



In the Matter of:

WILLIAM SMITH,

ARB CASE NO. 14-027

COMPLAINANT,

ALJ CASE NO. 2009-ERA-007

v.

DATE: February 25, 2015

DUKE ENERGY CAROLINAS, LLC,

and

ATLANTIC GROUP, d/b/a DZ ATLANTIC,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Scott Oswald, Esq. and Adam Augustine Carter, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia; Jason Zuckerman, Esq.; *Zuckerman Law*; Washington, District of Columbia

For the Respondent, Duke Energy:

Kiran Mehta, Esq. and Molly L. McIntosh, Esq.; *Troutman Sanders, LLP*; Charlotte, North Carolina

For the Respondent, DZ Atlantic:

Lewis M. Csedrik, Esq. and Jane T. Accomando, Esq.; *Morgan, Lewis & Bockius LLP*; Washington, District of Columbia

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Corchado, concurring. Judge Royce, dissenting.

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act (ERA), as amended, and its implementing regulations. 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA); 29 C.F.R. Part 24 (2013). William Smith, a security guard, filed a complaint with the Occupational Safety and Health Administration (OSHA). Smith alleged that Duke Energy Carolinas, LLC (Duke Energy) and DZ Atlantic (collectively, Respondents) violated the ERA by releasing him from his duties, revoking his unescorted access authorization, and terminating his employment because he reported certain safety violations. OSHA dismissed the complaint. On September 29, 2010, after an evidentiary hearing, a Department of Labor Administrative Law Judge (ALJ) entered a Decision and Order (D. & O. I) denying the complaint. Smith petitioned the Administrative Review Board (ARB) for review. On June 20, 2012, the ARB entered a decision and order reversing the ALJ's ruling on contributing factor and remanding for a determination whether Respondents proved by clear and convincing evidence that the same actions would have been taken absent the protected acts. On January 15, 2014, the ALJ entered a Decision and Order on remand (D. & O. II), determining that Respondents met that burden of proof, and dismissed the complaint. Smith again petitioned for review. We affirm.

BACKGROUND

A. Facts

1. Nuclear Regulatory Commission fire safety regulations and Duke Energy's fire safety policy

The facts in this case are set out in prior orders.¹ Duke Energy, a licensee of the Nuclear Regulatory Commission (NRC), co-owns the Catawba Nuclear Station. Regulations promulgated by the NRC require licensees to comply with certain safety standards. Section 50.48(a)(1) of 10 C.F.R. requires licensees to maintain a "fire protection plan that satisfies" specific standards set out in the regulation and the plan must "[d]escribe the overall fire protection program for the facility." The description must include, among other things, "[a]utomatic and manually operated fire detection and suppression systems." 10 C.F.R. § 50.48(a)(2)(ii). The regulations further specify that any licensee, employee of a licensee, or contractor who provides "any components, equipment, materials, or other goods or services that relate to a licensee's or applicant's activities in this part, may not:"

- (1) Engage in deliberate misconduct that causes or would have caused, if not detected, a licensee . . . to be in violation of any rule,

¹ See *Smith v. Duke Energy*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ALJ Sept. 29, 2010) (D. & O. I); *Smith v. Duke Energy*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012); *Smith v. Duke Energy*, ARB No. 14-027, ALJ No. 2009-ERA-007 (ALJ Jan. 15, 2014) (D. & O. II).

regulation, or order; or any term, condition, or limitation of any license issued by the Commission; or

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

10 C.F.R. § 50.5(a). The regulations further state:

10 C.F.R. § 50.9 Completeness and accuracy of information.

(a) Information provided to the Commission by . . . a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

To satisfy the NRC's regulatory requirements for fire safety, Duke Energy published a Nuclear Safety Directive (NSD) setting out requirements for worker safety. Section 105 of the NSD states that "Duke Energy Corporation is responsible for the quality of work performed at the Nuclear Sites and ensuring that individuals have the training needed to enable them to work safely." NSD 105.1.2 (RXD 14 at 130). Section 316 of the NSD sets out the "requirements and responsibilities for reporting fire protection feature impairments and insure proper compensatory actions are satisfied for licensing, insurance and good fire protection practices." NSD-316.1; RXD 19 at 444. Under that directive, a "Firewatch Patrol" is a "type of impairment firewatch that requires inspection of the affected area on routine intervals. . . ." NSD-316.4; RXD 19 at 446. The "Hourly Firewatch" is a "type of impairment firewatch that requires inspection of the affected area at least once per hour during the entire time of impairment." *Id.* The Impairment/Compensatory Action (ICM) Form is "used to document the fire protection feature impairment, the compensatory action, and to document fire watch surveillance by the designated fire watch person." NSD-316.4; RXD 19 at 447. The Directive further reads:

316.5.5 Personnel and Supervision Responsible for Performing an Impairment Firewatch

- Personnel responsible for performing an impairment firewatch are responsible for understanding the impairment, reason for the impairment, and the area to be surveyed.

. . . .

- Personnel performing the impairment firewatch are responsible for observing conditions which indicate incipient stages of a fire (smoke, flame, smoldering) and any changes of conditions that could increase fire risk

RXD 19 at 448-49.

NSD-316 requires firewatchers to complete a firewatch surveillance log. RXD 20 at 454 (Impairment and Compensatory Measures Form). The firewatch surveillance log form requires information from “the person currently responsible for the fire watch tours” and is subject to NRC inspection. D. & O. I at 83 (citing RXD 19, 20; RXZ B2); *id.* at 95. The DZ Atlantic Safety Manual and Handbook requires workers to “adhere to the safety rules and regulations in existence at the site where they are working.” D. & O. I at 71 (citing CX 72, 75; RXD 13, RXZ B1). The Safety Manual directs DZ Atlantic workers to “bring to [the company’s] attention any nuclear safety concerns.” RXZ B1 at 46. The Manual directs as follows: “Please read this manual carefully and keep it with you on the job, refer to it often, and if you see unsafe acts or work situations report them to your supervisor immediately.” *Id.* at 4. The Manual states: “Any violation of the . . . rules may be grounds for termination.” *Id.* at 44.

2. Events leading to Smith’s termination on February 21, 2008

Smith began working as a firewatcher for DZ Atlantic, a contractor to Duke Energy, in February 2007. D. & O. II at 9, 10. Duke Energy granted Smith unescorted access authorization to the power station based on DZ Atlantic’s authorization documentation so that he could perform his job as a firewatcher. *Id.* at 10. Smith worked with Cathy Reid, who was his partner for the night shift, and Chris Borders and Jeffrey Pence, who worked the day shift as partners. *Id.* at 11-12. A group designated as Single Points of Contact (SPOCs) that included Duke Energy supervisors Claude Mabry and David Hord oversaw their work. *Id.* at 11. The SPOCs required the firewatchers to check in daily at the start of their shifts, and were available during firewatch shifts to receive any reports of discrepancies. *Id.* In January 2008, Duke Energy Supervisor Hord informed firewatchers at the Catawba Plant that the NRC had determined that a nuclear station violated NRC regulations by falsifying firewatch logs. *Id.* at 12. Hord directed firewatchers at Catawba, including Smith, to follow proper procedures for maintaining accurate firewatch log books.

On February 12, 2008, during the day shift that Borders and Pence were working, Borders signed the firewatch log indicating that she completed inspections that day at 15:50, 15:55, 15:58, 16:01, and 16:04. D. & O. II at 12. Borders, however, left work at around 15:10, and Pence agreed to inspect her last rounds for her. That afternoon, Smith arrived at Catawba Nuclear Station for the start of his shift at 15:45. Smith noticed that Borders had left the facility for the day, and that there was a blank space for the 14:50 inspection, Borders’ signature on the line for the 15:50 time period, and a blank space for the 16:50 inspection. When Pence entered the work area at 16:10, Smith inquired about the firewatch log and the first blank inspection space for 14:50. *Id.* at 13. Pence stated that he would sign for that time period. Smith asked Pence where Borders was since she signed for the 15:50 inspection. Pence responded that Borders had left work early, and that he was completing her shifts so that she would get paid for extra time worked. Smith informed Pence that the firewatch log must be corrected to reflect that Pence completed the inspection, and that if not corrected, Smith would report the discrepancy to management. *Id.* at 26. Pence stated that he would correct the log. *Id.* at 13. Before leaving

work, Pence signed the two blank spaces for inspections and did not correct the inspections that Borders had signed but not completed. *Id.*; see also RXZ D8 and RXD 21. Borders' signature remained on the log for all five times periods that she had signed before she left.

Two hours after Smith confronted Pence about the discrepancy in the logs, Pence left the plant and Smith signed the same firewatch log with Borders' signature still on it. D. & O. at 26. Smith signed the log book five more times during the course of his shift, and left the plant at the end of his shift without reporting the discrepancy committed by Borders and Pence on the February 12 firewatch log. Smith worked again on February 14 and 15, and signed the log book with the discrepant firewatch reporting from February 12. *Id.* at 13.

On February 17, 2008, Borders informed Reid that Smith was spreading rumors about Borders' personal life and reporting on her time sheet. Borders told Reid that she would get back at Smith by reporting to the Human Resources Office that Smith was sexually harassing her. Borders raised those allegations with Duke Energy Supervisor Mabry later that day. Mabry informed Duke Energy and DZ Atlantic managers. Reid informed Smith about Borders' allegations.

On February 18, Smith reviewed the firewatch log dated February 12, and saw that Borders' signature was still on the form for the 15:50 inspection; the inspection that Pence had performed. The next day, February 19, Smith arrived at work and reported to DZ Atlantic Project Manager Larry Ray for an interview. *Id.* at 14. DZ Atlantic Human Resources Manager Ellen Simmons was present by telephone. Ray and Simmons notified Smith that Borders had accused him of sexual harassment. *Id.* at 15. Smith denied the allegation. After Simmons asked Smith why he thought that Borders would make such a claim, Smith responded that Borders thought that he was aware of an affair that she was having, and that she had falsified her timesheets. Smith told Ray and Simmons about the falsification by Pence and Borders that occurred on February 12. Simmons told Smith that she was investigating the sexual harassment complaint and asked Smith for more time to investigate the falsification matter. After the interviews, Simmons concluded that she had insufficient evidence to prove or disprove Borders' sexual harassment complaint. Later that same day, Smith reported to Duke Energy Supervisor Hord that Borders raised sexual harassment allegations against him because of her fear that Smith would disclose that she had signed the firewatch log on February 12, even though she had not completed the inspection. Hord notified Duke Energy Station Manager Danny O'Brien.

On February 20, O'Brien directed DZ Atlantic to place the four firewatchers on leave pending an investigation. *Id.* at 16. The next day, DZ Atlantic Project Manager Michael Henline, Duke Energy Station Manager Danny O'Brien, and other Respondent managers interviewed Borders, Pence, and Smith about the firewatch log discrepancy of February 12. The investigation confirmed that, among other things, Borders signed the firewatch log on February 12, even though Pence completed the inspection. Henline concluded that Reid was not aware of the firewatch log falsification. During Smith's interview, Henline inquired why Smith delayed in reporting Borders' pre-signing. Smith replied that he did not think of it at the time. Smith stated that he reported the discrepancy on February 19, because he wanted to report the problem

before the firewatch logs were turned in at the end of the month and because the discrepancy began to bother him. However, Henline believed that Smith's failure to report the falsification until confronted with a sexual harassment charge raised significant integrity and trustworthiness issues. *Id.* at 27. Henline saw "Smith's inaction and failure to report the falsification issue for seven days and only when presented with the sexual harassment charge," as Smith deliberately deciding to withhold knowledge about the falsification. *Id.* Henline believed that the timing of Smith's disclosure created serious doubts about whether absent Borders' allegation, Smith would have ever reported the falsifications. *Id.* Henline terminated Smith's employment. *Id.* at 18. Later, Duke Energy denied Smith's unescorted access authorization with an unfavorable characterization. *Id.* at 19.

3. Nuclear Regulatory Commission Notice of Violation Imposed On Duke Energy (2009)

The NRC investigated the reporting of the February 12 firewatch log discrepancy "to determine if licensee contract personnel deliberately falsified records pertaining to fire watches at Catawba Nuclear Station." CX 51 at 1. On September 25, 2009, the NRC imposed on Duke Energy a Notice of Violation; the agency determined that Duke Energy violated 10 C.F.R. § 50.9(a), which states that "information required by the Commission's regulations, orders, or license conditions to be maintained by the licensee shall be complete and accurate in all material respects." CX 51 at 6. The NRC determined as follows:

Contrary to the above, between August 5, 2007, and February 12, 2008, multiple contract fire watch employees of DZ Atlantic Group at Catawba Nuclear Station created information required to be maintained by the licensee which was inaccurate by deliberately pre-signing the Impairment and Compensatory Measures (ICM) forms. Specifically, on seven occasions, the individual who signed the ICM form for the Unit 1 and 2 auxiliary feedwater (CA) pump rooms was not the person who performed the actual fire watch surveillance, resulting in inaccurate ICM forms being retained by the licensee. The ICM forms are material to the NRC, in that this information is created and maintained to provide sufficient evidence that the licensee's Fire Protection Program satisfies regulatory requirements.

Id. The NRC determined the violation to be Severity Level IV, stating as follows:

[F]ailure to provide complete and accurate information has the potential to impact the NRC's ability to perform its regulatory function. Although the investigation revealed that no fire watch surveillances were actually missed, this issue is considered more than minor due to the willful aspects of the performance deficiency. In accordance with the guidance in Supplement VII of

the Enforcement Policy, this issue is considered a Severity Level IV violation because it involved information that the NRC required be kept by a licensee that was incomplete or inaccurate and of more than minor safety significance.

Id. at 9-10; see also *id.* at 11-13.

B. ALJ Decision

On January 15, 2014, the ALJ issued a decision on remand determining that Respondents proved by clear and convincing evidence that they would have taken the same action against Smith even absent his protected acts. The ALJ analyzed the “sufficiency of [the] employer[’s] affirmative defense” under the parameters set out in *Carr v. Social Security Admin.*, 185 F.3d 1318 (Fed. Cir. 1999). D. & O. II at 24. The ALJ determined that strong evidence in the record supported the personnel actions that Duke Energy and DZ Atlantic took against Smith. The ALJ found that while Smith’s work record was good, that Duke Energy had strong evidence to support terminating Smith’s employment based on “the regulatory significance of an accurate firewatch log as a condition of retaining an NRC license; the serious breach associated with Ms. Borders’ falsification of the regulatory-mandated firewatch log, which subsequently led in part to an NRC notice of violation; and Mr. Smith’s deliberate withholding of his knowledge of Ms. Border’s falsification for several days, as well as his disclosure of the falsification only after being confronted with an allegation of sexual harassment.” *Id.* at 27.

The ALJ further found that DZ Atlantic had strong evidence to support its termination decision. The ALJ credited Henline’s testimony that Smith’s failure to disclose the record error “until confronted with a sexual harassment allegation raised significant integrity and trustworthiness issues.” *Id.* at 27. The ALJ stated that even though DZ Atlantic had a progressive disciplinary policy, “Mr. Henline chose termination because in addition to questionable integrity, Mr. Smith failed to provide a reasonable explanation for the seven day delay until February 19, 2008, when confronted with Ms. Borders’ allegation.” *Id.* at 27. The ALJ found no evidence that Duke or DZ Atlantic managers sought to retaliate against Smith due to protected activity. *Id.* at 28.

Finally, the ALJ observed that Duke Energy supervisors “acknowledged that no other employee had been released from duty for failure to promptly report a violation or discrepancy.” *Id.* at 29. Based on that finding, the ALJ concluded that the “evidentiary record is essentially inconclusive due to the lack of any comparison with non-whistleblower employees.” *Id.* at 29. The ALJ determined that DZ Atlantic “treats non-whistleblower employees with integrity issues in a manner similar to Mr. Smith—termination of employment with DZ Atlantic.” *Id.* at 29-30. The ALJ further observed that the two non-whistleblowers involved in the matter—Ms. Borders and Mr. Pence—were treated “[i]n a manner similar to . . . Mr. Smith.” *Id.* at 29.

Based on evidence in the record, the ALJ determined that Duke Energy and DZ Atlantic “prove[d] by clear and convincing evidence that they would have taken the same adverse personnel actions if they had learned of Mr. Smith’s seven day delay in reporting the firewatch falsification, and the circumstances of that disclosure, through some means other than the contents of his protected activity.” *Id.* at 30. Finally, the ALJ rendered “alternative findings regarding the appropriate remedies for Mr. Smith” in the event that the ARB vacated his ruling that Duke Energy and DZ Atlantic were not liable for violating the ERA. *Id.* at 30-38.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the ERA. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012). The ARB reviews the ALJ’s factual findings for substantial evidence and legal conclusions de novo. 29 C.F.R. § 24.110(b); *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 8 (ARB Apr. 25, 2014) (citations omitted).

DISCUSSION

A. Statutory And Regulatory Framework

To prevail on an ERA claim, Smith must demonstrate that protected behavior or conduct “was a contributing factor in the unfavorable personnel action alleged in the complaint.” 42 U.S.C.A. § 5851(b)(3)(C); 29 C.F.R. § 24.109(b)(1); *Smith*, ARB No. 11-003, slip op. at 6. Since in this case Smith has met his burden, Respondents can avoid liability by demonstrating “by clear and convincing evidence that [they] would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 24.109(b)(1); *Smith*, ARB No. 11-003, slip op. at 6, 9 (ARB June 20, 2013). The sole issue before us is whether substantial evidence supports the ALJ’s determination that Respondents met that burden.

B. Substantial Evidence Supports The ALJ’s Determination That Respondents Would Have Taken The Unfavorable Personnel Actions Against Smith Absent Protected Activity Due To His Seven-Day Delay In Reporting The February 12, 2008, Discrepancy In The Firewatch Logs

In *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014), slip op. at 12 ((internal footnote omitted), the ARB explained that in assessing “clear and convincing evidence,” the ERA requires consideration of

the combined effect of at least three factors applied flexibly on a case by case basis: (1) how ‘clear’ and ‘convincing’ the independent significance is of the non-protected activity; (2) the

evidence that proves or disproves whether the employer ‘would have’ taken the same adverse actions; and (3) the facts that would change in the ‘absence of’ the protected activity.

Evidence clearly and convincingly “supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.” *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012); see also *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 7 (ARB Feb. 29, 2012) (“Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’”) (quoting *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011) (internal quotation omitted)).² In this case, substantial evidence fully supports the ALJ’s determination that Respondents demonstrated clear and convincing evidence that they would have terminated Smith’s employment and revoked his badge absent any protected acts.

First, NRC regulations require Respondents to maintain a “fire protection plan that satisfies” specific standards set out in the regulation, and the plan must “[d]escribe the overall fire protection program for the facility.” 10 C.F.R. § 50.48(a)(1)(i). Duke Energy (licensee) and DZ Atlantic (contractor to the licensee) are required to avoid deliberate misconduct that would cause a licensee to “be in any violation of any rule, regulation, or order,” or that would “constitute[] a violation of a requirement, procedure, . . . or policy of a licensee” 10 C.F.R. § 50.5(c). The regulations require that information provided to the NRC be “complete and accurate in all material respects.” 10 C.F.R. § 50.9(a). Duke Energy promulgated a Nuclear Safety Directive for complying with NRC’s regulations for ensuring fire protection safety. Nuclear Safety Directive (NSD), RXD 14 at 130. The Directive requires firewatchers to complete a surveillance log at designated intervals, and the logs are “filled out by the person currently responsible for the fire watch tours.” D. & O. I at 83. The DZ Atlantic Safety Manual requires workers to promptly report safety concerns to company managers. See RXZ B1 at 44, 46. Employees who fail to adhere to the requirements set out in the Safety Manual may be subject to “[c]orrective action” that can include “termination.” Hearing Transcript (Tr.) at 911-

² The ALJ, in analyzing the question of clear and convincing evidence, applied factors set out in *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318 (Fed. Cir. 1999). *Carr* involved a petition for review of a final decision of the Merit Systems Protection Board authorizing the Social Security Administration (SSA) to remove complainant from her position as an administrative law judge. 185 F.3d at 1320. The court of appeals observed that assessing “whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, it will consider the following factors: the strength of the agency’s evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.” *Id.* at 1323. The ARB’s recent decision in *Speegle* was issued on April 25, 2014, three months after the ALJ’s Decision and Order of Remand that is on review before us in this case. While *Speegle* applies in our review, the analysis set out in *Speegle* is not unlike that set out in *Carr*, and the evidence supporting the ALJ’s ruling on Respondent’s affirmative defense is correct even applying the *Speegle* analysis.

912 (Henline). It is undisputed that Smith knew that on February 12, 2008, Borders pre-signed the firewatch log, and that Pence completed Borders' firewatch inspections so that she could leave early from her work at the plant. Respondents released Smith from his duties, revoked his unescorted access authorization, and terminated Smith's employment because of Smith's knowledge of this discrepancy, and his seven-day delay in reporting the discrepancy to Respondents' officials. *Supra* at 5.

Second, DZ Atlantic Manager Michael Henline, who was responsible for terminating Smith's employment, testified that it is important for workers to fill out the firewatch logs correctly "for the safety of the plant and operation." Tr. at 904. Henline testified that after investigating the firewatch issue, he determined that "Chris Borders had falsified [the] time sheet, Jeffrey Pence had covered it up, and Mr. Smith had delayed in bringing up the concern." Tr. at 923. Henline determined that the failure to report the discrepancy constituted an "integrity issue" that required Smith's termination. Tr. at 927. Henline testified that DZ Atlantic "felt it was a cover up for Ms. Borders leaving early that day." Tr. at 927. Henline testified that during an interview, Smith was not responsive to questions about his delay in reporting the discrepancy. Tr. at 928-929. Henline testified that Smith's reporting delay required his "[t]ermination, along with the rest [of the DZ Atlantic employees involved], because of integrity and trustworthy issues." Tr. at 929; see also Tr. at 930 (Henline testifying: "[W]hen I told [Smith] it was a unfavorable termination for an integrity and trustworthy issue for delaying bringing up the concern without a reasonable explanation, and he didn't say anything."). Duke Energy Manager O'Brien testified that in the interview with Smith, he learned that Smith was aware of the February 12 discrepancy, but that Smith "just didn't think about it at the time, and that once he did it began to bother him and he just wanted to report it before the firewatch logs were turned in at the end of the month." Tr. at 975. O'Brien believed that the discrepancy was a serious matter for Duke Energy. Tr. at 145. O'Brien testified about his concern that "if on the 12th when the incident initially happened, if we had missed a firewatch, then we would have had seven days of delay in reporting a potential event." Tr. at 148. O'Brien stated that on February 12, Smith should have "raise[d] the concern to at least the SPOC supervisors who they knew were there providing them oversight." Tr. at 166.

Protected activity will not shield an under-performing worker from discipline. *See, e.g., Formella v. U.S. Sec'y of Labor*, 628 F.3d 381, 391-93 (7th Cir. 2010); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("We have consistently held that an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination."). As a general matter, the whistleblower statutes the Department of Labor enforces "render[] whistleblowers no less accountable than others for their infractions or oversights." *Daniel v. Timco Aviation Svcs., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003). "It ensures only that they are held to no greater accountability and disciplined evenhandedly." *Id.*; *see, e.g., Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037, slip op. at 6, n.5 (ARB Oct. 17, 2012) ("Certainly, the undisputed evidence of Abbs' falsification of the log book and payroll record is 'clear and convincing evidence that [Con-Way] would have taken the same adverse action in the absence of the protected conduct.'). The ALJ in this case reasonably concluded that Respondents' "decision to release Mr. Smith from his fire

watcher duties and terminate his employment [was based on his] failure to promptly disclose that falsification demonstrated unsatisfactory trustworthiness, reliability, and integrity for a Duke Energy fire watcher and DZ Atlantic employee.” D. & O. II at 28. This determination is underscored further by the undisputed evidence that about 18 months later, on September 25, 2009, the NRC imposed on Duke Energy a Notice of Violation of 10 C.F.R. § 50.9(a), stemming from the firewatch reporting discrepancies that included the February 12, 2008 discrepancy involving Smith, Pence, and Borders. See *supra* at 5-6.

Finally, the evidence demonstrates that Smith was treated the same as the two other employees with whom he worked. See, e.g., *Speegle*, ARB No. 13-074, slip op. at 11 (circumstantial evidence can include “evidence of other similarly situated employees who suffered the same fate.”). Borders was terminated for pre-signing the log book and Pence was terminated for facilitating Borders’ pre-signing by performing her firewatch inspections on February 12, 2008. D. & O. II at 29. While Pence was eligible for re-hire, the ALJ credited Henline’s testimony that “Pence acknowledged that he should have corrected the fire watch log and explained that he thought the most significant factor was that he actually accomplished the fire watch round.” *Id.* The ALJ stated that “Smith’s explanation was that he didn’t think to report the falsification at the time he discovered it.” *Id.* Moreover, there is evidence in the record that DZ Atlantic had terminated a worker for failing to report another worker’s violation of a company rule. D. & O. I at 8; see also Tr. at 103 (Henline).

The ALJ’s ruling on Respondents’ affirmative defense is supported by substantial evidence. Smith’s failure to promptly report the firewatch reporting infraction and Respondents’ determination that Smith was not trustworthy and lacked integrity was clear and convincing evidence that Respondents would have taken the same adverse actions against him absent protected activity. See D. & O. II at 30 (“I conclude Duke Energy and DZ Atlantic have proven by clear and convincing evidence that they would have taken the same adverse personnel actions if they had learned of Mr. Smith’s seven-day delay in reporting the firewatch falsification, and the circumstances of that disclosure, through some means other than the content of his protected activities.”).

CONCLUSION

For the foregoing reasons, the ALJ’s Decision and Order on Remand is **AFFIRMED** and Smith’s complaint is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Corchado, *Administrative Appeals Judge*, concurring:

I concur in affirming the ALJ's decision and write separately to emphasize two points. First, in my view, failures to adhere to safety concerns in the nuclear plant industry, like proper fire watches and properly certifying that fire watches were in fact performed, are serious concerns regardless of whether such failures are a subject of protected activity or an employer's basis for discipline. In addition to the fire watch safety issue, Respondents were also concerned about Smith's integrity, another important concern in the nuclear plant industry. It is undisputed that Smith failed to disclose the fact of inaccurate certifications of fire watch logs. This means that the employer had clear and undisputed reasons, among other reasons, to question Smith's integrity, not ambiguous and subjective reasons. These reasons provided strong justifications for severe personnel actions against Smith, as the ALJ more fully explained.

Second, while I appreciate the benefit gained by looking at non-binding Merit System Protection Board decisions, we must remember that proper understanding of the whistleblower statutes under the Board's jurisdiction begins with the statutory text of the relevant whistleblower statute, as implemented by pertinent whistleblower regulations, and further explained by ARB precedent (unless expressly overturned by a federal court or the ARB per the Secretary's delegation of authority referenced above).³ Where the statutory and regulatory terms are plain, they should be applied as written.⁴ For example, the phrase "contributory factor" (a factor that contributes to a result) in the ERA whistleblower statute is a plain phrase and there is no need to look elsewhere to understand it.⁵ The "clear and convincing" phrase is not quite as clear but it obviously suggests a high standard, a point the ARB made long before its decision in *Speegle*.⁶ This higher burden makes sense because the statute imposes this burden on the employer after an employee has proven that a whistleblower violation *actually occurred*, that protected activity actually contributed to an unfavorable employment action. In *Speegle*, in further explaining the "clear and convincing" affirmative defense, the Board did not introduce a new standard but highlighted the mandate driven by the actual words of the affirmative defense clause in the ERA's whistleblower statute ("clear and convincing," "would have" and "absent the

³ The United States Supreme Court expressly warned against applying "rules applicable under one statute to a different statute without careful and critical examination." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

⁴ See *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, slip op. at 25 (ARB May 25, 2011) (There is no need for interpretation if the statute's meaning is plain and unambiguous).

⁵ See 42 U.S.C.A. § 5851(b)(3)(C).

⁶ See, e.g., *Talbert v. Wash. Public Power Supply Sys.*, ARB No. 96-023, ALJ No. 1993-ERA-035, slip op. at 3 (ARB Sept. 27, 1996) (the "clear and convincing" standard is higher than the preponderance standard and lower than the "beyond reasonable doubt" standard).

protected activity”).⁷ As the ALJ recognized, the statutory text requires that, after a violation has been established, Respondents must provide “clear and convincing” evidence of what they “would have done” in the “absence of” protected activity.

The record as a whole supports the ALJ’s finding that Respondents proved by clear and convincing evidence that they would have fired Smith over the fire watch and integrity issues. Consequently, despite the Board’s previous finding that Smith’s reporting was inextricably intertwined with the unfavorable employment actions,⁸ the statutory law expressly requires the ALJ to consider a hypothetical scenario when considering the employer’s affirmative defense: what Respondents would have done in the absence of Smith’s reporting. The difficulty lies in deciding how much hypothesizing to do with the facts. In this case, the ALJ did not need to hypothesize too much because, if he assumed only that Respondents discovered the violation another way, Respondents’ actions against Smith’s co-workers demonstrate how seriously Respondents treated the safety issues in this case.

LUIS A. CORCHADO
Administrative Appeals Judge

Joanne Royce, *Administrative Appeals Judge*, dissenting:

On his exit interview form, Smith wrote that he was fired for telling the truth.⁹ I agree. On February 19, 2008, Smith informed Duke Energy that Borders had accused him of sexual harassment because she feared he would report that she pre-signed for a fire watch round that she did not conduct. The following day, Duke Energy released all four fire watchers—regardless of their comparative culpability—“to get a fresh start with fire watchers at Catawba.”¹⁰ As Smith recognized,¹¹ his disclosures regarding fire log irregularities threatened to reflect poorly on Duke Energy. Inferentially, all four fire watchers were sacrificed as scapegoats for what the NRC later found to be “lack of licensee supervision” on the part of Duke Energy.¹² Smith was fired

⁷ See 42 U.S.C.A. § 5851(b)(3)(D).

⁸ *Smith v. Duke Energy*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 8 (ARB June 20, 2012).

⁹ D. & O. I at 109.

¹⁰ *Id.* at 106.

¹¹ Complainant-Appellant’s Appeal Brief at 20.

¹² D. & O. II at 21. Smith is no less eligible for whistleblower protection because he was also arguably a scapegoat. The purposes of the ERA whistleblower statute to encourage open lines of

because of the *contents* of his protected disclosures—namely, the existence of a faulty fire surveillance system—not only because of his status as a whistleblower. The ALJ erred legally and factually in ruling that Respondents proved by clear and convincing evidence that Respondents would have fired Smith in the absence of his protected disclosures.

The ALJ found that Smith first engaged in protected activity on February 12, 2008, when he advised Pence to correct inaccuracies in the fire logs after learning that Pence had conducted a fire watch patrol for which Borders had pre-signed. Believing that Smith reported her to Duke Energy management, Borders told Reid on February 17, 2008, that she planned to get Smith fired, which would “be easy if she claims sexual harassment since Mr. Smith is black.”¹³

Shortly thereafter, Borders reported to Duke Energy that Smith sexually harassed her, both physically and verbally. Later that day, Reid advised Smith that Borders intended to get him fired by accusing him of sexual harassment. Two days later, on February 19, 2008, Smith notified Duke Energy that Borders had accused him of sexual harassment because she thought he was going to report her for putting inaccurate information in the fire logs.¹⁴ The ALJ ruled this was protected activity. The following day, Duke Energy released all four fire watchers from service. The day after, on February 21, 2008, DZA fired all the fire watchers except for Reid who was transferred to another plant. Borders and Pence were fired because of their involvement in the falsification of the fire logs. Smith was fired ostensibly for “untrustworthiness,” because he delayed reporting the issue.¹⁵

The ALJ found that the evidentiary record strongly supported Respondents’ decision to fire Smith because he was not trustworthy or reliable.¹⁶ The ALJ based his finding largely on three findings of fact: (1) the seriousness of the breach of security resulting from Borders’ falsification of the fire watch log; (2) Smith’s *deliberate* withholding of his knowledge of Borders’ falsification and (3) Smith’s disclosure of the log inaccuracy only after being confronted with Borders’ allegation of sexual harassment.¹⁷ These findings are not supported by substantial evidence and the record falls short of providing the clear and convincing evidence necessary to prove Respondents’ affirmative defense. Additionally, the ALJ’s application of the clear and convincing burden of proof in this case constituted legal error.

communication and shield employees willing to disclose misconduct are ill-served by punishing Smith (and his colleagues) because Smith alerted Duke Energy to problems in its fire watch system.

¹³ D. & O. I at 100.

¹⁴ D. & O. II at 15.

¹⁵ *Id.* at 16-17.

¹⁶ D. & O. II at 30.

¹⁷ *Id.* at 26-27.

The ALJ ultimately found that Respondents reached their “decisions to release Mr. Smith from his fire watcher duties and terminate his employment on the non-discriminatory basis that Mr. Smith’s failure to promptly disclose that falsification demonstrated unsatisfactory trustworthiness, reliability, and integrity for a Duke Energy fire watcher and DZ Atlantic employee.”¹⁸

Caution is required in cases such as this one, where the basis of the adverse action (termination for delay in reporting violation) is so closely linked to the protected activity (reporting violation).¹⁹ Viewing the untimely report of a violation as an “independent” ground for termination can easily be used as a pretext for eviscerating protection for employees who report violations of law. Consequently, in cases in which the protected activity is virtually inseparable from the basis for termination, the fact finder must be particularly vigilant to assure that the respondent has met the high clear and convincing affirmative defense standard.

As noted in the majority decision, the ALJ did not have the benefit of the Board’s ruling in *Speegle*, which explained in detail the parameters of the high clear and convincing standard. “‘Clear’ evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. ‘Convincing’ evidence has been defined as evidence demonstrating that the proposed fact is ‘highly probable.’”²⁰ But an employer’s subjective determination of “unsatisfactory trustworthiness” as a basis for termination is almost by definition “ambiguous.” Subjective assessments of “untrustworthiness” by which Smith was measured are inherently open to bias. Appellate courts have observed that “subjective criteria can be a ready vehicle for [discrimination].”²¹ Subjective standards are difficult for courts to evaluate and difficult for employees to disprove and their use in employment decisions should be viewed with suspicion.²² As detailed below, there is not substantial evidence in the record to clearly and convincingly prove that Smith was “untrustworthy.”

¹⁸ *Id.* at 28.

¹⁹ *See Speegle*, ARB No. 13-074, slip op. at 11-13; *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 14 (ARB Oct. 26, 2012) (“Effective enforcement of the Act requires presumptive causation under circumstances such as Henderson’s, where viewing the ‘untimely filing of medical injury’ as an ‘independent’ ground for termination could easily be used as a pretext for eviscerating protection for injured employees.”).

²⁰ *Speegle*, ARB No. 13-074, slip op. at 11.

²¹ *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005); *see also Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective evaluations provide supervisors with a mechanism to indulge in bias, which cannot be objectively rebutted).

²² *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 808-09 (11th Cir. 1989).

As explained in *Speegle*, the express language of the statute requires that the “clear and convincing” evidence prove what the employer “would have done,” not what it “could have done,” in the absence of protected activity.²³ In this case however, the protected activity created the factual basis for the discipline. *Speegle* instructs that the ALJ must analyze Smith’s termination “in the absence of protected activity” and *without reliance* on any *facts closely linked* to his protected activity.²⁴ The ALJ failed to undertake such an analysis. Indeed each of the three principal reasons he cites in support of Respondents’ affirmative defenses is *based upon* the content of Smith’s protected activity.²⁵

The ALJ recognized the difficulty in literally applying the statute in this case; in the absence of Smith’s protected reporting there would have been no *delay* in reporting and no discipline. There is no question that in cases like this where the alleged violation is anchored in the protected activity, excising the protected activity (and related facts) removes the context for the discipline and diminishes the ability to determine what Respondents “would have done.”²⁶ Given the difficulty of a literal application of the affirmative defense in this case, a reasonable interpretation of congressional intent might be to require Respondents to convincingly show that they would have fired Smith solely for his delay in reporting some behavior comparable to the actual protected activity. There is insufficient evidence of record to meet this test.

In any case, the ALJ relied upon an altogether different test—one derived from *Watson v. Department of Justice*, 64 F.3d 1524 (Fed. Cir. 1995), in which the Federal Circuit held that the statutory phrase, “in the absence of the protected disclosure,” does not mean that the *contents* of a protected disclosure cannot be considered in connection with assessing the legitimate reasons for discipline.²⁷ But even if the test derived from *Watson* is applied, the ALJ’s critical findings of fact lack substantial evidence.

²³ *Speegle*, ARB No. 13-074, slip op. at 11.

²⁴ *Id.* at 11-12.

²⁵ For example, the ALJ credited the testimony of O’Brien (Duke Energy) (D. & O. II at 26) and Henline (DZA) (D. & O. II at 27) both of whom inferred untrustworthiness from the fact that Smith did not alert them to the fire log discrepancies until Borders falsely accused him of sexual harassment. But the ALJ may not consider this evidence to prove Respondents’ affirmative defense. *Speegle* explains that not only must the protected activity be excised under the affirmative defense burden, so must certain facts closely connected to the protected activity. In the absence of Smith’s first protected disclosure (to Pence), Borders would never have supposed that Smith would notify managers and she would not have falsely accused Smith of sexual harassment. Under these circumstances, Respondents had to show clearly and convincingly that they would have fired Smith for “untrustworthiness” absent Border’s sex harassment charge.

²⁶ *See Speegle*, ARB No. 13-074, slip op. at 13.

²⁷ D. & O. II at 23 (citing *Watson v. Dep’t of Justice*, 64 F.3d 1524, 1528 (Fed. Cir. 1995)).

As stated above, the ALJ made three principal findings in support of his conclusion that Respondents proved their respective affirmative defenses. First, the ALJ found that “the evidentiary record also demonstrates the magnitude and seriousness of Mr. Smith’s seven day delay in reporting the fire watch log falsification.”²⁸ While the evidence clearly demonstrates that Duke was concerned about the possible *failure to conduct* a fire watch or *missing* a fire watch round,²⁹ there is nothing to suggest that Duke Energy or DZA was greatly concerned about pre-signing fire watch logs, much less a delay in reporting such pre-signing. Pre-signing for fire watch rounds was common at Catawba,³⁰ and Duke Energy initially condoned the practice.³¹ When the NRC confronted Duke Energy with its pre-signing violations, Duke Energy informed the NRC that its bigger concern was assuring completion of the fire watches rather than the accuracy of the required documentation.³² Smith was well aware of the distinction.³³ When Smith first confronted Pence about Borders’s pre-signing, he asked Pence if he had performed the fire watch (for which Borders had signed).³⁴ Once Smith learned that Pence had indeed undertaken the fire watch, he advised Pence to correct the inaccurate fire log.

When Smith first reported Border’s fire log falsification to Hord, Hord’s original concern was about a *missed* fire watch.³⁵ But after the investigation of Smith’s allegation, Duke Energy and DZA managers learned that Pence had actually completed the fire watch and none was missed.³⁶ Ultimately, even the NRC agreed that these incidents had a “very low significance in

²⁸ *Id.* at 26.

²⁹ D. & O. I at 13, 15, 27.

³⁰ D. & O. I at 96, 97; D. & O. II at 16.

³¹ In June 2008, Smith informed Mabry that he was unable to complete a fire watch round for which he had signed in advance. Mabry completed Smith’s rounds, substituted his name on the log, and explained to Smith that if it ever happened again, simply correct the log. D. & O. II at 11. Hord never specifically told the fire watchers not to pre-sign the logs. D. & O. I at 24.

³² D. & O. II. at 21.

³³ Smith reported to Mabry in June 2007 that he pre-signed for a round that he was unable to complete (due to a temporary inability to access the inspection areas). Mabry assured Smith that Mabry would complete the inspection and correct the log. D. & O. II at 11.

³⁴ *Speegle*, ARB No. 13-074, slip op. at 11-12.

³⁵ D. & O. I at 15.

³⁶ Tr. at 100.

terms of safety.”³⁷ NSD-316 requires the fire watcher responsible for completing a tour to certify completion of the tour by signing the fire watch surveillance log. Borders pre-signed the logs for a tour actually completed by Pence and this inaccuracy violated 10 C.F.R. § 50.9(a), which requires licensee documentation to be accurate. However, pre-signing a log does not implicate the same safety and security concerns as a *missed* fire watch.

The ALJ failed to distinguish between these two very different violations when he found the evidence demonstrated the “magnitude and seriousness” of Smith’s delay in reporting. Smith did not delay reporting a *missed* fire watch; he only delayed reporting a technical inaccuracy in the fire log: namely, that Borders pre-signed for the round which Pence undertook and promised to correct. Both Henline and O’Brien testified that Smith would not have been required to report the log inaccuracies, had the logs been corrected.³⁸ There is insufficient record evidence to support the ALJ’s finding of the “magnitude and seriousness” of Smith’s delay in reporting log inaccuracies.

There is also a lack of substantial evidence to establish that Smith “*deliberately* decided to withhold his knowledge about fire watch log falsification.”³⁹ First of all, Smith did *not* withhold his knowledge for a week. As soon as he suspected that a fire watch may have been missed on February 12, 2008, he questioned Pence about it and, satisfying himself that the fire watch had been performed, he urged Pence to correct the inaccuracy in the fire log. Pence assured Smith he would correct the log.⁴⁰ The ALJ finds that Smith “chose” not to take the opportunity to look at the logs to determine if Pence had made the promised correction and “chose” not to report Border’s falsification.⁴¹ But these findings assume both that Smith was required to monitor the logs to ensure their accuracy and that he checked the log pages every day to determine whether the false entry had been corrected. The evidence of record supports neither assumption. The record evidence supports findings that Smith saw the inaccuracy on February 12 and February 18.⁴² There is no evidence that Smith noticed the inaccuracies on any other day. In fact, the only direct evidence regarding whether Smith “deliberately” delayed reporting was the testimony of Ray, DZA Project Coordinator, that he did not know whether Smith’s delay was intentional or unintentional.⁴³

³⁷ D. & O. I at 112; D. & O. II at 21.

³⁸ Tr. at 92 (Henline); Tr. at 151 (O’Brien).

³⁹ D. & O. II at 27 (*italics added*).

⁴⁰ *Id.* at 13.

⁴¹ *Id.* at 122, n.30.

⁴² *Id.* at 13-14.

⁴³ Tr. at 280 (Ray).

The ALJ also credited the testimony of O'Brien (Duke) and Henline (DZA) both of whom inferred Smith's untrustworthiness from the fact that he did not alert them to the fire log discrepancies until Borders falsely accused him of sexual harassment.⁴⁴ However, Borders' sex harassment allegation against Smith was *itself retaliation* for protected activity. Borders was angry at Smith because she (mistakenly) believed that Smith had notified Withers, a Duke Energy manager, about her falsification of the fire log. Borders told Smith's colleague, Reid, that it would be easy to get Smith fired by accusing him of sexual harassment, since he was a black man. Borders did just that.⁴⁵ Although Smith was ultimately exonerated of the harassment charge, the testimony of Smith's managers demonstrates that the existence of Borders' false and retaliatory accusations were inextricably intertwined with Respondents' reason for terminating Smith. Both O'Brien and Henline testified that they felt they could not trust Smith because he had not notified them of Borders' falsification until confronted by her sexual harassment charges. Borders' retaliatory charges directly influenced Respondents' decision to terminate Smith. This evidence supports a finding of illegitimate motive by Respondents⁴⁶—it does not, as the ALJ found, support a finding of “untrustworthiness” by Smith.⁴⁷

The *Speegle* decision also cautions that the relationship between an adverse action and the justification for the action should be examined for proportionality.⁴⁸ The ALJ noted that DZA had a progressive disciplinary policy—raising the obvious question of why it was not applied to Smith.⁴⁹ Prior to February 2008, Smith had a good work record.⁵⁰ Duke Energy supervisor Mabry testified that Smith was reliable and more proactive in reporting concerns than Smith's other three colleagues.⁵¹ Duke Energy supervisor Hord also testified that Smith was reliable and proactive.⁵² Nevertheless, the ALJ credited the testimony of the deciding officials

⁴⁴ D. & O. II at 27.

⁴⁵ *Id.* at 14.

⁴⁶ Compare with *Staub v. Proctor*, 131 S. Ct. 1186, 1190-1192 (2011) (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).

⁴⁷ The ALJ also failed to address the taint that Borders' harassment charge may have had on Respondents' subjective assessment of Smith's “trustworthiness.”

⁴⁸ *Speegle*, ARB No. 13-074, slip op. at 11.

⁴⁹ D. & O. II at 9.

⁵⁰ *Id.* at 26.

⁵¹ Tr. at 299-300; D. & O. II at 11.

⁵² Tr. at 332; D. & O. II at 26.

that Smith was “untrustworthy” because he delayed reporting Borders’ pre-signing of the fire log. Smith was never instructed not to pre-sign logs nor did he have an obligation to promptly report an inaccuracy in a log.⁵³ As mentioned, pre-signing was condoned by Duke management.⁵⁴ Smith’s only actual error was a week delay in notifying his supervisors⁵⁵ about a technical violation—namely, that Pence and Borders failed to accurately document several completed fire watches—incidents the NRC considered “to have a very low significance in terms of safety.”⁵⁶ Duke Energy supervisors acknowledged that they knew of no other employee who had been terminated for a delay in reporting a log discrepancy.⁵⁷ Smith—the most proactive worker, the only one who attempted to address the fire log discrepancy with his colleagues and managers—received the same discipline as Borders, who falsified the fire log and falsely charged Smith with sexual harassment. Given these record facts, Smith’s termination for a delay in reporting a technical fire log inaccuracy does not strike me as proportional.

JOANNE ROYCE
Administrative Appeals Judge

⁵³ D. & O. I at 22-23 (“Mr. Withers did not instruct Mr. Smith not to pre-sign the fire watch log Mr. Withers didn’t specifically tell Mr. Smith that he had an obligation to promptly report an inaccuracy on the fire watch log); D. & O. I. at 24 (“Mr. Hord never specifically told the fire watchers not to pre-sign the logs.”); Tr. at 315, 324.

⁵⁴ D. & O. I at 96, 97; D. & O. II at 11, 16.

⁵⁵ The ALJ failed altogether to credit Smith with urging Pence to address the falsification in first place.

⁵⁶ D. & O II at 21.

⁵⁷ *Id.* at 29.