to file a claim.

In terms of adverse action, Mr. Clark did not suffer any loss of income or adverse effect on the terms and conditions of his employment. Instead, a PIP is considered to be a valid form of coaching that is commonly used to permit an interactive, and collaborative, discussion between a supervisor and employee.

Even if the PIP were considered to be an adverse action, it had nothing to do with his complaints, and was not issued for retaliatory purposes. Instead, the June 26, 2013 PIP was issued in response to Mr. Clark's accusatory and disrespectful communications sent outside his department. And, his supervisor only became aware of the purported protected activities during her meeting with Mr. Clark to discuss the PIP that she was presenting.

Closely related, the Respondent has established by clear and convincing evidence that the PIP would be presented even absent Mr. Clark's complaints based on his supervisor's testimony about the reasons she placed M. Clark on the PIP – his accusatory and non-collaborative workplace communications.

In light of the above considerations, Mr. Clark's complaint was frivolous and he pursued his complaint in bad faith. Although Mr. Clark heard from several individuals that his claim was frivolous, he nevertheless proceeded with his case. As a result, the Employer seeks \$1,000 in attorney fees permitted under the statute for successfully defending against a frivolous complaint and litigation brought in bad faith.

⁵TR, pp. 40-43, and February 28, 2014 closing brief.

Issues

1. Covered employee.
2. Protected activity.
3. Adverse personnel action.
4. Contributing factor.
5. Affirmative Defense
6. Damages.
7. Employer's attorney fees.

Summary of Evidence

Mr. Neil D. Clark
(TR, pp. 48-162)

[Direct examination] Since 2003, Mr. Clark has held a property and casualty insurance license. He joined Farmers Insurance Exchange ("Farmers Insurance") in July of that year in their regional center that has about 3,000. Working in the inbound calls center, Mr. Clark's daily tasks include answering inbound customer calls, making changes to customer policies, answering billing questions, and discussing coverage. However, he is not involved in sales, claims, and claims determinations. He engages customers by telephone and e-mail.

Mr. Clark's supervisor is Ms. Elizabeth Marchena, who periodically monitors his calls a few times a month. He receives monthly, mid-year, and annual evaluations and appraisals. Most of the evaluations involve coaching and providing feedback. The monthly assessments are conducted in a collaborative goal setting meeting. During the mid-year review, Mr. Clark and Ms. Marchena review his goals to ensure that they are aligned with company objectives and initiatives. During this process, Mr. Clark has an opportunity to provide comments. The annual appraisal consists of an assessment of the four categories of expectations, an exchange of comments, and overall rankings, ranging from below expectations, to fully meets expectation, to exceeds expectations. Over the past several years, and in 2012, Mr. Clark received a few exceeds expectations ratings. He has not received a below expectations on an annual appraisal.

Ms. Marchena has been his supervisor for about a year. His prior supervisor was Mr. Andrew Bierling. Mr. Clark's annual salary is \$37,596. In addition to periodic recognition, Mr. Clark has received nearly annual, shared bonus checks; most recently, he received a \$2,000 bonus check in April 2013. His most recent promotion was three years ago; while he last received a wage increase based on performance about four years ago.

In October 2010, due to a buyout, a large number of customers were transferred from another motorcycle insurance company to Farmers Insurance, including 5,000 California customers. However, due to inconsistent underwriting and incorrect personal data that occurred during the transfer, many customers were charged incorrect rates. Mr. Clark became aware of the incorrect rates issue due to calls from customers who indicated that the new rates didn't seem right, and his subsequent review of the records in order to make corrections. He discovered that at times, the company relied on default settings, such as years of experience, if they were unsure of the correct information. Due to the large scale of the issue, Mr. Clark expressed to his supervisor, Mr. Bierling, his concerns about its scope, and his belief that the inaccurate underwriting needed to be addressed. In particular, Mr. Clark believed that all 5,000 customers should be contacted proactively to have their rates reviewed for accuracy. Otherwise, many customers would pay the billed rates, which may not be correct. Mr. Clark believes his actions in bringing the incorrect rate issue to his supervisor was a protected activity because it was an unfair situation since the customers trusted the insurance company to have correct information upon which to determine the correct rate. When he didn't receive any response, Mr. Clark escalated his concern to the company's human resources ("HR") office.

In January 2011, Mr. Clark contacted the California Department of Insurance because he was worried about the incorrect rates. He asked the agency to look into underwriting and rating compliance associated with the buyout conversion. The audit was done in June 2011. Mr. Clark did not inform his supervisor of his request and the state agency indicated his request would be anonymous. Nevertheless, he believes that someone in Farmers Insurance management knew that he had made the request because one day a person from the management team spoke to Mr. Clark's cube mate, who was also a friend of the manager, that they were going to have a long week because they had to deal with the California audit. Mr. Clark believes the person's loud tone was purposeful so that Mr. Clark would hear his comment. Following this action, Mr. Clark did not receive any adverse feedback on his appraisal; no one talked to him about the California audit; and no one expressed any anger to the group about the audit. At the same time, Mr. Clark believes the California audit provides some evidence of motive to retaliate against him.

Since he was a licensed agent, Mr. Clark e-mailed his supervisor, Ms. Marchena, on November 21, 2012 and requested to talk to her about the frequency, up to about 10 a day, and severity of, the claim transfer misdirects. Specifically, Mr. Clark was receiving calls from customers involving damage that they wanted to report. When he advised that they needed to talk to the claims department, the customer would indicate the claims department had referred him to Mr. Clark in customer service. Ms. Marchena said that she would look into the issue, and suggested that problem might be a new claims agent.

In December 2012, Mr. Clark concluded that the misdirected calls issue had not been resolved. So, Mr. Clark contacted a person in government compliance at the National Association of Insurance Commissioners ("NAIC"), which is a branch of the federal government which oversees the representatives from the states' insurance commissioners. Mr. Clark requested guidance and assistance concerning customers who were experiencing difficulty in presenting their claims because a claims adjuster would not return a call, or the person's call would be disconnected or misdirected to customer service by the claims department. He also informed the NAIC of the most severe example about how a phone in an empty room would ring

and ring, day after day until a supervisor finally ran in, answered the phone, and handled the claim. The NAIC referred Mr. Clark's concern to his home state's department of insurance, the Michigan Licensing and Regulatory Department in January 2013. At that time, he was contacted by the state agency. Mr. Clark cooperated with the agency, kept track of the affected policy numbers and situations, and provided information about the claims calls issue. Mr. Clark did not tell his supervisor that he was cooperating with the state agency. No one at Farmers' Insurance talked to him about his cooperation. On February 20, 2013, the state agency advised Mr. Clark that Farmers Insurance was addressing the problem and his cooperation would remain confidential.

On February 8, 2013, Mr. Clark got a meeting invite from his department director, Ms. Deb Powell, to discuss misdirected calls. The meeting with her was very quick. The director did not mention his interaction with the state agency. She indicated the company was going to set up a call tracking initiative improvement event with Mr. Clark and Mr. Rodriguez, a department supervisor, as participants. When he met with Mr. Rodriguez, it was difficult and unpleasant. Mr. Clark didn't want to be seen as stirring up problems. He was just trying to get the issue fixed because so many customers were upset about their difficulty in getting through.

In April 2013, Mr. Rodriguez asked Mr. Clark to track the misdirects and report back to him. Mr. Clark tracked the calls for about a month and reported to Mr. Rodriguez in May. In October 2013, the problems diminished. However, to some degree, it still exists.

EX 9 contains an e-mail exchange about the significant problem one direct customer experienced trying to get a claim resolved.

On June 20, 2013, Mr. Clark had a customer with an RV glass claim who was very upset because he couldn't get through to claims. Mr. Clark tried to reach his immediate supervisor but there was a wait time. So, Mr. Clark reached out to another manager who had the phone company look into an immediate fix. At that point, Mr. Michael Steele, who is a liaison between customer service and claims became involved. He confirmed the claims lines were down and said they were going to look into the issue. At that point, Mr. Clark's supervisor complimented Mr. Clark in the e-mail chain for calling out the issue.

When Mr. Clark continued to present his concerns, Mr. Steele eventually contacted Ms. Powell, Mr. Rodriguez, and Mr. Clark's supervisor, indicating his concern that Mr. Clark's message implied that they were not handling things like they were suppose to. Then, on June 25, 2013, Mr. Clark was presented with the PIP at an HR meeting. Mr. Clark was cited for not meeting standards by failing to engage in collaborative communications with other employees. Confused, Mr. Clark initially thought they were indicating that his e-mails about the telephone problem were not understandable or concise. However, they were addressing his communication with Mr. Steele, Mr. Neusiis, and Mr. Rodriguez.

Between January and May 2013, during the monthly evaluation, Mr. Clark was advised that his e-mails needed to be more concise and more understandable. In a subsequent e-mail, Mr. Clark indicated that he felt that he needed to escalate the situation and he contacted DOL on June 27, 2013.

Mr. Clark believes the PIP is related to his prior contacts with the national organization and then the state because it referenced that he used accusatory language and insinuated that they didn't have the customer's best interests in mind. The PIP also referenced the concerns that he raised over misdirected calls, which clearly related to his reporting.

Mr. Clark is still employed in his same job, with the same pay. As relief, he seeks removal of the PIP.

Mr. Clark notes that the Employer has an open door policy which permits open discussions about compliance. However, his supervisor used the PIP as reprisal for taking his concerns to Mr. Steele and the directors. The PIP also curtails his ability to elevate unaddressed or unresolved concerns, which is inconsistent with the company's policy.

[Cross examination] In his experience, the 2010 transfer of 5000 policies was the only time that has occurred. As a result, he doesn't know whether reliance on defaults in that situation was unusual for the company. Mr. Clark agrees that the main issue was the defaults led to inaccurate rating information. As a result, in responding to Mr. Clark's concerns, Mr. Bierling indicated they had to verify all of the rating information. Due to the incorrect rating issue, some customers actually received a lower premium. Mr. Bierling also indicated that they were working on the transitions issues. Nevertheless, Mr. Clark reported the issue to the state of California because he wanted an "unbiased" review.

Mr. Clark made his complaint to California on behalf of customers who did not know that he had made the complaint. That is, the customers were unaware of his complaint to the state. Although the customers hadn't made a complaint to the state, they had complained to him.

Mr. Clark doesn't know whether California took any legal action based on his complaint.

When Mr. Clark contacted the NAIC in 2012, he told them about the unanswered phone ringing in the break room. After he notified persons about the phone, it stopped ringing within a couple days.

The other telephone issue involved misdirects by VDN, which is a shortened pathway to an extension phone number. After Mr. Neusiis became aware of the VDN misdirects, it was repaired in two days. The company put in a "fix fairly quick."

Mr. Clark contacted the NAIC about December 2012. In approximately February 2013, he became aware that the NAIC had contacted Ms. Tracy Peck at the Michigan LARA.

On November 21, 2012, Mr. Clark sent Ms. Marchena an e-mail about the claim transfer misdirects, which was about a month after he contacted the NAIC. While misdirects were bound to happen, he raised the issue because they were happening more often. He was concerned that the appropriate party should be answering the customers' questions about claims. The redirected calls that he was receiving involved customers who wanted to file a claim and he believed any questions that they had should be answered by the claims person who had transferred the call to

him. Usually the transferred calls involved an inquiry on whether the customer's insurance covered the claim. When Mr. Clark indicated that they needed to talk to a claims adjuster about their coverage, the customers would then indicated that the claims adjuster had transfer their calls to Mr. Clark.

Mr. Clark does not have experience as a claims adjuster.

Mr. Clark had a meeting with Ms. Marchena and Ms. Powell on February 8, 2013. The e-mail response from Ms. Peck from Michigan did not arrive until February 20, 2013.

The GSM (goal setting meeting) in April 2013 arose during his monthly review, EX 2. At that time, April 16, 2013, under people strategy, Ms. Marchena advised Mr. Clark that he was not meeting standards due to an issue between Mr. Clark and Ms. Wasikowski. Mr. Clark had handled a call from an upset customer who believed the premium was incorrect. Through a supervisor, he determined that a wrong premium had been quoted. Subsequently, based on Ms. Wasikowski's e-mail, there appeared to be a difference of opinion on whether the initial rate quote was wrong. In the review, Ms. Marchena commented that Mr. Clark didn't communicate a sense of teamwork and collaboration with co-workers. Her comment occurred before the PIP. Consequently, Mr. Clark acknowledged that prior to the PIP this issue had been raised to him.

Mr. Clark's job title is customer service agent. He is licensed as an agent with the state of Michigan.

Mr. Clark doesn't set premiums. Instead, he discusses with the customers the information upon which the premiums are set.

Mr. Clark read the PIP, EX 5, but did not sign it. He read the part that indicated he had the opportunity to engage in the process of developing the PIP.

EX 9 is an e-mail about a customer who had already been paid on his claim but was upset about the amount.

Mr. Clark believes the summarization in the e-mail at EX 10 is incorrect. The DOL investigator advised him that his claim wasn't covered by the CFPA. Both Mr. Hendrick and another attorney who talked to Mr. Clark opined Mr. Clark's complaint was not covered by the CFPA.

[Redirect testimony] Based on the response that he received from NAIC, Mr. Clark reasonably believed that his concerns had been CFPA violations.

Ms. Elizabeth A. Marchena
(TR, pp. 167 – 242)

[Direct examination] Ms. Marchena is a service operations supervisor at Farmers Insurance. She has supervised Mr. Clark since August 2012. Ms. Marchena wrote the PIP and met twice with Mr. Clark on June 25 and 26, 2013.

When Ms. Marchena closed out Mr. Clark's annual review for 2012, she gave him an overall rating of meets standards. April 2013 was the first time Mr. Marchena discussed collaborative communications with Mr. Clark. The conversation arose due to the e-mail chain with Ms. Wasikowski. The event started when Mr. Clark spoke to a customer who had previously dealt with another employee. After a conversation with the customer, Mr. Clark sent an e-mail to the other employee's supervisor, discussing the errors the other employee had made. Ms. Marchena's coaching related to that communication, which recipients interpreted as accusing the other agent of purposefully or knowingly making a mistake. Upset about the tone and mode of the message, the individuals brought the e-mail to Ms. Marchena's attention. Had Mr. Clark come to her first, she would have coached him to take a different approach to the situation.

During their coaching session, they discussed using language that was respectful and not proceeding with the assumption that a person had made an error. Instead, she recommended laying out the facts about what happened and asking for help. In the PIP, thinking that Mr. Clark had jumped the gun on the problem, since the other supervisor subsequently indicated the other employee had not made a mistake, Ms. Marchena recommended getting the whole story first to make sure co-workers don't feel that they are being accused of not doing everything possible for the customer. Since Mr. Clark didn't send the e-mail through her, or to the person he thought made a mistake and instead went directly to the person's supervisor, Ms. Marchena suggested that the next time he come to her so they could explore the situation before talking to someone else and saying they made a mistake. Most of Ms. Marchena's other employees would have brought the issue to her first, which she believes is just common sense.

The annual objectives, EX 2, include an area on people strategy/communication, which discusses teamwork, collaboration, empathy, and a genuine interest in helping others.

Another problem with the e-mail exchange is that after the individual's supervisor responded that her employee did not make an error, Mr. Clark responded to the supervisor without getting Ms. Marchena involved, and rehashed why he felt that he didn't make a mistake.

Ms. Marchena doesn't recall any other communications discussion with Mr. Clark in April and May or prior to June 25, 2013. The PIP or Action Plan was presented on June 25, 2013 due to two incidents.

First, on June 20th, as previously coached, Mr. Clark sent Ms. Marchena an e-mail, EX 3, about an error made by another employee concerning a customer's insurance deductibles. Ms. Marchena reviewed the situation and responded that she believed the other employee had handled the issue accurately. She cc'd Mr. Zachary Rodriquez, who was in charge of trying to

improve the process between claim and customer service. However, in response, Mr. Clark then sent a lengthy e-mail to Mr. Steele, raising broader concerns about specific issues that customer service employees should be expected to handle. He didn't understand why so many customers with damage and claims issues were being referred back to customer service for a discussion that would involve a specific claim and associated deductibles. Due to the broad nature, and accusatory tone, of some of Mr. Clark's e-mail statements relating to the ability of the claims department to handle claims, Ms. Marchena didn't think his response was an effective approach because when she read his follow-on e-mail she assumed the recipients were going to be upset.

The company's open door policy is "within your chain of command or HR." Generally, a person does not go outside his department to provide feedback about a problem. In Mr. Clark's case, he again went around Ms. Marchena to raise concerns to a supervisor in another department.

Ms. Marchena probably first talked to Mr. Clark about the communication during the Action Plan meeting.

On June 21, 2013, Mr. Steele sent an e-mail to Mr. Jim Doane and Ms. Deb Powell, who were directors, Ms. Marchena's bosses, and Mr. Steele's peers, indicating his concern with Mr. Clark's message. Mr. Steele noted that claims did work to improve the flow of customer calls; claims and customer service were part of one organization; and it was their business to serve customers. In contrast, Mr. Clark implied claims agents were not doing their job. Ms. Marchena doesn't know why Mr. Steele sent his e-mail directly to them. She assumes Mr. Steele felt Mr. Doane and Ms. Powell should handle the situation rather than respond directly to Mr. Clark. Mr. Clark was not cc'ed on this e-mail.

In light of these e-mail exchanges, Ms. Marchena concluded that Mr. Clark had again chosen an inappropriate way to deal with the problem.

The second communication issue also started on June 20, 2013 and involved the VDN telephone sequence. A customer would respond to a series of telephone prompts but then become disconnected because there was a problem with the telephone line. "Thankfully," Mr. Clark discovered the problem and sent her an e-mail about the problem. In turn, Ms. Marchena sent Mr. Neusiis an e-mail about the VDN problem and he responded that they were fixing it "right now." However, Mr. Clark then responded with concern about Mr. Neusiis leaving the department and another individual coming in, which Ms. Marchena interpreted as Mr. Clark questioning the new hire and her competency. Again, Ms. Marchena believed Mr. Clark had gone around and not presented his concern first to her. If he had done so, she would have told Mr. Clark that Mr. Neusiis was not actually leaving the department; and the whole situation would have been avoided.

Ms. Marchena has been with Farmers Insurance for five years; she has been a supervisor for three years. The company has a progressive disciplinary program. The first step is a verbal warning. The second step is an action plan which is agreed upon by the supervisor and employee. To date, Ms. Marchena has initiated three action plans and placed one person on probation. If the employee's behavior improves, then the action plan is not a "big deal." At the

same time, Mr. Clark's action plan indicated that any further direct e-mails containing accusatory language to another employee would be considered unacceptable which could lead to additional corrective action, such as probation, and up to termination. Mr. Clark's action plan did not have a completion date.

Mr. Clark has not yet received his annual appraisal for 2013.

On June 28th, Mr. Clark sent another e-mail to Mr. Rodriguez who is outside his reporting chain, EX 4. The content of the e-mail was not a problem. However, despite their action plan discussion three days earlier, Mr. Clark had again sent an e-mail to someone outside his chain of command. Mr. Rodriguez appeared to think the e-mail was odd and asked Ms. Marchena whether he should respond to Mr. Clark because he was uncertain what Mr. Clark was seeking.

On February 8, 2013, Ms. Marchena and Ms. Powell had a meeting with Mr. Clark about misdirected calls. Ms. Powell asked Ms. Marchena to set up the meeting due to an e-mail she had received from Mr. Clark which outlined claims concerns; and Ms. Powell indicated that it would be more effective to discuss the problem in person and provide Mr. Clark an opportunity to voice his concerns with the process.

After the June 28th e-mail, Ms. Marchena did not put Mr. Clark on probation. Instead, after consulting with HR, she utilized the e-mail as the final example of the behavior that she was attempting to correct, included it in a revised action plan, and signed the revised action plan on July 9, 2013. Mr. Clark indicated by e-mail that he did not want to participate in the action plan, or sign it. During their action plan discussion, Mr. Clark indicated that he did not believe the e-mails were accusatory and he didn't view them as non-collaborative.

In her opinion, if someone was doing his job, a factual discussion should occur about what happened to solve the problem without placing blame on someone. The action plan offered Mr. Clark an opportunity to include Ms. Marchena in conversations related to feedback. Her approach remains consistent with the company's open door policy because Mr. Clark can still go to someone higher in their chain of command, or HR, without going through her. At the same time, the open door policy does not apply to going outside the chain of command.

Farmers Insurance provides training programs for communications and conflict resolution.

Farmers Insurance also has an anonymous tip line that Mr. Clark could have used to present his concerns. Nevertheless, Ms. Marchena would prefer Mr. Clark work with her first.

In 2010, Mr. Marchena was not Mr. Clark's supervisor. She only became aware of Mr. Clark's concerns with the transfer of the 5,000 claims after the initiation of litigation in this case. As a result, when Ms. Marchena prepared and signed the action plan in 2013, she was unaware of the 5,000 claims transitions problems that Mr. Clark raised in 2010. Although Ms. Marchena sought assistance from HR, no one recommended that she start an action plan for Mr. Clark. Ms. Marchena approached her boss about initiating an action plan after the June 2013 e-mails

because she believed that having discussed the issue with Mr. Clark in April 2013, they needed something more concrete.

Ms. Marchena was also aware that Mr. Clark was working with Mr. Rodriguez between May to July 2013 in tracking misdirected calls.

Ms. Marchena did not know that Mr. Clark had gone to the national organization with concerns in the fall of 2012. She only became aware of his involvement with the state of Michigan when he told her during their action plan discussion, which occurred after she decided to initiate an action plan.

Ms. Marchena sees a difference between calling the tip line to advise someone is not doing his job and sending an e-mail to the supervisor with the same information. The difference is the mode of feedback of offering the communication; the e-mail method interferes with teamwork.

The root of the problem with claims misdirected phone calls occurred because when a customer calls Farmers Insurance with a loss, the person answering the call is not a claims adjuster and only enters data about the loss. If the customer then has a question about whether the loss is covered, that employee can't answer the question because a claim hasn't been filed yet. Farmers Insurance would never intentionally interfere with a customer filing a claim because that's the basis for their business – to provide a positive customer experience.

Having now become aware of Mr. Clark's calls to the NAIC and states of Michigan and California, Ms. Marchena would still have issued the action plan anyway. That decision was not related in any way to his contacts with those entities.

There are two versions to the action plan because Ms. Marchena initially wrote the action plan in the first person since prior action plans had been prepared with the employee's collaboration. However, since Mr. Clark declined to participate, she re-wrote the action plan in the third person.

In a November 2013 goal-setting memorandum, EX 11, Ms. Marchena observed that Mr. Clark had not fully demonstrated some of the people strategy requirements. Although he had not sent e-mails outside the department, and she was not concerned with the content, Mr. Clark had recently sent two e-mails containing feedback which he hadn't discussed with Ms. Marchena.

[Cross examination] In the April 2013, Ms. Wasikowski indicated to Mr. Clark that she while researching the write-off issue she discovered that it wasn't her employee's error and asked Mr. Clark to talk to his supervisor about a write-off. And, while Mr. Clark made a follow-up inquiry, Ms. Marchena felt his language was not collaborative. Ms. Wasikowski had given him her opinion and asked him to discuss the write-off with Ms. Marchena. Instead, he responded with another e-mail restating why he didn't believe the write-off was his responsibility.

In her e-mail, Ms. Marchena complimented Mr. Clark with “great job” for identifying the VDN problem.

In his e-mail about the new hire, Mr. Clark did indicate that she would do fine as a new hire with the anticipated training. Nevertheless, he also suggested transferring some of her work to others and routing calls from USAA to others. So, it’s possible Mr. Clark intended a different meaning than Ms. Marchena’s interpretation.

Mr. Clark’s e-mail to Mr. Steele was not necessarily a violation of the company’s open door policy, but it was not her expectation for her department.

In one of her e-mail responses, Ms. Marchena acknowledged that claims service transfers had a lot of area for improvement. However, she did not communicate to Mr. Clark directly on whether improvements were made.

If Mr. Clark believed that improvement had not actually been made, he could escalate the issue to Ms. Marchena’s boss, HR, or the anonymous tip line. But, she would not expect any of her employees in that situation to go directly to Mr. Steele. And, she would not want Mr. Clark to do that. And, he would be in violation if he did it again.

Mr. Victor Lacic sent out a broadcast e-mail, EX 9, which went outside the department. However, he had an imminent customer need and the customer might call back, so he informed all his peers who might possibly receive the customer’s phone call at any moment. And, it was a generalized message and not specific to someone not doing their job. So, Mr. Lacic’s e-mail was appropriate. And if Mr. Clark sent out a similar broadcast e-mail in that situation he would not be in violation of the action plan.

Ms. Marchena was present at the February 8, 2013 meeting when Mr. Clark discussed his claims misdirect concerns. However, she was not aware that he had filed those concerns with anyone else.

Because Mr. Clark did not go through the process of sending the June 28th e-mail to Mr. Rodriguez through her, he violated the action plan. If the concern is imminent, then direct contact may be warranted, but Mr. Clark was focused on a concern across a broader process.

If Mr. Clark believes Ms. Marchena is the problem, he can go to her boss. If he thinks the chain of command is non-responsive, he can take the problem to HR. And, then the anonymous tip line is always available.

All his communications should go through her. If he needs to respond to someone outside the department or chain of command, Mr. Clark should “loop” in Ms. Marchena. The action plan relates solely to feedback that originates from him.

Ms. Eleanor (Beth) E. Asbury
(TR, pp. 242 – 270)

[Direct examination] Ms. Asbury has been a human resource consultant at Farmers Insurance for over 10 years. Between the summer of 2010 and August 2013, she worked in recruiting and talent acquisition.

The company's progressive discipline process starts with informal and formal coaching; proceeds to action plan; and eventually termination.

While under the action plan, Mr. Clark was not demoted, did not miss a promotion, and did not lose any paid time or bonus. On his appraisals, Mr. Clark has consistently met expectations.

Since people are Farmers Insurance's biggest source to move the organization in a positive manner, employees are expected to be respectful to each other. The company's policy on that subject is clearly communicated to its employees.

Because Mr. Clark did not alter his behavior after the April 2013 coaching session, and while more than one coaching session may be warranted at times, the subsequent action plan in his case was appropriate.

The company's open door policy encourages an employee to bring their concerns about their work environment and job to their supervisor. And, if they are not satisfied with the result, they can go to the department head to address the issue. And, recently when Mr. Clark asked to use the open door policy to see Ms. Powell, the head of his department, she advised him to start the conversation with his supervisor but also that he eventually could reach out to the department head. Mr. Clark can also talk to anyone in HR. And, the company has a anonymous telephone ethics hotline.

Three thousand employees are located in the regional office.

Supervisors engage the HR department in the action plan process. On average, HR is involved with three to six action plans a month. A person's action plan is "ongoing." It doesn't go away even if the employee's following appraisal indicates everything is fine.

[Cross examination] Under the company's code of ethics, EX 8, an employee may contact the vice president of auditing about an ethics violation, Ms. Asbury acknowledged that the vice president of auditing is not in Mr. Clark's chain of command.

Ms. Asbury does not believe the issue with dropped calls represents a violation of the company's business ethic.

If an employee's communication involved reporting an unethical issue, whether HR would recommend backing off of an action plan would depend on the ethical issue, the employee's behavior, and what steps the employee took about the issue.

If an employee works with his supervisor and doesn't get relief, it is appropriate to go to the next level in the chain of command.

Ms. Asbury believes Mr. Lacic was not placed on an action plan for his broadcast e-mail outside his chain of command because the subject matter involved an immediate customer need and broadcast channel contained his peers. At the same time, Mr. Clark presented a concern about a group of customers who were unable to get through to claims.

[Redirect examination] None of the communications discussed in Mr. Clark's case involved a violation of the code of business ethics.

E-Mail Chain: April 3 – 12, 2013

(JX 1)

On April 3, 2013, Mr. Clark advised Ms. Wasikowski that he had handled an upset customer who wanted to add a new motorcycle to his policy. Ms. Gregkia had quoted him \$513 a year for all his units if he added the new bike. However, Mr. Clark was unable to match that quote and was off by an additional \$68. Upon research, Mr. Clark determined Ms. Gregkia had used the wrong rate. Because the customer needed a quick response, and in light of the lower quote, Mr. Clark agreed to honor the \$513 rate. Mr. Clark asked Ms. Wasikowski to set up a write off for the transaction "otherwise I can take care of it."

On April 12, 2013, Ms. Wasikowski responded that Ms. Gregkia had not made a mistake in determining the rate because the insured did not tell her that he intended to remove one of the bikes. So, when he called back and talked to Mr. Clark to drop the Ducati and add a new Harley, his new premium would be higher at \$572. Since Mr. Clark had offered to write off the difference, Ms. Wasikowski left that decision to Mr. Clark and his supervisor.

On April 12, 2013, Mr. Clark thanked Ms. Wasikowski for letting him know what happened. He indicated that he would take care of the write off. However, Mr. Clark had forwarded his concern to Ms. Wasikowski because he didn't feel that he should be responsible for the write off. In the past, he had been questioned about writing off premiums "as it's almost looked at that the agents submitting the larger write off are the ones making mistakes."

Ms. Wasikowski replied that she would see that the write off was taken care of.

Mr. Clark thanked Ms. Wasikowski but upon more research questioned Ms. Gregkia's explanation and observed that even with her explanation she was still \$86 off in her quote. So far, the write off had not been submitted.

Monthly Review: April 2013

(JX 2)

On Mr. Clark's April 16, 2013 monthly review, Ms. Marchena advised that he did not meet the People Strategy standard. She observed that when a rate error has been discovered, "there is always more to the story and we want to make sure that our peers don't feel that we are trying to suggest they didn't do everything they saw possible at the time of their call with the customer."

Mr. Clark responded that he handled the situation with "great due diligence on behalf of the customer." He understood that in some cases there was no need to escalate an issue when it can be resolved at their level.

Ms. Marchena replied that she looked forward to working with Mr. Clark on how to effectively communicate with his peers and other departments to facilitate the goal of improving the customer service experience.

On all the other rating factors, Ms. Marchena noted that Mr. Clark demonstrated compliance.

E-Mail Chain: June 19 – 21, 2013

(JX 3)

Part One

On June 19, 2013, Mr. Clark advised Ms. Marchena that the claims VDN was causing customer disconnects and requested that telecom be informed of the issue which had been a problem for months.

On the same day, Ms. Marchena passed on to Mr. Neusiis the VDN issue that Mr. Clark identified.

On June 20, 2013, Mr. Neusiis told Telecom that he had tested VDN in the morning and the issue had not been fixed. He also asked if there was an update to VDN that the agents should be using. He also cc'ed Ms. Marchena on the e-mail.

Ms. Marchena then told Mr. Clark "great job calling out the issue."

Mr. Clark replied that there was no need to give him credit. Since prompt and smooth service were important, he was concerned about the number of customers who were frustrated with the inability to get through to claims.

By late morning on June 20, 2013, Mr. Neusiis informed Mr. Clark that Telecom had located the problem and were fixing it.

Mr. Clark thanked Mr. Neusiis for the prompt response and then offered some advice. Acknowledging that they may be worrying too much, wishing Mr. Neusiis the very best in his new role, and believing “Stephanie” would do well with some training, Mr. Clark was nevertheless confused/concerned about the upcoming transition because when “urgencies” arose Mr. Neusiis had been willing to drop whatever he was doing and help fix the problem. Mr. Clark pondered whether other individuals could be utilized so that Stephanie would not be bombarded with too much. He also wondered whether USAA had been advised of the changes and what would happen if they called with an emergency and wanted to speak with Mr. Neusiis; should the call go to Stephanie? Mr. Clark cc’ed Ms. Marchena on the e-mail.

Part Two

In the afternoon of June 20, 2013, Mr. Clark informed Ms. Marchena that he had received a transferred call from claims involving a customer who reported a damaged air conditioner. Mr. Clark explained to the customer that because as a customer service representative he could not make a claims determination, the customer would have to talk to claims and file a claim. Due to their complexity with deductibles, Mr. Clark had been advised not to confirm a deductible with a customer. Mr. Clark stated, “To me, it seems like claims are avoiding the customer concerns?” Since Mr. Clark had been tasked with tracking misdirected claims calls, he intended to add the call to the tracking list.

Ms. Marchena responded that the claims/service process had lots of room for improvement, and she copied Zach (Mr. Rodriguez) since he was working on the issue. She also advised Mr. Clark that it was ok to advise a customer about deductibles.

In the evening of June 20, 2013, Mr. Clark replied to Ms. Marchena, and cc’ed Mr. Michael Steele, that it was great news that he could discuss deductibles with customers. He then specifically asked Mr. Steele for advice about the form and content of the deductible conversation with a customer. Mr. Clark added, “I do not understand why so many customers with damages or issues come back into customer service either by a direct transfer or a callback.” He further noted that Mr. Lacic was concerned about the inability to reach claims adjusters. And, Mr. Clark advised that “customers always say my claims adjuster won’t answer or call,” which concerned Mr. Clark as a licensed insurance professional. In his opinion, they were sending customers “in circles on the phone which makes it appear we are avoiding them.”

In the morning of June 21, 2013, Mr. Steele replied to Mr. Doane and Ms. Powell, with cc’s to Mr. Marchena and Mr. Rodriguez, that while he appreciated Mr. Clark’s concerns, he was “concerned with the message he is sending.” Mr. Steele pointed out that claims worked very hard with their level of service and year-to-date yielded completely, or mostly, satisfied customers around 90% of the time. He emphasized that they all were one organization in the business of serving their customers. Mr. Steele wanted the service organization to know that “under no circumstances is it acceptable for a claim to go without contact for weeks. And, at no time, do we delay assignment more than a few hours.”

E-Mail: June 28, 2013

(JX 4)

On June 28, 2013, Mr. Clark asked Mr. Rodriguez, with a cc to Ms. Marchena, if someone was still tracking misdirected calls. Mr. Clark had received a customer call which was transferred from claims. The customer had a damaged air conditioner due to a lighting strike power surge. He wanted to know his deductible. Mr. Clark informed the customer that he should file a claim and that his deductible was \$250. When the customer then asked if the damage was covered, Mr. Clark explained that he could not do a claims determination. At that point the customer became upset when Mr. Clark transferred him back to claims and they said customer service should be able to help him. When Mr. Clark again spoke with the customer, the customer was angry about being transferred back and forth, and indicated the he would repair the air conditioner and send the bill to Farmers Insurance. Mr. Clark did not understand “why claims believes that the agent or customer service can help in that situation.”

Action Plan: July 7, 2013

(JX 5)

On July 7, 2013, Ms. Marchena signed an “action plan,” dated June 26, 2013, as a follow-up to her discussion with Mr. Clark about failing to meet expectations in the area of collaborative communications with other employees. Ms. Marchena observed that she had coached Mr. Clark during a monthly goal setting meeting to communicate his concerns and feedback with peers using collaborative and constructive language. She had previously advised him to discuss his concerns with her prior to sending lengthy e-mails to his peers or co-workers in other departments. However, he did not consistently meet these expectations.

In order to improve his performance in this area, Ms. Marchena presented several requirements. First, Mr. Clark was expected to treat all co-workers and peers with “utmost” respect and collaboration. Second, Mr. Clark must review all his specific concerns with his supervisor. Third, during a customer interaction, if he determines that an error had been made, he must take every opportunity to fully resolve the customer’s problem, rather than engaging in a unacceptable action of sending the situation back to the prior agent for resolution. Subsequently, any feedback to the prior agent must be constructive and “filtered through your supervisor,” who will determine whether the feedback is constructive. In particular, constructive language does not: insinuate the prior agent did not have the customer’s best interests in mind; the employee did not strive to meet his or her performance standards; and proper leadership was not in place.

Mr. Clark was further advised that “any instance” in which he directly or indirectly forwarded accusatory language to another peer, regardless of the person’s role in the company, would be considered unacceptable and grounds for possible additional corrective action, up to and including termination.

Ms. Marchena annotated that Mr. Clark declined to sign the action plan.

As supporting documentation, Ms. Marchena attached summarizations concerning Mr. Clark's mid-April 2013 e-mail exchange about the insurance write off; Mr. Clark's June 20, 2013 e-mail exchange about the insurance deductible which eventually went to Mr. Steele which provoked a response from Mr. Steele about teamwork; Mr. Clark's June 20, 2013 e-mail containing his concerns about the addition of a new employee in terms of ability to rapidly respond to issue; and Mr. Clark's June 28, 2013 e-mail to Mr. Rodriguez about another claims call transfer.

Farmers Insurance Policies
(JX 8)

Under the company's open door policy, all employees may bring any concerns to his or her immediate supervisor. If the issue isn't resolved at that level, an employee may go to the head of the department. For a situation or issue outside the department, the employee may go to an HR representative who will then refer the person to someone who can address the person's concerns. The company prohibits retaliation in any form for an employee's use of the open door policy.

Under its business ethics, the company declares its commitment to fair and ethical practices which are fundamental to maintaining the public's confidence and trust. The company also commits to maintaining a work environment in which respect is given to other employee.

As part of its performance policies, the company has the following situational, progressive disciplinary process: oral warning, written warning, probation, transfer/demotion, suspension with or without pay, and termination of employment.

E-Mail: May 30, 2013
(JX 9)

On May 30, 2013, Mr. Victor Lacic sent a broadcast e-mail to various departments advising everyone that if a particular customer who was upset "how claims has been handling his loss," called back after his call was "misdirected" to the wrong department, he should be directed to specific individuals in order.

OSHA Investigator Interview Notes⁶
(JX 10)

During the course of his interviews with Mr. Clark in early July 2013, the OSHA investigator indicated to Mr. Clark that his complaints to his employer and a state agency did not appear to be protected activities under the CFPA, in part based the definition of what represents a violation of the Act. He further advised that if Mr. Clark proceeded with his complaint, OSHA would deny it due to failure to establish a protected activity. Nevertheless, Mr. Clark advised that he intended to continue with the complaint in order to obtain a hearing before an administrative law judge to resolve the issues in his case.

⁶Again, as I advised the parties, the proceedings before me are *de novo*; therefore, I am only summarizing a portion of the interview notes for the limited purpose to address the issue of the employer's attorney fees.

Monthly Review: November 2013

(JX 10)

On Mr. Clark's November, 2013 monthly review, Ms. Marchena advised that he did not meet the People Strategy standard. She observed that while she had no issue with the content of an e-mail that Mr. Clark sent to "Ken," actually appreciated his suggestion, and would have agreed that he discuss the suggestion with Ken, Ms. Marchena advised Mr. Clark that she expected him to comply with the action plan and discuss feedback with her prior to addressing it with others.

Ms. Marchena also pointed out that in another e-mail in which contrary to the action plan, Mr. Clark again provided feedback without first addressing the feedback with her. She again emphasized her expectation that he adhere to the specific feedback guidelines set out in the action plan.

On all the other rating factors, Ms. Marchena noted that Mr. Clark demonstrated compliance.

E-Mail Chain: June 3 -6, 2011

(EX 1)

On June 3, 2011, in conjunction with an underwriting error and rating, Mr. Clark stated to his supervisor, Mr. Andrew Bierling, that customer service had "run into a lot of circumstances of incorrect rating and underwriting on various conversions." In particular, he had not yet seen a conversion from 21st Century without an error. Customers have been dealing with the issue related to the 5,000 claims conversions since Thanksgiving of 2010 and it was still going on.

On June 6, 2011, Mr. Bierling thanked Mr. Clark for the information. He agreed the problem existed but highlight the corrective actions that had been taken. Mr. Bierling further stated, "I do not ignore these instances."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility Determinations

Based on their demeanor, generally direct answers, and lack of equivocation, I considered the sworn testimony of the witnesses in this case, including Mr. Clark and Ms. Marchena probative. Further, I consider any associated testimonial inconsistencies to be attributable to incomplete recollections rather than purposeful inaccuracies.

CFPA Whistleblower Protection Adjudication

Based on the statutory language of the Act, to establish entitlement to the whistleblower protection under the CFPA based on a violation of the employee protection provisions, 12 U.S.C. § 5567 and 29 C.F.R. § 1985.102, a complainant must establish four elements. First, the complainant must be a “covered employee.” Second, the employee must have engaged in specific activities protected under the Act. Third, the complainant must have suffered an adverse personnel or employment action. And, fourth, a protected activity by the complainant must be a contributing factor in the adverse personnel action. According to 29 C.F.R. § 1985.109(a),⁷ a complaint must establish these elements by a preponderance of the evidence (emphasis added).

However, according to 12 U.S.C. § 5567(c)(3)(C), and 29 C.F.R. § 1985.109(b), even if a complainant satisfies his burden of proof under 29 C.F.R. § 1985.109(a), he may not be entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity (emphasis added).

Finally, 12 U.S.C. § 5567(c)(4)(B), and 29 C.F.R. § 1985.109(d)(1), provide the following remedies for a successful complainant: a) affirmative action to abate the violation; b) reinstatement to his former position together with compensation, including back pay, and restoration of the terms, conditions, and privileges associated with his employment; c) compensatory damages; and, d) assessment against the respondent of the sum equal to the aggregate amount of reasonably incurred litigation expenses and attorney fees.

In the event that the respondent did not violate the law, and if at the request of the respondent an administrative law judge determines that a CFPA whistleblower complaint was frivolous or brought in bad faith, 12 U.S.C. § 5567(c)(4)(C), and 29 C.F.R. § 1985.109(d)(2), permit an award of reasonable attorney fees to the prevailing respondent, not to exceed \$1,000.

⁷Interpreting the word “demonstrates” in 12 U.S.C. § 5567(c)(3)(C). See 79 Fed. Reg. 18636.

Issue No. 1 – Covered Employee

According to 12 U.S.C. § 5567(a) and 29 C.F.R. § 1985.102(a), whistleblower protection is provided under the statute only for a “covered employee.” In turn, the implementing regulation at 29 C.F.R. § 1985.101(i) specifically defines “covered employee” as any individual performing tasks related to the offering or provision of a consumer financial product or service.” The CFPA’s definition section then defines the term “consumer financial product or service” at 12 U.S.C. § 5481(5) as any “financial product or service” described under the definition of “financial product and services” at paragraph 15 that is offered or provided for use by consumers primarily for personal, family, or household purposes.⁸ Following the definitional trail then leads to 12 U.S.C. § 5481(15)(A) which enumerates in subparagraphs (i) through (x) several specific financial products and services, which include extending credit and servicing loans, providing real estate settlement services, providing financial advisory services, and collecting consumer report information. Significantly however, at the end of this particularly long definitional section, 12 U.S.C. § 5481(15)(C) specifically excludes “the business of insurance” from the definition of “financial product or service.” Finally, at the end of the interpretative journey, 12 U.S.C. § 5481(3) defines “business of insurance” as “writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insuring or the reinsuring of risks conducted by persons of act as, or are, officers, directors, agent, or employees of insures or who are persons authorized to act on behalf of such persons.”

Further, as noted by Respondent’s counsel, consistent with the above definitions, in establishing the authority and limitations of the Bureau, the CFPA at 12 U.S.C. § 5517(m) also specifically prohibits the Bureau from “defining as a financial product, by regulation or otherwise, engaging in the business of insurance.”

Although the route is tortuous and fairly obtuse, the statute eventually makes fairly clear that a person who is employed by an insurance company and engaged in activities associated with the company’s insurance business is not a “covered employee” under the CFPA whistleblower protection provision.

In applying these provisions to Mr. Clark’s complaint, I have considered his assertions that insurance is actually a financial product, the CFPA is part of the Dodd-Frank statute which contains several other provisions related to insurance, and that during the course of his employment at Farmers Insurance he handles financial transactions, which include ordering and viewing consumer credit reports and bank account information. Nevertheless, Mr. Clark still remains an employee of an insurance company which provides insurance, and thus is engaged in the business of insurance, which Congress has specifically excluded from the definition of “financial product or service” for the purposes of the CFPA and more particularly the criteria of “covered employee” who may be entitled to whistleblower protection under 12 U.S.C. § 5567(a). As a result, I find Mr. Clark is not a “covered employee” and thus not entitled to any relief under

⁸29 C.F.R. § 1985.101(h) likewise defines “consumer financial product” as “any financial product or service” described in 12 U.S.C. § 15(A),” that is provided for use by consumers primarily for personal, family, or household use.

12 U.S.C. § 5567(a). Accordingly, on his basis alone, Mr. Clark’s CFPA whistleblower complaint must be dismissed.

Issue No. 2 – Protected Activity

Adjudication Principles

The second requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. As previously discussed, under 12 U.S.C. § 5567, the specific activities protected by the statute fall into four categories.

First, a covered employee provided, caused to be provided, or is about to provide, or caused to be provided information to: a) an employer; b) the Bureau; or c) State, local, Federal, government authority, or law enforcement agency that relates to any violation of, or any act or omission that the covered employee reasonably believes to a violation of any provision of the CFPA, or other provision of law that is subject to the jurisdiction of the Bureau, and any rule, order, standard, or prohibition of the Bureau⁹ (emphasis added). 12 U.S.C. § 5567(a)(1) and 29 C.F.R. § 1985.102(b)(1).

Second, a covered employee testified, or will testify, in any proceeding resulting from the administrative or enforcement of any provision of the CFPA, or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau.¹⁰ 12 U.S.C. § 5567(a)(2) and 29 C.F.R. § 1985.102(b)(2).

Third, a covered employee filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law. 12 U.S.C. § 5567(a)(3) and 29 C.F.R. § 1985.102(b)(3).

Fourth, a covered employee objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any law, rule, order standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau¹¹ (emphasis added). 12 U.S.C. § 5567(a)(4) and 29 C.F.R. § 1985.102(b)(4).

Under another recent, similar whistleblower provision, the Administrative Review Board (“ARB”) has establish the adjudication parameters for the term, “reasonably believes.” Specifically, the ARB has interpreted the concept of “reasonable belief” to require both that a complainant have a subjective belief that the complained-of conduct represents a violation of relevant law; and the belief be objectively reasonable. To establish the subjective belief component, a complainant must demonstrate that he actually believed the conduct complained of constituted a violation of relevant law. On the other hand, the objective component “is evaluated

⁹However, 12 U.S.C. § 5517(m) essentially precludes the Bureau from regulating the business of insurance.

¹⁰See above footnote.

¹¹See footnote 12.

based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as the aggrieved employee,” a standard similar to the objective reasonableness standard applied in Title VII retaliation claims. *Sylvester v. Parexel Int’l*, at 14, ARB No. 07-123, ALJ Nos. 2007-SOX¹²-39, 2007-SOX-42 (ARB May 25, 2011), slip op. at 14-15, citing *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009). To satisfy the reasonable belief requirement, a complainant need not actually convey the reasonableness of his beliefs to management. *Sylvester*, slip op. at 15. “An employee’s whistleblower communication is also protected where based on a reasonable, but mistaken, belief that the employer’s conduct constitutes a violation of” one of the enumerated laws. *Id.* slip op. at 16. And, there is no materiality requirement for the information being provided to the employer that a complainant alleges is a protected activity. *Sylvester*, slip op. at 22. However, the triviality of a complainant’s concerns is relevant to whether the complainant actually engaged in protected activity.

Discussion

With these principles in mind, I turn to consideration of Mr. Clark’s alleged protected activities raised at the hearing which arose during the following time periods: fall of 2010, January – June 2011, fall of 2012 and spring of 2013, and June 2013.

Fall of 2010

In October 2010,¹³ by handling customer complaints about inaccurate motorcycle insurance rates, Mr. Clark discovered that due to a recent buyout which lead to the conversion of 5,000 motorcycle insurance policies to Farmers Insurance, the rates for the converted insurance policies were many times incorrect due to insufficient underwriting or reliance on default settings when the customer’s specific information was unknown. Mr. Clark considered the company’s reliance on rates based on this deficient process to be an unfair consumer practice because the 5,000 motorcycle insurance customers affected by the conversion implicitly trusted Farmers insurance to utilize accurate information in determining the appropriate rate for the new policies. Due to the magnitude of the issue, Mr. Clark presented his concerns to his supervisor at the time, Mr. Bierling with the recommendation that Farmers Insurance contact all of the 5,000 potentially affected customers to have their rates reviewed for accuracy. Subsequently, in the absence of a response, Mr. Clark also presented the problem to HR.

In considering the elements of a CFPA protected activity, I first find that Mr. Clark held a subjective belief that Farmers Insurance’ rates for the converted motorcycle insurance policies represented an unfair practice under 12 U.S.C. § 5531, which prohibits unfair, deceptive, or abusive acts or practices that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers. Under the situation as presented to Mr. Clark, I find that he also had an objectively reasonable concern that Farmers Insurance reliance of default rates and inadequate underwriting efforts, instead of verified customer information, in establishing the converted policy rates for 5,000 motorcycle insurance consumers was an unfair

¹²Sarbanes Oxley Act of 2002 (Pub. L. 107–20).

¹³CFPA was enacted into law on July 21, 2010.

practice, which would cause substantial harm to a consumer which the consumer could not reasonably avoid unless the new, converted rate represented a significant departure from the replaced motorcycle insurance policy. Mr. Clark also satisfied the requirement of 12 U.S.C. § 5567(a)(1) and 29 C.F.R. § 1985.102(b)(1) by informing his Employer, through his immediate supervisor and then HR, of the reasonably perceived violation of 12 U.S.C. § 5531. However, as previously discussed, at the time Mr. Clark reported his concerns, he was not a “covered employee” since he was engaged in the business of insurance, and was not dealing with a consumer financial product as defined by the CFPA. Accordingly, Mr. Clark did not engage in a protected activity under 12 U.S.C. § 5567(a)(1) and 29 C.F.R. § 1985.102(b)(1).

January – June 2011

Due to the continuing issue with the incorrect motorcycle rates, Mr. Clark contacted the California Department of Insurance with his concerns, which eventually lead to an audit in June 2011. In June 2011, Mr. Clark also again advised Mr. Bierling of the continuing issue. Again, while his concern was objectively reasonable, since he was not a covered employee at the time, and the state insurance agency’s audit would not be considered a proceeding under Federal consumer financial law, his reports to the California Department of Insurance and his supervisor were not a protected activities under 12 U.S.C. § 5567(a)(3) and 29 C.F.R. § 1985.102(b)(3).

Fall of 2012 and Spring of 2013

In the fall of 2012, Mr. Clark contacted the NAIC, and subsequently informed his supervisor, Ms. Marchena, about the persistent complaints he received from customers involving the difficulties they experienced in attempting to file a claim with Farmers Insurance by phone, due to unanswered calls, non-returned calls, or misdirected calls. He believed this issue also represented a violation of 12 U.S.C. § 5531 as an unfair practice. In January of 2013, based on a referral from NAIC, the Michigan state insurance agency contacted Mr. Clark about issue and he provided information about the misdirected and unanswered calls. And, during a February 2013 meeting, which included his supervisor, Ms. Marchena, Mr. Clark raised his concerns about the number of misdirected claims calls.

Unlike the incorrect motorcycle insurance rate situation, the consumers who experienced difficulty in making claims with Farmers Insurance by phone did not cause substantial harm which could not be reasonably avoid. Although some potential cost might be placed on the frustration associated with misdirected, unreturned, or unanswered calls associated with a customer’s attempt to file a claim by phone, a consumer had the means to diminish any substantial harm by making another phone call, contacting the company by e-mail, or filing a claim by mail. Consequently, while Mr. Clark’s credible testimony clearly demonstrates his sincere subjective belief that the phone problem represented a violation of the CFPA, I find that his belief was not objectively reasonable. As a result, in addition to not being a covered employee, Mr. Clark’s reports of the claims phone call disconnects and misdirects to the NAIC, the state insurance agency, and his supervisor were not a protected activities under 12 U.S.C. § 5567(a)(1) and 29 C.F.R. § 1985.102(b)(1).

June 2013

Similarly, based on my determination that the misdirected claims phone calls did not objectively represent an unfair, deceptive or abusive practice under 12 U.S.C. § 5531, Mr. Clark's continued reports about the problem to company directors and his immediate supervisor, Ms. Marchena, did not constitute protected activities under 12 U.S.C. § 5567(a)(1) and 29 C.F.R. § 1985.102(b)(1).

Issue No. 3 – Adverse Action

Adjudication Principles

Concerning an adverse personnel action or event, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB determined that the deterrence standard established by the U. S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Previously, a "tangible employment consequence" test had been applied.¹⁴ However, under the *Burlington Northern* adverse standard, to be deemed "materially adverse," an action must be such that it "would well dissuade a reasonable worker from making or supporting a charge of discrimination." Consequently, since the purpose of the employee protection provision is to encourage employees to freely report non-compliance with statutory requirement, the test is whether the employer's action could dissuade a similarly situated reasonable worker from engaging in protected activity.¹⁵ The ARB further indicated that

not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. The employee protections that the Labor Department administers are not "general civility codes," nor do they make ordinary tribulations of the workplace actionable. Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent. Like the *Burlington Northern* Court, our task has always been, and will continue to be, to separate harmful employer action from petty, minor workplace tribulations.¹⁶

¹⁴See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2, slip op. at 20 (ARB Feb. 28, 2003) (to be actionable, an action must constitute a tangible employment action; that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (a negative performance evaluation, absent tangible job consequences, is not an adverse action).

¹⁵*Id.* at slip op. 19-20.

¹⁶*Id.* at 23 (footnotes omitted).

Discussion

On June 26, 2013, Mr. Clark was placed on a PIP, or action plan. Ms. Marchena and HR view an action plan as a collaborative, or joint, enterprise between a supervisor and an employee. However, significantly, it's the supervisor, and not the employee, who initiates the "collaboration" as part of the company's progressive disciplinary process. Although the Employer further emphasized that an action plan itself does not adversely affect the pay, or terms of employment, of an employee, and Mr. Clark did not suffer loss of pay or a change in his job, as Mr. Clark perceptively noticed, an action plan nevertheless is a preliminary step that may lead to termination.¹⁷ The evidentiary record also establishes that even if an employee successfully responds to an action plan, which Ms. Marchena opines would render the action plan no "big deal," the document nevertheless remains in the employment record permanently. Under these circumstances I find that Mr. Clark's placement on a PIP/Action Plan on June 26, 2013 was sufficiently adverse that it would deter a reasonable person from engaging in whistleblowing. Accordingly, Mr. Clark has established that he suffered an adverse personnel action on June 26, 2013.

Issue No. 4 – Causation

As a preliminary step in addressing this element, another CFPA definition becomes an important factor. Specifically, the CFPA's prohibition against employment discrimination for whistleblowing apply only to a "covered person." 12 U.S.C. § 5567(a) and 29 C.F.R. § 1985.120(a). Predictably, in a manner similar to the term "covered employee," although "person" includes any company or corporation, 12 U.S.C. § 5481(19) and 29 C.F.R. § 1985.101(m), the definitional journey again eventually establishes that the "covered person" as defined by 12 U.S.C. § 5481(6) and 29 C.F.R. § 1985.101(j), subject to the discrimination prohibition must be engaged in offering or providing a consumer financial product or service, which as previously discussed specifically does not include the business of insurance. Accordingly, on this basis alone, since Farmers Insurance is engaged in the business of insurance, the CFPA restrictions against employment discrimination based on protected activities are not applicable and on this basis Mr. Clark's CFPA complaint must be dismissed.

Adjudication Principles

The ARB recently confirmed that "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011) (citing *Marano v. U. S. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)), *aff'd sub. nom. Bechtel v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 2d Cir., No. 11-4918 (2d Cir. Mar. 15, 2013). In the absence of direct evidence of causation, contributing factor may be proven through circumstantial evidence which may include temporal proximity, indications of pretext, inconsistent application of employer's policies, and shifting explanations for an employer's actions. *Bechtel*, ARB No. 09-952, at 13. If a complainant

¹⁷Having been placed on notice, the July 7, 2013 Action Plan indicated that a repeat of the critiqued behavior could become "grounds for possible additional corrective action, up to and including termination."

shows evidence of pretext, he may rely on inferences drawn from such pretext to establish by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable personnel action. *Bechtel*, ARB No. 09-952, at 13. At the same time, although the ARB has stated that "proof of causation or 'contributing factor' is not a demanding standard," *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009 FRS 015, slip op. at 15, (Mar. 29, 2013), under the AIR 21 adjudication framework incorporated by SOX, and specifically 29 C.F.R. § 1980.109(a),¹⁸ the complainant's burden of proof for all three elements, including contributing factor, remains "preponderance of the evidence."

The determination of contributing factor essentially has two components: knowledge and causation.¹⁹ In other words, the employer must have been aware of the protected activity (knowledge) and that protected activity was a contributing factor in the decision to take the adverse personnel action (causation). Further, knowledge of a protected activity may be either actual or imputed. Regarding the latter category, relying on the "cat's paw" legal concept of liability recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the ARB has concluded a complainant need not prove the decision maker responsible for the adverse action actually knew of the protected activity if he can establish that any person advising the decision maker on the adverse action was aware of the protected activity. *Rudolph*, slip op at 17.

In applying these principles to the one objectively reasonable concern raised by Mr. Clark involving the converted motorcycle insurance rates, I find that Mr. Clark is unable to establish by the preponderance of the evidence that his protected activity in 2010/2011 was a contributing factor in his June 2013 action plan. While Mr. Clark believed in the spring of 2011 that at least one supervisor had become aware of his anonymous complaint to the state of California based on a comment about the pending audit, and Mr. Bierling actually knew about his concern, Ms. Marchena credibly testified that when she decided to initiate the action plan two years later, she was unaware of Mr. Clark's protected activities associated with the converted motorcycle insurance policies. Her credible testimony also establishes that no one at Farmers Insurance, including Mr. Clark's former supervisor or any HR personnel, advised her to initiate an action plan against Mr. Clark in June 2013. As a result, at the time she took the adverse action in June 2013, Ms. Marchena had no actual or imputed knowledge of Mr. Clark's protected activity. Accordingly, even if Mr. Clark had been a "covered employee," Congress had concluded the business of insurance was a financial product, and Farmers Insurance had been a "covered person," Mr. Clark's CFPA whistleblower complaint would still be denied due to his failure to prove by a preponderance of the evidence that a protected activity was a contributing factor in his adverse action.

¹⁸76 Fed. Reg. 68,084, 68,095 (Nov. 3, 2011).

¹⁹See *Bechtel*, slip op. at 13 (the four elements that a claimant must prove by a preponderance of the evidence are: a) statutorily protected activity, b) employer's knowledge of the protected activity, c) adverse action, and d) contributing factor).

Issue No. 5 – Affirmative Defense

As previously discussed, under 12 U.S.C. § 5567(c)(3)(C), and 29 C.F.R. § 1985.109(b), even if a complainant satisfies his burden of proof under 29 C.F.R. § 1985.109(a), he may not be entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. However, since for several reasons Mr. Clark is unable to establish that an activity protected under CFPA was a contributing factor in his receipt of the June 26, 2013 PIP, I need not address this issue.

Issue No. 6 – Damages

Similarly, since an individual engaged in the business of insurance Mr. Clark was not a covered employee under the CFPA whistleblower protection provision, and he failed to establish the other requisite elements, he is not entitled to relief under the Act, which in this case would have been the requested removal of the Action Plan from his personnel record.

Issue No. 7 – Employer’s Attorney Fees

In the event that the respondent did not violate the law, and if at the request of the respondent, an administrative law judge determines that a CFPA whistleblower complaint was frivolous or brought in bad faith, 12 U.S.C. § 5567(c)(4)(C), and 29 C.F.R. § 1985.109(d)(2), permit an award of reasonable attorney fees to the prevailing respondent, not to exceed \$1,000. I have determined that Farmers Insurance did not violated the CFPA whistleblower protection provisions. And, counsel for the Farmers Insurance has requested attorney fees in the amount of \$1,000.

However, for the following reasons, I deny the Employer’s request for attorney fees in the amount of \$1,000. First, the principal defect in Mr. Clark’s case related to his not being a covered employee under the Act. In making his complaint under the CFPA whistleblower protection provisions, Mr. Clark did not have an unreasonable expectation as a lay person that insurance would be considered to be an important consumer financial product that would warrant governance under the CFPA. While his assumption was legally incorrect, Congress’ determination to actually exclude the business of insurance from the CFPA significant was not readily apparent. Instead, some lawyerly skills are necessary to decipher the statutory definitional labyrinth, starting with the recognition that unlike other statutory whistleblower provision, the CFPA whistleblower protection provision added the adjective “covered” to “employee.” That additional word requires seeking out the meaning of “covered employee” under the implementing regulation. Then, since the term “covered employee” is predicated on the definition of “consumer financial product or service,” which incorporates the term “financial product or service,” a lengthy traverse through several pages of what Congress defined as a “financial product or service” is necessary to reach the last subparagraph to find that Congress specifically excludes “the business of insurance” from the definition of “financial product or service.” Mr. Clark’s failure to navigate that regulatory and statutory morass on his own does not render his complaint frivolous.

Second, I have determined that Mr. Clark's concern about the inaccurate motorcycle insurance rates associated with insufficient underwriting and default settings was subjectively held and objectively reasonable to be considered an unfair practice which would represent a violation of the CFPA had the business of insurance been covered. Additionally, although not objectively reasonable, based on his credible testimony, I found Mr. Clark subjectively believed the difficulty customers with claims experienced in getting through to Farmers Insurance by telephone represented an unfair practice. And, Mr. Clark successfully established that the June 2013 action plan was an adverse action. Based on those determination, I do not consider Mr. Clark's CFPA complaint to be frivolous.

Third, in terms of bad faith or malice toward the Employer, the record demonstrates that Mr. Clark engaged in his activities for the benefit of Farmers Insurance customers rather than self-interest, and pursued his CFPA complaint on the basis of his sincere conviction that he was unfairly treated for his efforts to help customers who brought complaints to him. Further, since under the statute and implementing regulation Mr. Clark had a right to seek a *de novo* hearing before an administrative law judge, his asserted failure to heed the initial advice about the merit of his case from, or accept the subsequent denial of his complaint by, the OSHA investigator does not constitute bad faith. Similarly, Mr. Clark's disregard of the Employer's opinion about the merit of his CFPA whistleblower complaint hardly constitutes bad faith.

Accordingly, Employer's request for \$1,000 in attorney fees under 12 U.S.C. § 5567(c)(4)(C), and 29 C.F.R. § 1985.109(d)(2) is denied.

ORDER

The CFPA complaint of Mr. Neil D. Clark is **Dismissed**.

The Employer's request for \$1,000 in attorney fees is **Denied**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: December 19, 2014
Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1985.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1985.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1985.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1985.109(e) and 1985.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1985.110(b).