In the Matter of:

FERNANDO DEMECO WHITE, **ARB CASE NO. 13-015**

COMPLAINANT, **ALJ CASE NO. 2011-STA-011**

v. **DATE: June 6, 2014**

ACTION EXPEDITING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Fernando Demeco White, ***pro se*****, Clarkston, Georgia**

For the Respondent:
Farrah Leigh Fielder, Esq.; ***Dominguez & Edwards, P.A.*****; Lawrenceville, Georgia**

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

DECISION AND ORDER OF REMAND

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2013), and its implementing regulations, 29 C.F.R. Part 1978 (2013). Fernando Demeco White filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Respondent Action Expediting, Inc. (Action Expediting or Company), terminated his employment in violation of the STAA. OSHA dismissed the complaint. On October 31, 2012, after a hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) denying the complaint. White petitioned the Administrative Review Board (ARB) for review. For the following reasons, the ARB vacates the D. & O., and remands this case to the ALJ for reconsideration consistent with this decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA and its implementing regulations.[1] In reviewing a Department of Labor ALJ's STAA decisions, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence.[2] The ARB reviews the ALJ's conclusions of law de novo.[3]

BACKGROUND[4]

Respondent Action Expediting is a commercial motor carrier within the meaning of STAA, 49 U.S.C.A. § 31101. D. & O. at 2. Respondent hired White in May 2009, and he worked as a team driver until his discharge in September 2009. *Id.* Shortly after starting work with Action Expediting, White raised a concern to Lawrence Kyle, the Southeast Operations Manager, and James Wentz, the Safety Director, about splitting his drive time and time spent in the truck's sleeper berth in five-hour increments in violation of federal safety regulations. D. & O. at 28-29.

On September 15, 2009, White and his co-driver, Smith, left Lithia Springs, Georgia at around 4:00 p.m. to deliver automobile parts. There was a complication regarding the availability of toll money, which the drivers anticipated would be resolved upon reaching Memphis, Tennessee, where the money for tolls was expected to be placed on their fuel card. When White arrived for a fuel stop in Memphis at 11:00 p.m., he discovered that the money had not been placed on the card and contacted the company. It appears that Smith was in the sleeper berth throughout most, if not all, of the events at the Memphis fuel stop. White testified that he went to the restroom at the truck stop and saw that his eyes were red and felt that he was getting a headache. He purchased medication and returned to the driver's seat of the truck. He reported

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[1] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

[2] 29 C.F.R. § 1978.110(b); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). In conducting our review, the ARB will 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 the Board "'would justifiably have made a different choice' had the matter been before us de novo." *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 *Rooks v. Planet Airways, Inc.,* ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006)).

[3] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004) (citations omitted).

[4] The Background summary is based on the parties' stipulations, the few findings of fact the ALJ made, and uncontroverted evidence of record.

to Hardy, a manager for Action Expediting, that he was not well and was physically impaired. Hardy suggested to White that he phone for an ambulance or let Smith continue driving the route. White declined to call an ambulance, and Smith did not take over the driving. After a period of time, White began driving again, but e-mailed the company at 7:36 p.m. on September 16 that the route was delayed by nearly three hours "in light of STAA incident." D. & O. at 41. White returned to the terminal in Georgia on September 18, 2009, where Baxter, accompanied by a sheriff, met him. Baxter informed White that he was fired and told him to remove his property from the truck, leave the site, and not return. D. & O. at 13, 19.

ALJ PROCEEDINGS

Upon consideration of White's claim charging Respondent with retaliation in violation of STAA's whistleblower protection provision, the ALJ found that White had engaged in protected activity by reporting to his supervisor on or about July 1, 2009, his concerns regarding the practice of splitting sleeper berth time into five-hour increments and by refusing to drive between 11:30 p.m. and midnight, September 15, 2009, due to his proclaimed headache and impaired vision. D. & O. at 28-30, 32-35.[5] However, the ALJ ultimately denied White's claim as he found that Respondent terminated White's employment for a legitimate, nondiscriminatory, non-retaliatory reason, and that White failed to establish by a preponderance of the evidence that Respondent's stated reason for his employment termination was pretext for retaliation for White having engaged in STAA-protected activity. D. & O. at 37-42.

DISCUSSION

A. STAA Burdens of Proof and Analytical Framework

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C.A. § 31105(A)(1). The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard or order." *Id.* In addition, it is a STAA violation for any person to retaliate against a driver who refuses to operate a commercial motor vehicle while the driver's ability or alertness is impaired due to fatigue, illness, or other cause.[6]

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[5] The ALJ rejected White's contentions that he engaged in STAA-protected activity when he made a safety complaint to Action Expediting involving co-driver Hill and that he was forced to falsify his log books due to cross-training drivers. D. & O. at 31-32. White does not contest these findings on appeal.

[6] 49 U.S.C.A. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(a), (c)(1)(i).

Notwithstanding the ALJ's citation of the correct burdens of proof standards applicable under STAA,[7] in reaching his conclusion that White failed to prove causation, the ALJ erroneously relied upon case authority derived from Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq*., governing the parties' respective burdens of proof and analytical framework in which these burdens are evaluated.[8] The case law upon which the ALJ relied articulates the parties' respective burdens of proof under Title VII and the burden shifting paradigm by which each party presents its evidence to meet their respective burdens, as first articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804 (1973). In *McDonnell Douglas*, the Supreme Court set forth the basic allocation of burdens of proof and, secondly, the order of presentation of such proof in Title VII cases alleging discriminatory treatment.[9] This Title VII body of law was incorporated into STAA as early as 1984 with the Secretary of Labor's decision in *Nix v. Nehi-RE Bottling Co*., No. 1984-STA-001 (Sec'y, July 13, 1984), and by the ARB in *Byrd v. Consol. Motor Freight*, ARB No. 98-064, ALJ No. 1997-STA-009 (ARB, May 5, 1998); *Madonia v. Dominick's Finer Food*, ARB No. 00-003, ALJ No. 1998-STA-002 (ARB, July 26, 2002); and *Germann v. Calmat Co*., ARB No. 99-114, ALJ No. 1999-STA-015 (ARB, Aug. 1, 2002).[10]

Prior to the 2007 STAA amendments, adopted as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act) (Aug. 7, 2007), the burden of proof framework the ALJ relied upon, which was developed for pretext analysis under Title VII and other discrimination laws, was controlling. However, as the Board initially pointed out in *Salata v. City Concrete*, ARB No. 08-101, ALJ No. 2008-STA-012 (ARB Sept. 15, 2011), and recently reaffirmed in *Beatty v. Inman Trucking Mgmt.*, ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 12, 2014), the 2007 legislation replaced the *McDonnell Douglas* Title VII burden of proof standards and burden-shifting analytical framework in STAA cases by incorporating the legal burdens of proof and framework imposed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (AIR 21) (Apr. 5, 2000). The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to expressly provide that STAA whistleblower complaints are governed by the legal burdens of proof set forth at 49 U.S.C.A. § 42121(b), which provides whistleblower protection for employees in the aviation industry. Under the AIR 21 standard, a new burden of proof framework is established in

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[7] D. & O. at 9.

[8] The ALJ cited, inter alia, *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133 (2000); *Texas Department of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Moon v. Transp. Drivers, Inc*., 836 F.2d 226 (6th Cir. 1987); *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987); *Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1987); *Jackson v. Pepsi- Cola, Dr. Pepper Bottling Co.,* 783 F.2d 50 (6th Cir. 1986)*; Luckie v. Administrative Review Bd.*, 321 Fed. Appx. 889 (11th Cir. 2009) (unpub); *Self v. Carolina Freight Carriers Corp*., ARB No. 1989-STA-009 (Sec'y, Jan. 12, 1990).

[9] *See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Burdine*, 450 U.S. at 252-253.

[10] *See Moon*, 836 F.2d at 229.

which the complainant is initially required to show by a preponderance of the evidence that protected activity was a "contributing factor" in the alleged adverse personnel action.[11] Should the complainant meet the "contributing factor" burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant's showing, to prove by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected conduct.[12]

The AIR 21 burden of proof framework is much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard. As the Federal Circuit explained in *Marano v. Dept. of Justice,* 2 F.3d 1137 (1993) (interpreting similar provisions of the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)), the "contributing factor" standard was "intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action."[13] The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause.[14] The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination."[15] A "contributing factor," the ARB has repeatedly noted, is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."[16] Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity."[17] Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.[18]

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[11] 49 U.S.C.A. § 42121(b)(2)(B)(iii).

[12] 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 75 Fed. Reg. 53,545; 53,550.

[13] *Marano*, 2 F.3d at 1140.

[14] *Marano*, 2 F.3d at 1141; *Henrich v. Ecolab, Inc.,* ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 10 (ARB June 29, 2006).

[15] *Araujo v. New Jersey Transit Rail Operations, Inc.,* 708 F.3d 152, 158 (3d Cir. 2013).

[16] *Evans v. Miami Valley Hosp.,* ARB No. 07-118, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009); *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008).

[17] *Henrich,* ARB No. 05-030*; Klopfenstein v. PCC Flow Techs. Holdings, Inc.,* ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18-19 (ARB May 31, 2006).

[18] *Clark v Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). "Direct evidence is 'smoking gun' evidence that conclusively links the protected

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event.[19] "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'"[20] Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain."[21]

We recognize that the Board has sanctioned use of the Title VII analytical framework in past opinions.[22] The language of these decisions was intended to leave intact the analytical framework established under Title VII for analyzing the parties' respective burdens of proof notwithstanding the legislative substitution of new burdens of proof standards. In retrospect, however, it is clear that maintaining the Title VII analytical methodology has given rise to confusion regarding the burdens of proof required of the parties, as evidenced by the ALJ's decision in this case. It is also clear that leaving the Title VII analytical methodology in place was legal error on the ARB's part because, as the federal appellate courts have recognized,[23] the statutory adoption of the new burdens of proof was coupled with a new analytical framework.

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activity and the adverse action and does not rely upon inference." *Sievers,* ARB No. 05-109, slip op. at 4-5. Circumstantial evidence may include temporal proximity, pretext, inconsistent application of policies, an employer's shifting or contradictory explanations for its actions, antagonism or hostility toward a complainant's protected activity, or a change in the employer's attitude toward the complainant after he or she engages in protected activity. *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13, 28 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

[19] *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

[20] *Araujo*, 708 F.3d at 159 (citations omitted).

[21] *Williams*, ARB 09-092, slip op. at 5 (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006)).

[22] *See, e.g., Brune v. Horizon Air Indus., Inc.,* ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) ("This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases."); *Kester v. Carolina Power & Light Co.,* ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 6 (ARB Sept. 30, 2003) ("Nor do the 1992 amendments [to the ERA] dictate or suggest that an ALJ, or this Board, not rely, when appropriate, upon the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof.").

[23] See discussion, *infra*.

The Title VII framework imposes a three-step analytical process, beginning by requiring from the complainant an initial "prima facie" showing which, if met, is followed by a rebuttal showing by the respondent which, if met, returns the ultimate burden of proof again to the complainant. The STAA amendments instead impose a two-step analytical process at the hearing before an ALJ that focuses first on whether the complainant has met his burden of establishing that protected activity was a "contributing factor," which entitles the complainant to relief unless the respondent can establish in rebuttal, by "clear and convincing evidence," that it would have taken the same adverse personnel action had there been no protected activity.

The Eleventh Circuit was the first of the appellate courts to recognize this critical distinction. In *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997), the court explained that the 1992 Congressional amendments to the whistleblower protection provisions of the Energy Reorganization Act (42 U.S.C.A. § 5851)[24] sought "to codify a particular framework regarding burdens of proof where no statutory guidance existed before."[25] The Eleventh Circuit pointed out that reference to a "*prima facie* showing" caused confusion because it evokes the *McDonnell Douglas* Title VII framework, whereas "Section 5851 [of the amended ERA] is clear and supplies its own free-standing evidentiary framework." *Id.* In 1999, the Tenth Circuit had the opportunity to visit this issue, again addressing the 1992 amendments to the ERA, stating in *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098 (10th Cir. 1999): "In 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800-05 (1973)."[26]

Addressing the AIR 21 burdens of proof, the Second, Third, and Fifth Circuits have similarly recognized that the analytical framework AIR 21 imposes is significantly different from and independent of the *McDonnell Douglas* framework. The Fifth Circuit was the first to recognize this, in *Allen v Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008), a case arising under the whistleblower protection provisions of the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A, which like STAA expressly incorporates the AIR 21 burdens of proof standards. In *Allen*, the Fifth Circuit noted that the "'independent burden-shifting framework' [of SOX/AIR 21] is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claims." 514 F.3d at 476. Similarly, the Third Circuit in *Araujo,* 708 F.3d 152 (3d Cir. 2013), recognized that under AIR 21 Congress set forth, in place of the *McDonnell Douglas* burden-

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[24] The AIR 21 burdens of proof standards incorporated into the STAA whistleblower provision at 49 U.S.C.A. § 31105(b)(1) were themselves modeled after the burdens of proof provisions of the 1992 amendments to the ERA. *See Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

[25] 115 F.3d at 1572 (citations omitted).

[26] *Trimmer*, 174 F.3d at 1101 (footnote omitted). *Accord Williams v. Administrative Review Bd.,* 376 F.3d 471, 476 (5th Cir. 2004).

shifting framework, "a two-part burden-shifting test." 708 F.3d at 157. As *Araujo* explained, the congressional imposition of this alternative burden-shifting framework is significant:

> [I]f a statute does not provide for a burden-shifting scheme, *McDonnell Douglas* applies as the default burden-shifting framework. *See Doyle v. United States Sec'y of Labor,* 285 F.3d 243, 250 (3d Cir.2002). This implies that when a burden-shifting framework other than *McDonnell Douglas* is present in a statute, Congress specifically intended to alter any presumption that *McDonnell Douglas* is applicable.[27]

Recently confronted with an ALJ's application of the *McDonnell Douglas* Title VII burdens of proof and analytical framework to a SOX whistleblower claim, the Second Circuit was resolute, mincing no words: "The ALJ's alternative burden-shifting scheme has no basis in any relevant law or regulation, and is simply incorrect."[28] The Second Circuit's admonition is equally applicable to the present case. The ALJ's application of the *McDonnell Douglas* burdens of proof and analytical framework to White's STAA claim has no basis in law or regulation. It is simply incorrect.

B. Remand is required for Causation Analysis under STAA Burdens of Proof

The ALJ found that White engaged in protected activity by complaining to his supervisor that Respondent's practice of splitting sleeper berth time into five hour increments, where drivers were required to drive five hours, then sleep for five hours before driving again for five hours, violated federal regulations,[29] and by refusing to drive between 11:30 p.m. and midnight on September 15, 2009, during a refueling stop, because of a headache and temporarily impaired vision.[30] Action Expediting challenges neither finding of protected activity on appeal. Also not challenged is the ALJ's treatment of White's employment termination as adverse action covered under STAA.[31] Accordingly, the only issue remaining in this case is whether the ALJ properly concluded that White failed to meet his burden of proof under STAA for establishing that his protected activity was a contributing factor in Action Expediting's decision terminating his employment.

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[27] *Araujo*, 708 F.3d at 157-158.

[28] *Bechtel v. Administrative Review Bd., U.S. Dept. of Labor*, 710 F.3d 443, 448 (2d Cir. 2013).

[29] *See* 42 U.S.C.A. § 31105(a)(1)(A)(i); 49 C.F.R. § 395.1(g)(1).

[30] See 42 U.S.C.A. § 31105(a)(1)(B)(i); 49 C.F.R. § 392.3.

[31] While the ALJ did not expressly address the question of whether White was subjected to adverse employment action within the meaning of STAA, the ALJ treated the termination of White's employment on September 18, 2009, as a covered adverse employment action. *See* D. & O. at 36.

Notwithstanding his citation to the correct burden of proof standards applicable under STAA, the ALJ relied upon Title VII case law in reaching his conclusion that White failed to prove that his protected activity was causally related to the termination of his employment. Initially, the ALJ found that White was entitled to a presumption that his protected activity was causally related to the termination of his employment due to the temporal proximity between the protected activity and White's discharge on September 18.[32] However, the ALJ also found that Action Expediting established legitimate, non-discriminatory, non-retaliatory reasons independent of White's protected activity for terminating his employment, and because White failed to establish that these reasons were pretextual, the ALJ dismissed White's complaint.[33]

As previously discussed in detail, upon establishing that he engaged in STAA-protected activity, under the 2007 amendments to STAA the complainant is merely required to prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment taken against him. Where the complainant meets this burden of proof, the respondent may nevertheless avoid liability if the respondent is able, in turn, to prove by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity. Because the ALJ failed to apply the proper STAA burden of proof standards in rejecting White's claim, the ALJ's decision dismissing White's complaint cannot be sustained.

CONCLUSION

For the foregoing reasons, the Decision and Order herein appealed is VACATED, and this matter is REMANDED to the ALJ to for further consideration consistent with this opinion.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[32] D. & O. at 36.

[33] *See* D. & O. at 40-42.