In the Matter of:

JAMES J. BOBRESKI, **ARB CASE NO. 09-057**

COMPLAINANT, **ALJ CASE NO. 2008-ERA-003**

v. **DATE: June 24, 2011**

J. GIVOO CONSULTANTS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard R. Renner, Esq., ***Kohn, Kohn and Colapinto, LLP,*** **Washington, District of Columbia**

For the Respondent:
Alan C. Milstein, Esq., ***Rose & Podolsky,*** **Pennsauken, New Jersey**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge;*** **and Joanne Royce,** ***Administrative Appeals Judge***

ORDER OF REMAND[1]

[1] In this order we refer to the transcript as "Tr.," the Administrative Law Judge's Decision and Order in ALJ No. 2008-ERA-003 as "D. & O.," Bobreski's initial brief as "Comp. Br.," Givoo's reply brief as "Resp. Br.," Bobreski's rebuttal brief as "Comp. Reb. Br.," Bobreski's post-hearing brief to the ALJ as "Comp. Post-Hearing Br.," and Givoo's post-hearing brief to the ALJ as "Resp. Post-Hearing Br."

James J. Bobreski filed a complaint against J. Givoo Consultants, Inc. (Givoo) under the whistleblower provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011), the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (Thomson/West 2003), the Clean Air Act, 42 U.S.C.A. § 7622 (Thomson/West 2003), the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (Thomson/West 2003), the Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001), and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (Thomson Reuters 2009), as amended and recodified, and their implementing regulations, 29 C.F.R. Part 24 (2009) on May 2, 2006.[2] He alleged that Givoo violated the ERA's employee protection provisions when it failed to hire him because he engaged in ERA-protected activities. The Occupational Safety and Health Administration (OSHA) investigated his complaint and dismissed it on September 27, 2007. Bobreski requested a hearing before a Department of Labor Administrative Law Judge (ALJ), which the ALJ conducted on July 29, 2008. On January 26, 2009, the ALJ ruled against Bobreski. Bobreski appealed. We remand for the following reasons.

INTRODUCTION

This case arises from Bobreski's claim that the Respondent Givoo intentionally rejected him in February/March 2006 for a temporary job opening. Bobreski claims that Givoo rejected him because of his whistleblowing disclosure in 1999. The parties do not dispute that in 1999, Givoo terminated Bobreski's employment shortly after Bobreski reported some safety concerns. Bobreski filed a whistleblower claim in 1999 against Givoo's contractor (District of Columbia Water and Sewer Authority or "WASA"). He obtained a liability verdict in July 2005 against WASA, who was still contracting with Givoo in 2006. The remedies portion of the case was not resolved until September 2006. Meanwhile, in early 2006, Givoo had its first opportunity since 1999 to hire Bobreski and did not. Consequently, Givoo's rejection of Bobreski occurred in the middle of Bobreski's whistleblower litigation against WASA, litigation that the ALJ did not expressly recognize as ongoing protected activity. In analyzing the testimony of Givoo's highest ranking operational manager, Joel Givner, the ALJ said she was "skeptical" that he would hire Bobreski after 1999. She found that Givner's statement that he was willing to hire Bobreski was "inconsistent with the evidence." Nevertheless, despite a commendable journey through a complex maze of unclear legal relationships and testimony, the ALJ's ultimate ruling against Bobreski (1) defines the protected activity too narrowly, (2) does not contain sufficient findings as to the degree of influence that Givner exerted over the hiring process, (3) does not expressly decide the issue of causation upon all the circumstantial evidence as a whole, and (4) contains some incomplete and ambiguous findings on some material facts. Consequently, we remand for further findings.

[2] While we are aware that the language of the statutes at issue varies, this opinion focuses on issues for which these statutes have commonality, i.e., a complainant must prove causation by showing that adverse action was taken against him because he engaged in protected activity. For simplicity's sake, we refer solely to the ERA in our discussion.

BACKGROUND[3]

Givoo contracts directly or indirectly with industrial utility plants, including nuclear power plants, to provide instrumentation and control (I&C) technicians to service mechanical needs for such utility plants. Two of those utility plants, relevant to this case, are the Blue Plains Water and Sewage Treatment Plant ("Blue Plains") and the Hope Creek Plant Nuclear Generating Station (the "Hope Creek NGS"). D. & O. at 4-5. The Hope Creek NGS is on a small artificial island that also includes the Salem Nuclear Generating Station (the "Salem NGS")(collectively referred to as the "Hope Creek/Salem Nuclear Plant"). *Id.* at 5. PSE&G Nuclear, a subsidiary of Public Service Electric & Gas, owned all three nuclear generating stations. *Id.* at 5. Servicing the nuclear power plants occurs during temporary plant shut downs ("outages").

Joel Givner is the Manager of Plant Services and corporate secretary for Givoo Consultant's Inc. D. & O. at 13; Tr. at 27. His wife owns Givoo, but he runs the day-to-day operations. D. & O. at 13. Givner would "secure contracts" and "give direction to contracts" for the company. Tr. at 30.[4] Givoo had approximately six permanent employees in the corporate office; all other employees worked for Givoo as temporary employees. D. & O. at 13.

Two of Givoo's permanent employees relevant to this case were John Moore and Mel Morgan, both high level managers who reported directly to Givner in 2006. Morgan was the Manager of Program Development. Tr. at 30. Moore was the Manager of I&C Services. CX 11, CX 12. During the hearing in this matter, Givner acknowledged that "the most important and active persons at Givoo with respect to staffing and service contracts" were himself, Moore, and Morgan. Tr. at 30. All three of these individuals had known Bobreski since the mid-1990s. From 1994 through 1999, Morgan often drove to and from jobs with Bobreski and shared an apartment with him when they worked far from home; they knew each other well. D. & O. at 6, 13, 24. At some point around 1999, Morgan left employment with Givoo, but returned in January or February 2006. *Id.* at 12.

In 1999, Givoo had a long-term contract with the Washington, D.C. Water and Sewer Authority (WASA), which operated Blue Plains (collectively referred to as the "WASA/Blue

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[3] In describing the facts of the case, the ALJ often described what a witness "testified" without indicating whether she accepted the particular testimony as credible. Consequently, in such instances, we did not assume that a fact finding was intended.

[4] In expressly finding that Givner ran the day-to-day operations, the ALJ credited Givner's testimony found in the transcript at pages 28-30. D. & O. at 13. Consequently, we infer that she credited the remainder of his description of his duties. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (reasonable inferences may be drawn by an appellate body reviewing a trial or hearing court's findings of fact); *see also Jackson v. Comm'r*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted). The ALJ also credited the testimony of Law and Morgan with respect to their duties. D. & O. at 8-9, 12-13.

Plains Plant"). *Id.* at 5. Givoo maintained that contract at least until the time of the hearing in this matter in 2008. D. & O. at 5; Tr. at 36.

Bobreski worked for Givoo on at least nine projects from 1994 to 1999. D. & O. 13. In late 1999, Bobreski worked for Givoo at Blue Plains. He engaged in protected activity when he disclosed safety-related issues internally and to the media (the "Blue Plains Incident"). *Id.* at 21. Bobreski's media disclosures regarding the WASA/Blue Plains Plant caused friction (hostility) with Givoo managers. *Id.* at 6. On October 29, 1999, Givoo terminated Bobreski's employment at the request of the customer (WASA). *Id.* at 14. However, during the hearing, Givner unequivocally attempted to take full responsibility for terminating Bobreski's employment, saying that it was Givoo's decision. Tr. at 37, 40. Givner was fully aware of Bobreski's protected activity. Tr. at 37-46. Additionally, on November 1, 1999, Moore sent a letter to Givoo's site supervisor at Blue Plains reminding him and other Givoo employees that "any and all contact with the 'media'" needed to be referred to Givner. Tr. at 40-41; CX 12.

On November 3, 1999, Bobreski filed a whistleblower complaint against WASA based on these events. D. & O. at 2; CX 14. On November 5, 1999, the Washington Post ran a front page story about the Blue Plains Incident. D. & O. at 4; Tr. at 41.

Givoo never hired Bobreski again after the Blue Plains Incident. D. & O. at 14. Givner believed that there was an understanding between Givoo and Bobreski that it would be best if Bobreski worked elsewhere. *Id*. Givner testified that he thought that it would be better if they "parted ways for a little bit of time." Tr. at 45.

Givner's hearing testimony evidenced his displeasure over Bobreski's disclosures at the WASA/Blue Plains Plant. For example, he described Bobreski's efforts as trying to "re-engineer the whole facility" and stated that Bobreski "was not working to the direction of the supervision." Tr. at 36-37.

In 2000, after learning about the Washington Post article, Givner contacted the security department at the nuclear plant where Bobreski worked and reported that Bobreski was a security risk (in response to a routine questionnaire). D. & O. at 6, 14. Givner was referring to the Blue Plains Incident. *Id.* at 14. Givner's report about Bobreski was the only one Givner had ever made about a former employee as a security risk. *Id.*

After the Blue Plains Incident in 1999, Bobreski worked at various nuclear plants. *Id.* at 6. Bobreski worked at the Hope Creek NGS or the Salem NGS at least eight times from 1995 through 2005, including Spring 2004, Spring 2005, and Fall 2005. *Id.* at 7. Vincent Law was the foreman at Hope Creek who hired Bobreski to work during Spring and Fall 2005. *Id.* at 8, 10. Law liked Bobreski, considered him very smart, and tried to hire him when he was available. *Id.* at 9, 10. Law had also worked for Givner as a foreman prior to 1997 when Givner operated as J. Givoo Consultants, a fact that the ALJ found "significant." *Id.* at 2. Law had known Bobreski since approximately 1988. CX 5 at 2. After 1997, Law continued to work at the Hope Creek NGS as a contractor. CX 4 at 25.

The hearing in the WASA/Blue Plains case occurred during intermittent weeks from December 17, 2001, to March 28, 2002. CX 14 at 2. Moore was identified as a witness for this case. *See* Tr. at 49-50.

In 2003, Bobreski telephoned Morgan and asked him why he had not hired Bobreski for a job. D. & O. at 26. Bobreski testified that he accused Morgan of not hiring him because of his whistleblower complaint concerning the WASA/Blue Plains Plant. *Id.* at 6-7. Morgan remembered that Bobreski called him and expressed that he was upset because Morgan had not hired Bobreski for a job. *Id.* at 13. Morgan remembered the tone as angry and disturbing; yet, he did not remember the substance of Bobreski's communication. *Id.* at 26.

On July 11, 2005, Bobreski won his whistleblower case against WASA when ALJ Alice Craft ("ALJ Craft") issued an order in his favor. CX 14. With respect to the proper remedy in the WASA/Blue Plains case, ALJ Craft noted that reinstatement with full back pay was an issue, but she determined that there was "no evidence in the record pertaining to remedies after December 2001, and the evidence regarding the status of WASA's contract with Givoo or any successor is contradictory and incomplete." *Id.* at 55. ALJ Craft's order in the WASA/Blue Plains case presumably sought clarification about who was responsible for hiring and paying temporary employees like Bobreski at the WASA/Blue Plains Plant after Givoo terminated Bobreski's employment. As previously noted, Givoo still had the long-term contract for I&C technician work at the WASA/Blue Plains Plant at this time. Because of the unsettled evidence, ALJ Craft set discovery and briefing deadlines covering the next two or three months.

It is undisputed that Law learned about Bobreski's successful whistleblower case after Law hired Bobreski for the fall 2005 Salem NGS outage. Law heard about Bobreski's whistleblower case from an individual named Glen Kingsley, which caused Law to say "Jim's down on the island, I just hired Jim [Bobreski]." Tr. at 169. Sometime between September 26, 2005, and October 29, 2005, when Bobreski worked at the Salem NGS, Law asked Bobreski about Bobreski's whistleblower complaint and told him that he had heard about his victory. D. & O. at 7, 24. Law never hired Bobreski again after he learned about Bobreski's whistleblower victory. *Id.* at 24, 25.

Morgan also worked at the Salem Nuclear NGS just before going back to work for Givoo in December 2005 or January 2006. D. & O. at 12; Tr. at 172.[5]

The WASA/Blue Plains case settled in September 2006. D. & O. at 3. Meanwhile, in Spring 2006, while WASA and Bobreski were attempting to address the remedies for the Blue Plains case, Givoo became a subcontractor for Shaw Stone & Webster at the Hope Creek NGS.[6]

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[5] We infer that the ALJ credited this fact as testified to by Morgan when she found that Morgan had worked for companies besides Givoo in the United States and Canada prior to working for Givoo in 2006.

[6] The ALJ referred to the Shaw Group and Stone & Webster collectively as "Shaw." The Shaw Group acquired Stone & Webster at some point in its history. D. & O. at 8 n.11. We refer to the group as Shaw Stone & Webster.

Id. at 14. Givner was involved in securing the contract with Shaw Stone & Webster and was personally involved in the hiring process. CX 4 at 14; CX 9 at 10; Tr. at 60-61.

Law was working for Shaw Stone & Webster during the Spring 2006 outage at Hope Creek. D. & O. at 8, 15; Tr. at 127. Law's testimony was uncontroverted that the hiring practice at the Hope Creek NGS changed when Givoo became the subcontractor for the Spring outage. D. & O. at 9; Tr. at 140. Law was told to give his "list" of technicians to Givoo, that he was to share everything with Givoo, and that his role would be a "partnership" with Givoo for the outage. Tr. at 140-143. Givner saw Law's list and forwarded it to Morgan. Tr. at 60. Givner saw Bobreski's name on the list. *Id.* The record shows that Law did send his list to Morgan, as evidenced by an e-mail dated February 15, 2006.[7] D. & O. at 14; CX 1, at 7. It was made clear to Law that there was concern about the outage being successful, and that if it was not successful, then he would not have a job. Tr. at 142-43. Givoo's main office fielded phone calls from interested workers and then forwarded the names to Morgan. Tr. at 93.

Givoo relied on Law's list of I&C workers to hire individuals for the Hope Creek outage. D. & O. at 14, 27. It was the same list Law used for the Fall 2005 Salem NGS outage. D. & O. at 17; Tr. at 100-101. Bobreski was on that list of names. D. & O. at 15. Bobreski was well qualified to fill the positions for which Givoo was hiring. *Id.* at 20. Givoo began considering names for the Hope Creek outage on February 10, 2006. CX 1, at 3. Morgan, a high level manager at Givoo, worked with Law to select names from Law's list. D. & O. at 12, 27. Law and Morgan expressly discussed Bobreski during the hiring phase.[8] *Id.* at 12. Morgan mentioned Bobreski's name to Law while they reviewed a potential hiring list, and Law said "No, not at this time." D. & O. at 12; Tr. at 188. At the hearing, Law confirmed that a "decision" had been made about Bobreski. Tr. at 154. Givoo did not select Bobreski to fill one of the positions. *Id.* at 20-21. The ALJ concluded, "I agree it was possible for Mr. Givner to have interjected his opinion into the hiring process, but I do not find that Complainant has proven by a preponderance of the evidence that such interference occurred." D. & O. at 23.

Givoo began hiring individuals for the Hope Creek outage on February 27, 2006. CX 4 at 28; CX 7. On that same day, Bobreski called Law, seeking employment for the Spring 2006 Hope Creek job. D. & O. at 7. Law told him to contact Morgan. *Id.* The contract date was March 6, 2006, and Givoo and Shaw signed it on March 24 and 29, 2006, respectively.[9] CX 9 at

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[7] Law's list is CX 1 at 22-35.

[8] Law's testimony was not clear on this point. While he testified that he never told Morgan not to hire Bobreski, he also testified that a "decision" had been made not to hire Bobreski and that he participated in "the decision" to leave Bobreski off of the list of the ninety people who were hired. D. & O. at 11; Tr. at 154, 168.

[9] In spite of the signature blocks on the contract, and given the record, we assume that Payne signed for Shaw, and Givner signed for Givoo.

10. Substantial evidence demonstrates that Law and Morgan knew that Bobreski was available for the Spring outage at Hope Creek. D. & O. at 12, 14, 15.

On March 20 and 21, 2006, Bobreski called Morgan to seek employment. *Id.* at 7-8. On March 21, 2006, Morgan told Bobreski that there was a hiring freeze and that Bobreski should seek work at another power plant that Morgan thought was hiring. D. & O. at 8. However, Givoo continued hiring individuals until March 29, 2006. Tr. at 76-77. Morgan testified that he did not know about Bobreski's protected activity when the hiring decisions were made. D. & O. at 25.

Of the 202 individuals on Law's list, 90 technicians were hired for the Spring 2006 outage. D. & O. at 17; CX 10. Givner testified that his staff had to "scramble" to hire the ninety technicians that were required to staff the Hope Creek NGS outage because availability was an issue. D. & O. at 15. The final list of names of technicians to be hired had to be submitted to the customer by March 29, 2006. CX 1, pp. 4-5. Givner gave varied accounts about why Givoo failed to hire Bobreski. *Id.* at 16.

On April 3, 2006, Bobreski spoke to Morgan about the job, and Morgan told Bobreski that the job was fully staffed. CX 1, pp. 4-5.

On May 2, 2006, Bobreski filed the complaint in this matter.

On September 22, 2006, an ALJ issued an order approving a settlement related to the WASA/Blue Plains Plant.

On September 27, 2007, OSHA dismissed Bobreski's complaint in this matter. Bobreski timely objected and requested a hearing, which the ALJ held on July 29, 2008. On January 26, 2009, the ALJ issued a D. & O. dismissing the complaint.

JURISDICTION AND STANDARD OF REVIEW

As the Secretary's designee on appeals, we have authority to review the ALJ's decision. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110. We review questions of law de novo. 5 U.S.C.A. § 557(b)(Thomson Reuters 2011).

To conduct a meaningful review, the ALJ's opinion must "include findings of fact and conclusions of law, with supporting reasons, upon each material issue of fact or law presented on the record." 5 U.S.C.A. § 557(c); 29 C.F.R. § 18.57(b)(2010). Providing sufficient findings of

fact and analysis also allows the parties to understand the ultimate findings and order.[10] Where a material issue is left unresolved, a remand is typically necessary.[11]

The applicable standard of review when Bobreski filed his complaint under the ERA was de novo on all issues.[12] The current regulations call for substantial evidence review of the facts. 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b). We apply the current law and review the fact findings pursuant to the substantial evidence test.[13] Regardless, under either standard of review, we conclude that more findings and reasons are required.[14]

In conducting our review, we must uphold an ALJ's findings of fact to the extent they are supported by substantial evidence even if there is also substantial evidence for the other party, and even if we justifiably disagree with the finding.[15] Substantial evidence is evidence that a reasonable person might accept to support a conclusion.[16] "[T]he determination of whether substantial evidence supports [an] ALJ's decision 'is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.'"[17] A determination whether evidence is substantial on the record considered as a

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[10] *See, e.g., Guthrie v. Astrue*, 604 F. Supp. 2d 104, 112 (D.D.C. 2009) (under the Social Security Act).

[11] *See Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

[12] *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 2 (ARB Sept. 30, 2003).

[13] *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011).

[14] In its brief, Givoo often repeated the "arbitrary and capricious" standard as the standard of review before the Board. *See* Resp. Brief, at 10. This is the standard the federal courts apply in reviewing federal agency actions under the Administrative Procedure Act (APA), not a standard of review for the ARB reviewing ALJ decisions. *See* 5 U.S.C.A. § 706 (Thomson Reuters 2011).

[15] *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[16] *See Universal Camera* , 340 U.S. 477 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

[17] *Dalton v. United States Dep't of Labor*, No. 01-9535, 2003 WL 356780, at *445 (10th Cir. Feb. 19, 2003) (quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989)). *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159; ALJ No. 2005-STA-063, slip op. at 7-8 (ARB June 30, 2008) (quoting *Dalton v. U.S. Dep't of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 1993) (citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989))).

whole must "take into account whatever in the record fairly detracts from its weight."[18] "A single piece of evidence will not satisfy the substantiality test if the [adjudicator] ignores, or fails to resolve, a conflict created by countervailing evidence."[19]

We are not barred from setting aside a decision when we "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes."[20] We will not disturb the ALJ's credibility determinations unless they "conflict with a clear preponderance of the evidence" or "are 'inherently incredible and patently unreasonable.'"[21]

DISCUSSION

In his "refusal to hire" claim, Bobreski focuses on a hiring process Givoo orchestrated, along with Shaw Stone & Webster, for temporary work at the Hope Creek NGS owned by PSE&G Nuclear. There is no question that Bobreski applied for one of the open positions for the Hope Creek work and he was well qualified to do the work sought by Givoo. D. & O. at 20. Bobreski's name was on the hiring list, but Givoo did not select him. *Id.* at 21. The ALJ found that Bobreski proved he engaged in protected activity and that Givoo took adverse action against him when it rejected him for employment for the Hope Creek outage. *Id.* The parties do not dispute that there was protected activity and an adverse action; so, we do not address those issues. Substantial evidence supports the finding that Givoo's high-level manager (Morgan) reached Bobreski's name on a hiring list and did not select Bobreski. *Id.* at 20-21. The ALJ ultimately found however that there was no causal link between Bobreski's protected activity and the decision not to hire him. *Id.* at 28.

On appeal, Bobreski argues numerous errors of law, fact, and procedure.[22] The most compelling argument Bobreski raised was that the ALJ failed to properly consider the "record as a whole" and the "totality of circumstances." *See* Petition for Review (Issues number 3 and 7);

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[18] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[19] *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986).

[20] *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera Corp.*, 340 U.S. at 477-478).

[21] *Palmer v. Western Truck Manpower*, 1985-STA-006 (Sec'y Jan. 16, 1987) (quoting *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)). *See also Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

[22] Because we remand this case for the ALJ's reconsideration on numerous legal and factual issues, we will not address the procedural errors asserted. We render no opinion on the merits of the procedural arguments or the prejudicial effect of any procedural error, if any occurred. Rather, we leave those issues open to the ALJ to reconsider as deemed necessary.

Comp. Br. at 37. Bobreski also raised this point in his post-hearing brief before the ALJ. Comp. Post-Hearing Br. at 32. Bobreski argues a similar point as to the factual findings, that the ALJ's fact findings are not supported by the "record as a whole." *Id*. at 33. Bobreski also identifies irregularities and shifting reasons by Givoo to support its claim that Givner rejected him for the Hope Creek 2006 outage because of his protected activity during the Blue Plains Incident. *See id*. at 1. Givoo counters by arguing that the ALJ considered all the evidence and made factual findings supported by the record in rejecting Bobreski's claim. Repeatedly, Givoo argues that the seven years between the Blue Plains Incident and the Hope Creek 2006 hiring was too long. However, Givoo did not sufficiently address the legal argument that the ALJ was required to consider the "totality of circumstantial evidence" and the record as a whole.

After considering all the arguments and the record as a whole, we must remand this case for three independent reasons. First, the ALJ too narrowly defined Bobreski's protected activity as an act that ended seven years before the alleged failure to hire.[23] This error then led to a fundamentally skewed view of the temporal proximity as a seven-year gap when, in reality, Givoo's adverse action was engulfed by Brobeski's protected activity, which continued during the Hope Creek 2006 hiring process. Second, the ALJ made ambiguous findings as to whether Givner's actions contributed to Givoo's adverse action against Bobreski, despite the ALJ's finding that Givner did not have much "direct" involvement or communication when the actual hiring decision occurred as to Bobreski. If Givner contributed in any way to the adverse action, then the issue is whether his contribution was at all based on Bobreski's protected activity. Finally, the ALJ must expressly find and explain whether or not Bobreski's circumstantial evidence, *taken as a whole*, established that his protected activity contributed to Givoo's adverse action. The ALJ fragmented the circumstantial evidence, rather than considering it as a whole under the totality of circumstances. It is evident that the ALJ sorted through the complex business relationships and roles involved in this case. However, the ultimate decision is based on material legal and factual missteps, requiring a remand.

1. Governing Law

In deciding any whistleblower case, we look first to the governing statute. The ERA governs the whistleblower claim in this case and provides, at 42 U.S.C.A. § 5851(a) that:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--
>
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

[23] Bobreski argued in his post-hearing brief to the ALJ that the filing of the whistleblower complaint with the Department of Labor was "unto itself, protected activity." Comp. Post-Hearing Br. at 23. Similarly, the litigation of that claim is protected activity.

> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
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> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
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> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.[24]

At 42 U.S.C.A. § 5851(b)(3)(C), the statute provides that "[t]he Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint." And at 42 U.S.C.A. § 5851(b)(3)(D), the statute provides that "[r]elief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

Under the plain terms of the ERA statute, a complainant must prove three elements to establish a whistleblower claim: (1) he engaged in activity the ERA protects; (2) the employer subjected him to an unfavorable personnel action; and (3) the protected activity was a "contributing factor in the unfavorable personnel action." 42 U.S.C.A. § 5851(b)(3)(C).[25] If Bobreski fails to prove any one of these three requisite elements, the entire claim fails.[26] If the employee proves that his protected activity contributed to the unfavorable employment action, the employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 42 U.S.C.A. § 5851(b)(3)(D).

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[24] We note that while the other statutes under which Bobreski made claims have different definitions of protected activity, we are using the ERA's definition in this order.

[25] *See also Hibler v. Exelon Generation Co., LLC*, ARB No. 05-035, ALJ No. 2003-ERA-009, slip op. at 19 (ARB Mar. 30, 2006); *Kester*, ARB No. 02-007, slip op. at 6-7.

[26] *See McNeill v. Crane Nuclear Inc.*, ARB No. 02-002, ALJ No. 2001-ERA-003, slip op. at 5 (ARB July 29, 2005).

2. The ALJ Erred by Too Narrowly Defining Bobreski's Protected Activity

In finding that Bobreski engaged in protected activity, the ALJ too narrowly defined the contours of that protected activity. The ALJ defined it simply as the discreet disclosures made in 1999. D. & O. at 21. Consequently, the ALJ saw the gap between that narrowly defined "protected activity" and the Hope Creek hiring decisions as seven years. *Id.* at 22, 26. Givoo also argued that the gap was seven years.[27] In reality, the ALJ's findings established that Bobreski's protected activity ended just months after the Hope Creek decisions. But before looking to the ALJ's findings, we must look to the legal definition of "protected activity."

The ERA whistleblower provision includes numerous definitions of "protected activity." They include (1) disclosing an ERA violation, (2) testifying in a "proceeding regarding any provision of the AEA," or "in any other action to carry out the purposes of the AEA, and (3) filing a whistleblower claim, as well as prosecuting and obtaining a successful judgment of a whistleblower violation. 42 U.S.C.A. § 5851(a)(1)(A)-(F). In his closing argument to the ALJ, Bobreski referred to similar language found in the regulations at 29 C.F.R § 24.102(3)(2010).[28]

Given the statutory definition of protected activity, the ALJ's findings clearly establish that Bobreski was actively engaged in protected activity in February and March 2006 when Givoo made its hiring decisions for the Hope Creek outage. The ALJ recognized as protected activity the disclosure Bobreski made in 1999 regarding the chlorine exposures at the Blue Plains facility. The evidentiary hearing in that matter occurred between December 17, 2001, and March 28, 2002. On July 11, 2005, ALJ Craft issued the decision in Bobreski's favor finding that WASA/Blue Plains unlawfully retaliated against him. CX 14. The ALJ then set out to decide the remedy issue, leaving the case open for further development over the next sixty days or more.

This means that Bobreski was litigating the remedy issue against WASA, with whom Givoo had a long-term contract, while he was working at the Hope Creek/Salem Plant for Law. This was also during the time that Morgan was working at the Salem Plant before he began working for Givoo.

Significantly, ALJ Craft expressly referenced Givoo and implicitly involved Givoo in her attempt to sort out the remedies. *See* CX 14 at 55 (she ordered the parties to supplement the records because "the evidence regarding the status of WASA's contract with Givoo or any successor is contradictory and incomplete"). The D. & O. in this case also recognized that the WASA claim was not settled until September 2006, long after Givoo made its Hope Creek hiring decisions. The failure to hire Bobreski in this case fell in between the ALJ's liability ruling in 2005 and the settlement of that case in 2006. Consequently, as a matter of law, the ALJ's findings establish that Bobreski's protected activity stemming from the Blue Plains Facility engulfed the adverse action in question in this case. As we have noted in previous Board

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[27] *See, e.g.*, Resp. Reply Br. at 9.

[28] Bobreski Post-Hearing Br. at 23.

decisions, temporal proximity in some cases can establish that protected activity was a contributing factor.[29] Accordingly, the skewed view of temporal proximity in this case is so fundamental to the ALJ's decision that, regardless of any other errors, it requires us to remand this case for reconsideration by the ALJ. Upon remand, the ALJ must reconsider her ultimate decision while seeing the protected activity and adverse actions as overlapping events rather than seven years apart.

3. Causation

Despite a fairly exhaustive analysis of the causation evidence, it is not clear whether the ALJ ultimately considered the circumstantial evidence as a whole when deciding the single question of causation. *See* 42 U.S.C.A. § 5851(b)(3); 29 C.F.R. § 24.109(a). As we noted earlier in this decision, the only express statutory requirements are protected activity, adverse action, and a causal connection between the two.[30] A causal link is established if Bobreski's protected activity was a "contributing factor." "Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[31] This means that the employee must prove that there was an unbroken causation line from the protected activity to the adverse action through either one act or several acts committed by one person or a combination of individuals involved in the decision-making chain.

When the employee presents a case based on indirect or circumstantial evidence, as in this case, each piece of evidence should be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence. Logically, as was done in this case, the ALJ may examine each piece of circumstantial evidence to determine how substantial it is. Then the ALJ must weigh the

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[29] *See, e.g., Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (temporal proximity was the key factor supporting the finding of causation).

[30] *See Paynes v. Gulf States Utils. Co.*, ARB No. 98-045, ALJ No. 1993-ERA-047, slip op. at 4 (ARB Aug. 31, 1999) (To show whether Payne prevailed by a preponderance of the evidence on the ultimate question of liability, the determinations to be made were whether he proved by a preponderance of the evidence that he engaged in ERA-protected activity, whether Gulf took adverse action against him, and whether Paynes' ERA-protected activity was a contributing factor in the adverse action taken) (citing *Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power & Light*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 6 (ARB Mar. 31, 1999)).

[31] *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). The plain meaning of this term is a factor "playing a significant part in bringing about an end or result." *Merriam-Webster Online Dictionary*. 2011. http://www.merriam-webster.com (May 19, 2011).

circumstantial evidence as a whole to properly gauge the context of the adverse action in question. Taken as a whole, the evidence may demonstrate that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity. Conversely, the evidence as a whole may demonstrate that none of the decision-makers knew about the employee's protected activity and thereby break the causation chain between the protected activity and the final adverse action.

Permanently fragmenting circumstantial evidence can distort the greater context. For example, terminating an employee's employment for being late to work obviously could be a valid employment decision considered alone. It becomes suspicious when other employees committed the same infraction and were not fired. The same termination becomes even more suspicious if it followed days after the affected employee disclosed corporate fraud. Suspicion will increase even further if the company had not applied the punctuality rule in years. With the introduction of each piece of circumstantial evidence, the focus remains on the proverbial preponderance gauge to see which way it ultimately moves, toward or away from a conclusion of discrimination. The ultimate conclusion could be wrong if the ALJ either mischaracterizes each piece of evidence or fails to ultimately view them as a whole on the same scale. In the end, the ALJ must look at all of the circumstantial evidence as a whole. [32]

A. Additional Findings Are Needed as to Givner's Influence.

In this case, Bobreski argued that Givner, Morgan, and Law each participated at some level in the selection process and that his protected activity affected their participation. Comp. Br. at 33-36. There is no question that Givoo's role was to staff the Hope Creek 2006 outage. The ALJ found that the hiring process began with Givner, Givoo's manager of plant services. D. & O. 13. Bobreski's focus also began with Givner. Without citing any record support, Givoo incorrectly argues that the ALJ found Givner played "no part" in the hiring decision. Respondent's Brief at 21. We begin with the ALJ's findings and conclusions pertaining to Givner.

The ALJ expressly and implicitly found that Givner was involved at some level in the hiring process. The ALJ found that Givner oversaw the "day-to-day operations, including seeking contracts and managing employees." D. & O. at 13. This would include the Shaw Stone & Webster contract. After the contract was secured, Shaw told Law that Givoo would be in charge of the staffing, and Law would not be in charge as he had been in the past. *Id.* at 9. Law was told to turn over his "list of technicians" to Morgan. *Id.* Law was upset by this change. Law gave the list to Givner, who noticed Bobreski's name on it. *Id.* at 14-15. Givner then turned the list over to Morgan. *Id.* at 15. Givner expressly requested that one particular individual (Stan Mica) be hired. *Id.*. Having recognized that Givner was involved in the hiring process, even if he was the "least involved," the ALJ should have made a clear finding as to whether Givner was a contributing factor or influenced in any way the ultimate decision as to Bobreski.

[32] We note that the ALJ also has a duty under applicable regulations to make his or her decision based on the record as a whole. *See* 29 C.F.R. § 18.57(b).

Instead, the ALJ made narrow and ambiguous findings pertaining to Givner's influence on the decision to reject Bobreski. She expressly stated that she was "skeptical" that Givner was willing to hire Bobreski and that such alleged willingness was "inconsistent with the evidence." The ALJ found that there was no evidence that Givner "expressed an opinion regarding whether Complainant should be hired" and that he was not "directly" involved. *Id.* at 22. She found that Givner "never communicated a preference. *Id.* The ALJ acknowledged that "it was possible" for Givner to "interject" his opinion but that Bobreski failed to prove that such "interference occurred." *Id.* at 23. The ALJ found that Givner was not involved in the "compilation of the list of eligible technicians" or in the "decision-making part" of the hiring process. But the question is not whether Givner was "directly" involved or whether he was involved in the "compilation" of a list of technicians; it is whether Givner influenced the process that led to Givoo's refusal to hire Bobreski.

The ALJ must expressly find and explain whether the record as a whole does or does not support Bobreski's claim that Givner influenced the hiring decision as it pertained to Bobreski. The record as a whole or totality of circumstances includes, among other things: (1) the ALJ's skepticism that Givner would ever hire Bobreski; (2) Law hired Bobreski twice in 2005 to work at the Hope Creek/Salem Plant for outages not involving Givoo; (3) Law cited no reasons related to any changed circumstances between the last date he hired him and the 2006 Hope Creek outage; (4) the hiring process changed when Givner secured the contract for the Hope Creek NGS, as Law explained, to a "partnership" with Givoo; (5) Law was required to send his technician list to Givoo and, in fact, it went to Givner first and then Morgan; (6) Law had previously worked for Givner;[33] (7) Givner saw Bobreski's name on the list; (8) Morgan cited absolutely no reason for rejecting Bobreski's name (other than relying on Law's unexplained decision); (9) Givoo terminated Bobreski's employment and never hired him again; (10) Givner reported Bobreski as a security risk in 2000; (11) Bobreski's won his suit against WASA in 2005, a utility plant operator with whom Givoo had a long-term contract stretching from at least 1999 to 2006; (12) Givoo hired Bobreski a number of times before the 1999 Blue Plains Incident; (13) Bobreski called Law and Morgan and was given shifting explanations about the hiring process; (14) Givner and Morgan gave shifting stories during the OSHA investigation and hearing, including that Givoo did not know where Bobreski was even though he had just won his lawsuit against WASA in 2005 and was still litigating that claim in 2006 and (15) Givner testified that his staff had to "scramble" to hire the ninety technicians that were required to staff the Hope Creek NGS outage because availability was an issue. If the ALJ finds that the record as a whole establishes that Givner influenced the ultimate decision to reject Bobreski, then she must decide whether Bobreski's protected activity was a contributing factor in Givner's influence, even if it was based solely on a fear of losing the Hope Creek contract.[34] If the ALJ finds that Givner improperly influenced the ultimate decision as to Bobreski, the ALJ's findings as to Morgan's role as the final decision-maker becomes irrelevant or redundant.

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[33] The ALJ expressly found that Law's employment with Givner was "significant" and further findings as to the significance the ALJ placed on this factual issue are necessary.

[34] Law testified that it was made clear that there was concern about the Hope Creek outage being successful. Tr. at 142-43.

A recent Supreme Court case, *Staub v. Proctor*,[35] provides a good example of cases where improper influence occurs early in the decision-making chain and then unlawfully influences an allegedly neutral and unknowing final decision-maker. [36] In *Staub*, the Court held that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus. The employee, Staub, was a member of the U.S. Army Reserve and sued his employer, Proctor Hospital under a provision of the Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibiting discrimination against employees who serve in the uniformed services.[37] Staub's direct supervisor and second level supervisor resented Staub's military obligations because they felt it placed additional scheduling burdens on other employees. Staub's immediate supervisor issued Staub a "Corrective Action" requiring Staub to notify either his immediate or second level supervisor whenever he left his desk. Subsequently, Staub's second level supervisor reported to a third level supervisor that Staub had violated the Corrective Action. Staub's third level supervisor relied on this report in terminating Staub's employment. In his retaliation claim under USERRA, Staub argued that Proctor Hospital violated USERRA because his immediate and second level supervisors unlawfully influenced the third level supervisor's ultimate decision to discharge Staub. A jury found in favor of Staub based upon a finding that his military status was a motivating factor in the decision to discharge him. The Seventh Circuit reversed, holding that such a claim (referred to as a "cat's paw" claim) cannot succeed unless the decisionmaker relied almost exclusively on information provided by a nondecisionmaker (with discriminatory animus) in making the ultimate adverse personnel decision. The Supreme Court reversed the Seventh Circuit, finding that if a supervisor acts with antimilitary animus, intending to cause an adverse employment action, and if that act is a proximate cause of the final personnel action, then the employer is liable under USERRA. The *Staub* Court explained that the crux of the anti-discrimination provision in USERRA, like that in Title VII, lies in determination of whether discrimination was "a motivating factor" (or contributing factor) in the adverse employment action.[38]

Similarly, in ERA cases, the whistleblower statute focuses on whether protected activity was a "contributing factor," not whether it was the sole or substantial factor of the final decision-

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35 131 S. Ct. 1186 (2011).

36 Givoo objected to Bobreski's recent supplemental brief on the *Staub* case. The Board was already aware of this significant decision from the Supreme Court before Bobreski filed his supplemental brief.

37 38 U.S.C.A. § 4311 (West 2002).

38 38 U.S.C.A. § 4311(c); 42 U.S.C.A. §§ 2000e-2(m)(Thomson Reuters 2011). *Cf. Arendale v. City of Memphis*, 519 F.3d 587, 604 n.13 (6th Cir. 2008) ("When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.").

maker.[39] Consequently, on remand, it is critical for the ALJ to consider all of the circumstantial evidence and fully describe what level of influence she believed Givner had, if any, over the hiring process that led to Givoo's rejection of Bobreski. If Givner influenced the ultimate decision, then the ALJ must reconsider whether Givner's influence was motivated in any way by Givner's protected activity that was still ongoing during the Hope Creek 2006 hiring process.

B. Morgan's Role in Selection Process

Bobreski also appealed the ALJ's findings that Morgan lacked knowledge of Bobreski's protected activity. Bobreski argues that the knowledge could be inferred. The issue of knowledge is a necessary part of the single question of causation and similarly requires that the evidence be considered as a whole. Consequently, similar to the issue of Givner's role in the decision-making process, we find that the ALJ made the same error in failing to expressly consider the evidence as a whole.[40] In addition, we find that some of the ALJ's findings were ambiguous or inconsistent with the undisputed facts or other fact findings and may have materially affected the ALJ's ultimate conclusion as to Morgan's knowledge.

In deciding whether Morgan knew about Bobreski's protected activity, the ALJ expressly analyzed five factual issues. D. & O. at 26-27. Those issues were: (1) Morgan's relationship with Bobreski; (2) a 2003 telephone call from Bobreski to Morgan; (3) Morgan's "close relationship with Respondent's management;" (4) that people in the "industry" discussed Bobreski's case against WASA/Blue Plains; and (5) inconsistencies between Morgan's hearing testimony and statement to OSHA. We have already stated that the ALJ should have expressly considered the record as a whole and we need not repeat the list we provided earlier in our discussion. *See* "Causation" discussion, *supra*. In addition, as to Morgan's knowledge or lack of knowledge, the ALJ's limited discussion materially contradicted undisputed evidence in the record or created material ambiguities that must be resolved upon remand. First, there was a material ambiguity when the ALJ mischaracterized Morgan as being "close to Respondent's management" when the ALJ's findings establish that Morgan *was* "management." Morgan was

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[39] *See Byrd v. Illinois Dep't of Public Health*, 423 F.3d 696, 708 (7th Cir. 2005) ("If an employer simply rubber-stamps a recommendation tainted with illegal bias, the employer is liable for the harm caused unless the employer took action against the complaining employee for independent reasons untainted by any illegal motive."). The "contributory factor" test prevents "an employer from escaping liability by setting up many layers of pro forma review, thus making the operative decision that of a subordinate with an illicit motive." *Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

[40] *See Varnadore v. Oak Ridge Nat'l Lab.*, ALJ No. 1992-CAA-002 (ALJ June 7, 1993) (In this case, the ALJ properly recognized that "[k]nowledge of protected activity may be inferred from the record as a whole."). *See also Frady v. Tennessee Valley Auth.*, 1992-ERA-019, slip op. at 7-8 (Sec'y Oct. 23, 1995) (in which the Secretary found that the circumstantial evidence including that Frady had made protected complaints to TVA management in the past and witness testimony about widespread knowledge about Frady's complaints demonstrated the requisite knowledge on the part of the TVA).

among the top three Givoo managers, pertaining to staffing and service contracts, and he was one of only six permanent employees.[41] The ALJ created a second ambiguity, in discounting Bobreski's argument that Morgan might have heard about Bobreski's whistleblower victory against WASA, and by noting that Morgan worked in Canada sometimes. She did not discuss or explain the significance of Morgan's statement that he worked at Hope Creek/Salem Island at the end of 2005, where Law and Bobreski were working at the end of 2005. So, Morgan was not simply in the "industry," but actually working at the same nuclear plant during a critical time.

There were other critical ambiguities in the ALJ's findings. In addressing the evidence related to the alleged inconsistencies in Morgan's testimony and statements, the ALJ stated that the alleged inconsistency would only affect Morgan's "general" credibility but not serve as "indirect proof" of his knowledge of Bobreski's protected activity. It is unclear whether the ALJ was stating a general principle of law or a specific finding particular to Morgan. As a general legal principle, it is incorrect because a witness's inconsistency on one point permits a factfinder to reject the entire testimony as untrustworthy, including a denial of knowledge.[42] The inconsistencies were material. For example, the shifting testimony as to when Bobreski spoke to Morgan about the Hope Creek outage involved critical timing issues in the hiring process. Bobreski provided telephone records showing that he telephoned Law or Morgan on February 27, March 20, and March 21, 2006, before Givoo concluded hiring for the Hope Creek outage on March 29, 2006, and long before Givner's misstatement to OSHA during the investigation of this matter. *See* D. & O. at 17. There were also inconsistencies about the application process and the ALJ recognized some of the inconsistency when she rejected the testimony that submission of a resume was mandatory. The ALJ specifically found that application requirements did not exist. *Id.* at 20. The most glaring inconsistency is that Givner and Morgan said they would hire Bobreski and that he was qualified but, in fact, they did not hire him in 2006 or at any time after the Blue Plains Incident in 1999.

Upon remand, the ALJ must expressly decide the issue of Morgan's knowledge based on the record as a whole and to clarify the inconsistencies identified our opinion.

C. Pretext

In addition to or in conjunction with temporal proximity evidence and other circumstantial evidence in this case, an employee can prove or buttress a whistleblower claim by

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[41] Given that there were only six permanent employees, it is unclear whether Givner, Morgan, and Moore where the only permanent managers for Givoo.

[42] *See* Am. Jur. 2d Witnesses § 1008 (2011) ("Evidence of false sworn testimony given by a witness in one case conflicting with evidence given by the same witness in another case casts doubt upon his or her entire testimony"). *See also U.S. v. Gilkeson*, 431 F. Supp. 2d 270, 277 (N.D.N.Y. 2006) (partial false testimony on material issue allows but does not require rejection of entire testimony upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything).

proving that the employer's proffered reasons were pretextual (not credible).[43] When the proffered reasons for the adverse action are proven to be false, this evidence coupled with the complainant's evidence that he was qualified, applied, and was rejected suspiciously for the job in question may permit the trier of fact to find discrimination.[44] Pretext can be demonstrated in many ways. One way is by demonstrating that the proffered reasons were conspicuously missing from previous documentation.[45] Shifting explanations could also constitute evidence of pretext.[46] Vague and subjective reasons about personality issues may also suggest that the employer's reasons are pretextual or in reality complaints about whistleblowing. [47] In the end, all pretext evidence should be weighed with all of the circumstantial evidence to determine the issue of causation after an evidentiary hearing.

In this case, Bobreski presented substantial evidence of pretext that the ALJ did not adequately address. For example, contrary to her own findings, the ALJ determined that Givoo "articulated a legitimate business reason for declining to hire Complainant," but she did not identify that "legitimate business" reason. D. & O. 28. The ALJ had determined Givner "never communicated a preference" and was involved in the "hiring decision." *Id.* at 22-23. Morgan was the only other Givoo employee involved in the staffing decisions and the only reason he gave was that he relied on Law, who said "not at this time." There is no evidence in the record

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[43] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517 (1993).

[44] *Id.* at 511. *See Priest v. Baldwin Assocs*., 1984-ERA-030 (Sec'y June 11, 1986) (the Secretary reversed the ALJ's ruling through reliance on pretext evidence).

[45] In *Priest*, 1984-ERA-030, the Secretary found pretext where "several additional facts not mentioned by the ALJ" were "highly significant" and one of the employer's proffered reasons at hearing was not previously documented. *Id*., slip op at 7, 10, citing *Marathon Le Tourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983).

[46] In *Speegle*, ARB No. 06-041, the Board reversed the ALJ's denial of the complainant's claim because the ALJ failed to adequately explain his interpretation of the employer's shifting explanations for discharging the complainant but not others who were similarly situated. *See also Hoffman v. Bossert*, 1994-CAA-004, slip op. at 5 (Sec'y Sept. 19, 1995) (the Secretary found that the respondent's shifting explanations were relevant because they strongly indicated that lack of work and low seniority were a pretext).

[47] *See, e.g., Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor*, 992 F.2d 474, 481 (3d Cir. 1993) (the alleged "personality" problem or deficiency of interpersonal skills was "reducible" to the problem of the inconvenience caused by the employee's pattern of complaints); *Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (employer's expectation that an employee be a 'team player' to the point that it interferes with protected activity is prohibited); *Dodd v. Polysar Latex*, 1988-SWD-004, slip op. at 8 (Sec'y Sept. 22, 1994) (supervisor claimed that he recommended termination after considering complainant's deteriorating relationships, attitude, and performance, but his testimony taken as a whole showed that he recommended termination solely because of complainant's conflict with another manager over complainant's protected complaints).

that Morgan and Law discussed why Law said, "not at this time." When asked at the hearing to elaborate, Law relied on vague examples of events that allegedly happened many years before and certainly before Law hired Bobreski twice in 2005. *See* Tr. at 153. He did not explain why he was comfortable hiring him four months earlier for the Salem NGS but not the Hope Creek NGS when Givner was involved. If the ALJ attributed Law's reasons to Morgan, then the legal basis for doing so must be explained, especially where the ALJ did not attribute Law's knowledge and motive to Morgan. There were findings and vague testimony that Bobreski was dropped lower on the hiring list, but all of this is inconsequential testimony because it is undisputed that his name was reached and rejected. In addition, there is no documentary evidence in the record showing that his name was "lowered." The verbal testimony and the ALJ's findings are unclear as to how the list used for the Hope Creek outage could be the very same list Law used in 2005 and simultaneously reflect that Bobreski's name was lowered. The testimony and findings were also unclear as to whether Morgan or Law really made the decision to reject Bobreski.[48] Ultimately, we saw no legitimate reasons in the record that were offered by Givoo. To be clear, the burden of proof always remains with Bobreski at a hearing on the merits to prove his claim by a preponderance of the evidence. Nevertheless, to the extent that Givoo presented evidence of legitimate business reasons at the hearing the ALJ must clearly explain her findings as to what those reasons were and how they affect the ultimate question of causation when considered along with all of the circumstantial evidence presented by Bobreski.

CONCLUSION

In this case, the issues of protected activity and adverse action are settled, but we remand the issue of causation for further findings on several grounds. With respect to protected activity, substantial evidence of record supports the ALJ's fact findings that Bobreski engaged in ERA-protected activity, but that protected activity continued into September 2006. With respect to adverse action, it is established that Bobreski experienced adverse employment when Givoo failed to hire him for the Hope Creek 2006 outage. On the issue of causation, the ALJ must make additional and sufficient findings based on the circumstantial evidence as a whole and consistent with our opinion, that: (1) the temporal proximity between the protected activity and the adverse action was overlapping and not a seven-year gap; (2) Givner's influence, if any, on the ultimate adverse action must be determined by viewing all of the circumstantial evidence; (3) Morgan's knowledge or lack of knowledge of Bobreski's protected activity must be analyzed based on all of the circumstantial evidence as a whole; (4) further clarification is needed as to Givoo's legitimate business reasons; and (5) the issue of pretext must be weighed along with all of the circumstantial evidence.

If the ALJ finds that the overlapping temporal proximity and/or the record as a whole establishes that Bobreski's protected activity was a contributing factor to the adverse action, then the ALJ must provide additional reasons and bases explaining whether Givoo has sufficiently

[48] Bobreski accurately referred to this shifting responsibility as playing "hot potato" with Bobreski's name. Comp. Post-Hearing Br. at 35.

demonstrated that it would have taken the same action in the absence of the protected activity.[49] It is within the ALJ's discretion whether to allow additional oral or written argument by the parties on any of the preceding issues pertaining to causation.

ORDER

For the foregoing reasons, the Recommended Decision and Order is **REVERSED** and **REMANDED** for further findings consistent with this decision.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

[49] We recognize that there are different standards for whether a respondent has demonstrated that it would have acted in the same way absent protected activity under the various statutes this case implicates that may need to be taken into account on remand.