In the Matter of:

JOHN NAGLE,	**ARB CASE NO. 13-010**
COMPLAINANT,	**ALJ CASE NO. 2009-AIR-024**
v.	**DATE: May 31, 2013**
UNIFIED TURBINES, INC.,	**DATE REISSUED: June 12, 2013**
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lisa M. Werner, Esq.; *Clark, Werner & Flynn, P.C.;* Burlington, Vermont

For the Respondent:
John L. Franco, Jr., Esq.; *Law Office of John L. Franco, Jr.*; Burlington, Vermont

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

John Nagle filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his former employer, Unified Turbines, Inc. (UT), retaliated against him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] and its implementing regulations.[2] Following a remand from the Administrative Review Board (ARB) on October 25, 2012, an Administrative Law Judge (ALJ) issued a

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21).

[2] 29 C.F.R. Part 1979 (2012).

Decision and Order finding that Nagle proved by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action and that UT failed to demonstrate by clear and convincing evidence that it would have terminated Nagle's employment in the absence of his protected activity.[3] D. & O. on Rem. at 13-15. The ALJ ordered UT to reinstate Nagle and pay Nagle back pay and compensatory damages, and further indicated that upon application, Nagle was entitled to attorney's fees and litigation costs. *Id.* at 20. We summarily affirm.[4]

To prevail on his whistleblower complaint Nagle must prove by a preponderance of the evidence that (1) he engaged in activity protected by AIR 21, (2) that unfavorable personnel action was taken against him, and (3) that the protected activity was a contributing factor in the unfavorable personnel action being taken against him.[5] The ALJ determined that Nagle's protected activity was a contributing factor in UT's decision to terminate his employment. We find the ALJ's findings of fact and legal analysis are supported by substantial evidence of record and are in accordance with applicable law.

The ALJ concluded that Nagle engaged in protected activity on several occasions, including on December 16, 2008, when he reported to his employers that "M"[6] was engaged in an illicit drug transaction and was abusing prescription narcotic medication while on the job. D. & O. on Rem. at 11. The ALJ had previously found and adhered to the finding "'that a reasonable person with Nagle's training and experience could believe that M's ongoing abuse of drugs and deteriorating performance was in violation of FAA regulations.'"[7] *Id.* (quoting *Nagle*

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[3] *Nagle v. Unified Turbines*, ALJ No. 2009-AIR-024 (Oct. 25, 2012)(D. & O. on Rem.).

[4] The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under AIR 21 and its implementing regulations. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a). The ARB reviews an ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. § 1979.110(b). The ALJ's legal conclusions are reviewed de novo. *Rooks v. Planet Airways, Inc*., ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

[5] 49 U.S.C.A. § 42121(b)(2)(B)(iii). *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004) (explaining that to "demonstrate" under the statute is interpreted as having to prove by a preponderance of the evidence).

[6] We refer, as did the ALJ, to Nagle's co-worker by the initial "M" because of the sensitive nature of the allegations regarding his conduct.

[7] UT asserts that "[t]he FAA's regulations do not address the use of medications by a person for whom they were prescribed, which was the allegation here." We disagree. The FAA regulations at 14 C.F.R. § 120.33(b) "make it a violation for an employer to knowingly use an individual to perform a safety sensitive function, as defined by 14 C.F.R. § 120.105 and 120.215 while that individual has a prohibited drug in his system." "The prohibited drugs include marijuana, opiates, phencyclidine (PCP) and amphetamines. 14 C.F.R. § 120.7(m) c.f. 40 C.F.R. 40.85(b)." *Id.* M

v. Unified Turbines, Inc., ALJ No. 2009-AIR-024, slip op. at 15, (Sept. 27, 2010)(D. & O.). The record shows that Nagle brought M's drug abuse to the attention of his employers on several occasions including on December 16, 2008. Hearing Transcript (Tr.) at 47-49, 59-60, 182-84, 189-92. We hold that the ALJ's finding of protected activity is supported by substantial evidence.

The ALJ also concluded that Nagle met his burden to prove by a preponderance of the evidence that he suffered an adverse employment action. D. & O. on Rem. at 13. The ALJ found that UT terminated Nagle's employment under Board precedent as articulated in *Minne v. Star Air*[8] and *Klosterman v. E. J. Davies.*[9] In keeping with the precedent articulated in those cases, the ALJ found that "Nagle did not resign" and UT's behavior, rather than Nagle's, ended the employment relationship. *Id.* at 9, 12. Based on the facts as found by the ALJ, UT sent Nagle home on December 24, 2008. *Id.* at 12. When Nagle called Deavitt to talk about what happened on December 27, he got Deavitt's voicemail and left a message. *Id.* Deavitt never returned Nagle's call. *Id.* Deavitt failed to call Nagle back even after Deavitt found out that "Nagle thought he'd been fired and that M was the aggressor in the December 24th altercation." *Id.* Further, it was the UT's protocol to call employees if they did not come to work as planned, and UT "departed from its normal protocol of calling an absent employee and decid[ed] instead to interpret Nagle's failure to report for work on December 29th as a voluntary quit." *Id.* (citing Tr. at 224-25). The ALJ reasoned that it was thus UT's behavior that ended the employment relationship. There is substantial evidence in the record to support the ALJ's fact finding that UT "terminated" Nagle's employment under controlling DOL precedent.[10]

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confirmed that he was abusing prescription opiates during the relevant time period, and the ALJ so found. D. & O. on Rem. at 3. The regulations do not differentiate between prescribed and illegal opiates in its prohibition.

[8] *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007).

[9] *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 20, 2010).

[10] In its brief, UT asserts that the ALJ found in the prior D. & O. that Deavitt told Nagle to report to work on Monday, December 29. UT Br. at 10. This assertion mischaracterizes both what the ALJ found, and the evidence on this issue. Regarding what Deavitt said to Nagle when he told him to leave the shop on December 24, the ALJ properly credited the testimony of Dan Hubbert as a credible and neutral witness. D. & O. at 16. Hubbert testified that Nagle told him that Deavitt had told him to "'put his F-ing truck in gear . . . [and] take the long weekend to think about what he had done . . . .'". *Id.* (quoting Tr. at 325). Additionally, the record does not show that Deavitt told Nagle to report to work, but instead, by his own testimony, that he told Nagle to "think about whether you still want to work here and come back on Monday and we'll talk about it." Tr. at 208. Rather than an unqualified instruction to return to work, it appears to be an instruction to think and then perhaps negotiate in some way or otherwise discuss the possibility of getting his job back after the holiday. *See also* Tr. at 210, 229.

The ALJ further concluded that Nagle proved by a preponderance of the evidence that his protected activity under AIR 21 was a contributing factor to his discharge. In addition to the temporal proximity between the protected activity and termination, the ALJ explained that Nagle's protected activity "tended to affect the outcome which was Unified Turbines' decision not to return Nagle's telephone call and instead interpret his absence from work on December 29, 2008, as a voluntary quit." D. & O. on Rem. at 14-15. As discussed above, Nagle engaged in protected activity on December 16, 2008, when he reported to his employer that M was abusing prescription narcotic medication while on the job and that M was drug dealing outside of the UT shop. *Id.* at 11, 14. The ALJ reasoned that the reports of the drug dealing were intertwined with Nagle's reports that M had a problem with drugs.[11] UT informed M that Nagle was the source of the complaint that he had been observed in an illicit drug transaction outside of the shop." *Id.* The ALJ found that "M started the altercation because he was upset that Nagle had reported his suspected drug dealing to management." *Id.* The altercation is what caused Deavitt to angrily order Nagle to leave the premises. *Id.* It also caused Deavitt "to not return Nagle's call and instead let Nagle believe that he'd been fired." *Id.* Thus, there are several identifiable links in the chain of causation from Nagle's protected activity to the adverse action UT took against him, establishing that Nagle's protected activity was a factor in UT's termination of his employment. Substantial evidence in the record supports the ALJ's findings of fact regarding causation.

The ALJ further found that UT failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity. D. & O. on Rem. at 15. We find that the substantial evidence of record supports this finding and that it is in accordance with applicable law.

Finally, UT argues that Nagle's reinstatement should be stayed both because (1) the AIR 21 regulation providing for the remedy of reinstatement is unconstitutional and (2) reinstatement is inappropriate given irreconcilable animosity between the parties and lack of a suitable job opening for Nagle.

The regulations at 29 C.F.R. § 1979.109(c) require that an ALJ's order of reinstatement be immediately effective with no opportunity for stay.[12] The Respondent argues that this

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[11] Nagle's report that M engaged in an illegal drug transaction outside of the shop "was one of the three separate, specific communications to Unified Turbines management regarding M's suspected abuse of prescription drug medication . . . . " The ALJ explained that Nagle reported M's conduct on December 16, 2008, to management "because he believed that it was further evidence that M had a 'problem' with abusing prescription pain medication that was impacting on his performance." D. & O. on Rem. at 11.

[12] *Compare* 29 C.F.R. § 1979.110(b)("If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board."), *with* 29 C.F.R. § 1980.110(b)("If a case is accepted for review, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the

regulation violates due process and is unconstitutional. The ARB is not authorized to rule on the constitutionality of Department of Labor regulations.[13]

Regarding the Respondent's argument that a lack of a suitable job opening or hostility between the parties warrants staying the ALJ's order of reinstatement, we note that although the regulations do not specifically provide for a stay, the regulations state that the ALJ shall order reinstatement "where appropriate." 29 C.F.R. § 1979.109(b). Accordingly, the ARB has recognized that circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary.[14] Depending on the circumstances, an ALJ may award front pay or "economic reinstatement" in lieu of reinstatement.[15] Nothing stopped the Respondent from introducing evidence at trial, or more recently following our remand to the ALJ, demonstrating that reinstatement was not appropriate in this case. But neither the argument nor any supporting evidence was before the ALJ, and we therefore decline to address it.[16] We thus affirm the ALJ's order of reinstatement.

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decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board, **unless the ARB grants a motion by the respondent to stay the order based on exceptional circumstances**."). (Emphasis added).

[13] *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Further, with respect to the Respondent's argument that the regulations do not provide for an opportunity to stay a reinstatement order, we note that 29 C.F.R. § 1979.114 authorizes both the ALJ and the Board to waive any rule for good cause shown.

[14] *Clemmons v. Ameristar Airways*, ARB No. 08-067, ALJ No. 2004-AIR-011; slip op. at 12 (May 26, 2010); *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2004-AIR-092, slip op. at 9 (June 29, 2006).

[15] *See* 68 Fed. Reg. 14099, 14104 (Mar. 21, 2003) ("economic reinstatement" entitles a complainant to "receive the same pay and benefits that he received prior to his termination, but not actually return to work.").

[16] We will not consider arguments a party did not but could have presented to the ALJ. *Mancinelli v. Eastern Air Center*, ARB No. 06-085, ALJ No. 2006-SOX-008, slip op. at 5 (ARB Feb. 29, 2008). Further, when deciding whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c); *see Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-015, slip op. at 5-6 (ARB June 9, 2006); *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001)

UT did not challenge the *amount* of the ALJ's back pay award. Instead, UT argued that no back pay is appropriate because Nagle failed to "mitigate" his damages as demonstrated by the ALJ's finding regarding "Nagle's failure to do anything to preserve his employment at Unified other than place a call to Deavitt . . . .". D. & O. on Rem. at 20. However, as the ALJ explained, this finding was not legally determinative of whether Nagle was improperly terminated. Nor, by extension, does it have any bearing on an award of back pay, to which a complainant is presumptively entitled upon a finding of illegal termination under AIR 21.[17] Instead, the ALJ's reference to Nagle's "contributory" behavior served to support his decision to make a compensatory award at the lower end of the $50,000 to $100,000 range in non-economic damages – a range which the ALJ amply supported both legally and factually. We affirm the $26,128.75 back pay award as well as the $50,000 compensatory damage award.

CONCLUSION

The substantial evidence of record supports the ALJ's findings of fact, and we agree with his legal analysis and conclusions. We thus **AFFIRM** the ALJ's Decision and Order issued October 25, 2012, awarding Nagle damages and ordering reinstatement.

As the prevailing party, Nagle is also entitled to costs, including reasonable attorney's fees, for legal services performed before the ARB. Nagle's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the ARB, with simultaneous service on opposing counsel. Thereafter, UT shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

(regarding the comparable whistleblower protection provisions under the environmental whistleblower acts). The Respondent has not made such a showing.

[17] UT does not dispute that Nagle mitigated his back pay damages by finding alternative employment after his termination. D. & O. on Rem. at 16.