United States Department of Energy
Office of Hearings and Appeals

In the Matter of Anthony T. Rivera	)	
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Filing Date: October 17, 2017	)	Case No.: WBA-17-0010
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Issued: December 14, 2017

Decision and Order

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on September 27, 2017, dismissing a Complaint of Retaliation filed by Anthony T. Rivera against his employer, Lawrence Livermore National Security (LLNS) under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. On appeal, Mr. Rivera alleges that the Administrative Judge (AJ) erred in determining that LLNS would have terminated Mr. Rivera in the absence of his protected disclosures. As set forth in this Decision, we have determined that the Appeal should be denied.

I. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established for the purpose of "safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The Part 708 regulations prohibit retaliation by a DOE contractor against an employee because the employee has engaged in certain protected activity, including "disclosing to a DOE official, . . . any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals (1) a substantial violation of a law, rule, or regulation; (2) a substantial and specific danger to employees or to public health or safety; or (3) fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a).

Part 708 sets forth the procedures for considering complaints of retaliation. OHA is responsible for investigating complaints, holding hearings, and considering appeals. 10 C.F.R. Part 708, Subpart C. According to the Part 708 regulations, a complaint must include a "statement specifically describing the alleged retaliation … and the disclosure, participation, or refusal that [the complainant believes] gave rise to the retaliation." 10 C.F.R. § 708.12.

II. Background

A. Factual Background[1]

Mr. Rivera has been employed with LLNS since 1984. As of 2011, he was employed in the Laser Systems Engineering and Operations (LSEO) Division, one of five divisions in the Engineering Directorate. Mr. Rivera worked within the Laser Diagnostics Group, led by Steve Telford. Mr. Telford reported to Ron Darbee, the LSEO division superintendent. Mr. Darbee, in turn, reported to the LSEO division leader, Mark Newton, who reported to the Associate Director of Engineering, Monya Lane.

Beginning in late 2011 and early 2012, Mr. Rivera began sending emails to groups of LLNS personnel voicing disapproval of occurrences at LLNS and alleging verbal attacks and retaliatory conduct. In response to these e-mails, on February 7, 2012, Mr. Newton sent Mr. Rivera a Letter of Expectations, asserting that Mr. Rivera's e-mails constituted "improper and prohibited conduct" under LLNS's Personnel Policies Manual. Nonetheless, in September 2012, Mr. Rivera sent an email to hundreds of his colleagues, entitled "see ya I guess," again voicing disapproval of management practices. He followed this email with an October 2012 email, entitled "update to see ya I guess," wherein he described his assignment as an "undefined farce" and described a call that LLNS made to his home as "looking for a tactical 'soft spot.'"

Mr. Rivera was not attending meetings with his managers and pausing work on assignments he had not yet begun. As a result of his conduct, Mr. Newton issued Mr. Rivera a letter, on October 5, 2012, describing his conduct as unprofessional and unacceptable. Mr. Newton stated that Mr. Rivera's actions were a violation of the Letter of Expectations. Then on October 17, 2012, Mr. Newton issued Mr. Rivera a Letter of Warning. In this Letter, Mr. Newton formally told Mr. Rivera that his conduct had been unacceptable. In part, the letter stated that Mr. Rivera had acted inappropriately by refusing to attend a meeting. The letter requested that Mr. Rivera (1) adhere to the expectations in the Letter of Expectations issued in February 2012; (2) cease actions and communications that fellow employees might regard as disruptive or hostile; and (3) approach future job assignments in a cooperative manner.

Around January 2013, while performing an assignment, Mr. Rivera was assigned to complete a separate assignment. Though he began the assignment, he did not complete it. When the supervisor of the project informed Mr. Rivera's managers, Mr. Darbee attempted to schedule a meeting with Mr. Rivera. Mr. Rivera informed Mr. Darbee that he was taking sick leave and going home.

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[1] Due to the thorough recitation of the factual background in the IAD, *Anthony T. Rivera*, OHA Case No. WBH-14-0006 (2017) (*Rivera I*), we provide an abbreviated factual background addressing the portions relevant to this Appeal. Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

Accordingly, Mr. Darbee, Mr. Newton and Mr. Rivera scheduled a new meeting. The meeting was contentious.

On February 26, 2013, Ms. Lane wrote a memorandum to request a 5-day suspension for Mr. Rivera. She claimed that Mr. Rivera failed to meet the expectations enumerated in the Letter of Expectations and Letter of Warning. In support, the letter recounted, in relevant part, that Mr. Rivera avoided Mr. Darbee when he tried to hold a meeting with Mr. Rivera; Mr. Rivera refused to accept his assignment; Mr. Rivera continued to use Lab email to make disruptive demands to disinterested individuals; and Mr. Rivera attempted to intimidate Mr. Darbee during their meeting. On March 5, 2013, Mr. Rivera received a notice that LLNS intended to suspend him. Mr. Rivera responded to the suspension notice, but notwithstanding his objections, he received a 5-day suspension.

By July 2013, Mr. Rivera had begun work on a temporary interlock in Building 327 ("B327"). The building contains five rooms, or "caves," where LLNS experts use X-ray machines. Mr. Rivera's assignment was to evaluate and upgrade the interlock system in a non-functioning cave. On September 6, 2013, Mr. Rivera emailed the superintendent of the project regarding concerns that applied to all of the caves in B327. In the email, he described five concerns regarding the adequacy of the instructions used to test the functionality of the interlock system in the B327 X-ray caves. He suggested several steps moving forward, which included pausing all X-ray cave operations in B327 until the issues were addressed. In response to Mr. Rivera's concerns, a team reviewed the interlock test instructions. The review found that there was nothing wrong with existing procedures and that, in practice, employees were performing the interlock test in the thorough manner that Mr. Rivera wanted.

On August 16, 2013, based on his previous work, Mr. Rivera emailed Mr. Darbee and others and proposed replacing the ignitron switches in existing flash lamp banks with spark gap switches that did not rely on mercury. Mr. Rivera noted that if the old banks were used in experiments, there would be a risk of a mercury spill. He stated that such a spill could present a human hazard. His spark gap email was forwarded to the safety team.

On September 20, 2013, Mr. Rivera attended a meeting where he was presented with a Notice of lntent to Dismiss. Attached to the Notice of Intent to Dismiss was a memorandum from Ms. Lane, recommending dismissal. The memorandum cited continued misconduct and poor performance in violation of the Letter of Expectations, the Letter of Warning, and the notice Mr. Rivera received when he was suspended. Ms. Lane reviewed the reasons Mr. Rivera had been disciplined at each stage of the process. She also contended that, more recently, Rivera had refused to attend meetings as directed, and refused to complete his work in B327. Ms. Lane noted in the memorandum that LLNS employees are free to disagree with management, but that ultimately they are paid to carry out line manager instructions. On October 16, 2013, Mr. Rivera was terminated.

B. Procedural Background

On January 14, 2014, Mr. Rivera filed a Part 708 Complaint with the Employee Concerns Program (ECP) office for the National Nuclear Security Administration (NNSA) at Lawrence Livermore National Laboratory. The NNSA ECP Manager accepted the complaint for processing. Under

10 C.F.R. § 708.17, Mr. Rivera elected to have his complaint referred to OHA for an investigation followed by a hearing.

On July 11, 2014, an OHA Attorney-Investigator was assigned to investigate Mr. Rivera's Complaint. During the investigatory stage, LLNS filed a request to dismiss the case. Thereafter, the Investigator dismissed the Complaint on September 15, 2014, for failure to state a claim for relief. Mr. Rivera appealed this dismissal to the OHA Director on October 23, 2014, arguing that the Investigator lacked the authority to dismiss his Complaint. On March 9, 2015, the OHA Director issued a decision dismissing Mr. Rivera's appeal.

On March 23, 2015, Mr. Rivera filed a Petition for Secretarial Review of the OHA Director's decision. Mr. Rivera sought to require OHA to complete the investigation and conduct further proceedings with respect to his Complaint. On August 19, 2016, the OHA Director issued an Order that vacated the March 9, 2015, Appeal Decision and the underlying dismissal of Mr. Rivera's Complaint. The Order also stated that the case would be further processed pursuant to 10 C.F.R. Part 708. As a result, a second OHA investigator was assigned to continue processing the case.

The second OHA investigator conducted an investigation, and issued the Report of Investigation (ROI) on February 17, 2017. The ROI provided an analysis of Mr. Rivera's claims, and relying upon 10 C.F.R. § 708.22(c), it focused on Mr. Rivera's safety disclosures, in relevant part: the spark gap switch proposal, his refusal to participate in certain work, and the safety procedures in B327.

On February 17, 2017, an Administrative Judge (AJ) was appointed to this matter. After discovery, the submission of pre-hearing briefs, and discovery motions, the AJ convened a hearing from June 13-15, 2017. At the hearing, Mr. Rivera presented the testimony of four witnesses, in addition to testifying himself. LLNS presented the testimony of five witnesses. After the hearing, both parties submitted post-hearing briefs. Mr. Rivera's post-hearing brief contained a 14 page Declaration.

The AJ issued an IAD on September 27, 2017, striking Mr. Rivera's Declaration and determining that Mr. Rivera engaged in protected activity with regard to the spark gap switch disclosure and the B327 disclosure. The AJ also found that Mr. Rivera demonstrated, by a preponderance of the evidence, that his protected disclosures were a contributing factor to his termination as he demonstrated that the acting officials had actual or constructive knowledge of the protected disclosure and had acted within a period of time such that a reasonable person could conclude that the disclosure was a factor in his termination. However, the AJ also determined that LLNS showed, by clear and convincing evidence, that it would have terminated Mr. Rivera in the absence of his protected disclosures on the basis of his misconduct and insubordination. Accordingly, the AJ denied the relief Mr. Rivera sought.

III. Appeal

On October 17, 2017, Mr. Rivera filed a Notice of Appeal, challenging the IAD. Notice of Appeal of IAD (October 17, 2017). In response to his Notice of Appeal, OHA asked Mr. Rivera to submit a Statement of Issues, identifying the issues he would like to be considered on appeal. Acknowledgment Letter (October 18, 2017). On November 2, 2017, Mr. Rivera filed his Statement

of Issues. Statement of Issue (November 2, 2017). On appeal, Mr. Rivera makes nineteen "appeal requests" and responded to twenty-seven statements in the IAD and three statements within the ROI with which he disagreed. *Id*. He additionally asserts his belief that the AJ failed to fully review evidence, contests the AJ's decision to strike his "Declaration," denies that he was insubordinate, and contends that LLNS failed to show by clear and convincing evidence that it would have terminated him in the absence of his protected disclosures. *Id*. In response, LLNS argues that Mr. Rivera does not present "any viable ground on which to challenge the [IAD], and instead seeks investigation of a multitude of irrelevant issues." LLNS Response to Statement of Issues (November 16, 2017).

"It is well established in appeals brought under 10 C.F.R Part 708 that factual findings of a[n Administrative Judge] are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses." *Curtis Hall,* OHA Case No. TBA-0002 at 5 (2008) (*Hall*). However, an Administrative Judge's conclusions of law are reviewed de novo. *Id*.

IV. Analysis

We now must determine whether the AJ erred in concluding that LLNS showed by clear and convincing evidence that it would have terminated Mr. Rivera regardless of his protected activity. Prior to addressing Mr. Rivera's substantive arguments, we will first attend to his requests on appeal.

A. Requests on Appeal

Mr. Rivera makes nineteen requests for both witness statements and documentary evidence with regard to the following general categories: (1) two individuals he asserts were fired for raising safety concerns; (2) the conduct of an LLNS senior official; (3) various LLNS employee and facility records; and (4) documents related to his conduct and dismissal. Statement of Issues at 3-4. In support of these requests, Mr. Rivera relies on 10 C.F.R. § 708.33, which he interprets to allow him to "request any document or testimony with relevance to the case, where such requests are not limited or confined to existing case documentation, testimony, opinions, or rulings deemed of value by either the Investigator and his ROI, or the Judge assigned to the Hearing phase or his order." *Id*. at 2.

At the outset, we note that Mr. Rivera's interpretation of 10 C.F.R. §708.33 is misguided. Section 708.33 permits the OHA Director to (1) initiate an investigation of any statement contained in the request for appellate review, (2) solicit and accept submissions from parties relevant to the review, and (3) consider any other source of information that will advance the evaluation. 10 C.F.R. § 708.33(b)(1)-(3). While Section 708.33 does not preclude Mr. Rivera from requesting additional review or investigation, the acceptance of such a request is within the complete discretion of the OHA Director. Furthermore, the OHA Director is limited to: (1) investigating a statement contained in the request for review, (2) examining submissions relevant to the review, and (3) considering information that will advance the evaluation of the case. *Id*.

In studying Mr. Rivera's requests, none of them ask the OHA Director to investigate a statement contained in his request for review, *see* 10 C.F.R. § 708.33(b)(1), and additionally, Mr. Rivera provides no interpretation, nor can we discern any, of how his requests are either relevant to the appellate review or advance the evaluation in this case. *See* 10 C.F.R. § 708.33(b)(2)-(3). Specifically, Mr. Rivera requests that we obtain evidence with regard to two individuals, unrelated to his own claim, whom he alleges were terminated from a separate DOE site for raising safety concerns. Statement of Issues at 2. He additionally requests that we obtain information about a senior official and his conduct toward other employees on a matter extraneous to Mr. Rivera's claim, and that we obtain various LLNS employee and facility records. *Id*. at 3-4. On appeal, we are specifically examining whether the AJ erred in determining that LLNS showed by clear and convincing evidence that it would have terminated Mr. Rivera in the absence of his protected disclosures. Without an explanation from Mr. Rivera illustrating how these requests are linked to the case before us, we cannot determine that any of these requests would be relevant to the appellate review or advance our evaluation. *See* 10 C.F.R. § 708.33(b) (2)-(3).

While Mr. Rivera does request documentation regarding his conduct and dismissal, we again cannot discern how this information is relevant to the appellate review or advance our evaluation of whether the AJ erred. *See* 10 C.F.R. § 708.33(b) (2)-(3). Mr. Rivera requests documentation of personnel who knew of his impending dismissal. Statement of Issues at 4. Though a list of personnel who knew of the impending dismissal or the statements associated with the dismissal may be marginally relevant to the appellate review, we do not consider this information to be so compelling as to advance our evaluation. With regard to Mr. Rivera's requests for information about his conduct or opinions of his conduct, Mr. Rivera had ample opportunity through the course of the investigation and hearing phases to request, obtain, or submit this evidence, and without explanation of its value, we cannot determine that it will advance our evaluation. For these reasons, in the discretion of the OHA Director, we deny Mr. Rivera's requests on appeal.

B. Procedural Arguments

Upon the completion of the hearing, in lieu of oral closing arguments, the AJ permitted the parties to submit their arguments in the form of post-hearing briefs. The AJ imposed a deadline of 10 days after the receipt of the hearing transcript for the parties to file an initial post-hearing brief, and then an additional 10 days for each party to submit a response. *Rivera I* at 13. On August 7, 2017, both parties filed an initial post-hearing brief. *Id*. On August 17, 2017, LLNS filed a reply brief. *Id*. The following day, on August 18, 2017, Mr. Rivera's counsel submitted a reply brief, and then, later that day, submitted a "corrected" reply brief. *Id*. The "corrected" reply brief contained a 14 page Declaration authored by Mr. Rivera. *Id*. Mr. Rivera's counsel explained the addition of the Declaration, contending that it was mistakenly omitted from the submission. *Id*. LLNS responded by filing a Motion to Strike the Declaration, asserting that it constituted new evidence and permitting its admission without allowing LLNS to cross-examine Mr. Rivera on the contents of the Declaration or submit a rebuttal would be prejudicial. *Id*.

The AJ granted LLNS's motion to strike the Declaration, explaining that in setting the post-hearing briefing schedule and imposing the same deadlines for both parties, he intended the second post-hearing briefs to serve as rebuttal for the initial post-hearing briefs. *Id*. The AJ noted that in creating this schedule, neither party would be permitted an opportunity to rebut the second, and final, post-

hearing brief. *Id*. Per the imposed schedule, the AJ explained, LLNS submitted its second brief on the 10th day following the submission of the initial post-hearing brief. *Id*. at 13-14. However, Mr. Rivera's Declaration was submitted on the 11th day. *Id*. at 14. The AJ observed that this permitted Mr. Rivera an opportunity to read LLNS' second post-hearing brief and respond accordingly. *Id*. The AJ stated that to the extent that the Declaration constituted evidence, it was unsworn testimony on which LLNS had no opportunity to cross-examine, and to the extent the Declaration is argument, it constituted a third post-hearing brief, which was not permitted by the set post-hearing briefing schedule. *Id*. Accordingly, the AJ stuck the Declaration. *Id*. Now, on appeal, Mr. Rivera asserts that the AJ erred in striking his August 17, 2017, Declaration. Statement of Issues at 1.

It is well established that the AJ "has all powers necessary to regulate the conduct of the proceedings." 10 C.F.R. § 708.28(b). This includes the power to regulate and direct post-hearing submissions. *See* 10 C.F.R. § 708.28(b)(7). Here, it is undisputed that the AJ directed that not only were the initial post-hearing briefs due on the same day, but that the replies to the initial post-hearing briefs were due concurrently. LLNS was timely in its submission of both post-hearing briefs, and although, Mr. Rivera was timely in the submission in the initial post-hearing brief, he was not only tardy in submitting the reply brief, but then sought to amend the tardy reply with an addition 14 page Declaration. As such, we determine that the AJ did not err in granting LLNS' Motion to Strike the Declaration.

C. Findings of Fact

On appeal, Mr. Rivera responds to objections he has to both the IAD and the ROI. Statement of Issues at 6-16. At the outset, we note that this is not the forum to appeal the ROI, but instead to solely appeal the IAD. *See* 10 C.F.R. § 708.32. Accordingly, we decline to address Mr. Rivera's three responses to the ROI. With regard to the IAD, Mr. Rivera asserts that the AJ erred in striking his Declaration as it led the AJ to rely on "disinformation." Statement of Issues at 1. He also asserts that he was not insubordinate and, therefore, did not engage in improper conduct. *Id*. at 5. Mr. Rivera further presents twenty-seven responses to the IAD. *Id*. at 6-15. We note that his twenty-seven responses to the IAD and his argument regarding the Declaration challenge the AJ's findings of fact.

As previously stated, we overturn an AJ's factual findings "only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses." *Hall* at 5. Accordingly, we will not overturn a finding of fact solely because a party disagrees with a creditability determination, factual characterization, or factual interpretation. For this reason, we will solely examine the findings of fact that Mr. Rivera contends to be inaccurate.

1. Improper Conduct and Insubordination

Mr. Rivera argues that the AJ erred in determining that he engaged in improper conduct and insubordination. Statement of Issues at 5. Mr. Rivera contends that the "root basis of the LLNS claim that [he] was insubordinate [is] limited to [his] questioning of LLNS policies and practices, and offering engineering safety guidance." *Id*. He asserts that LLNS' definitions of improper conduct do not fit the circumstances in this case. *Id*.

As Mr. Rivera recognizes, Section D.II.1 of the Lawrence Livermore National Laboratory Personnel Policies and Procedures Manual (PPPM) states that "Being insubordinate to proper authority" constitutes improper conduct. *Id*. The AJ found that Mr. Rivera "refused on at least three occasions to meet with his managers at the time that they set for those meetings," and that this refusal constituted insubordination and, thus, improper conduct. *Rivera I* at 27. Although the AJ recognized that Mr. Rivera interpreted his absence at the meetings to be merely a "delay," the AJ interpreted these events as a refusal on Mr. Rivera's part to attend the meetings at the direction of his management, *id*., and we will not overturn such as factual interpretation. *See Hall* at 5.

Furthermore, the AJ determined that Mr. Rivera refused to perform duties that were assigned to him by his management, constituting insubordination and, thus, improper conduct. *Rivera I* at 29. The AJ noted that the testimony of LLNS and Mr. Rivera differed with regard to these circumstances, the AJ found LLNS to be more credible. *Id*. at 28. We will not overturn the AJ's findings of fact as a result of Mr. Rivera's disagreement with the AJ's credibility determination. *See Hall* at 5.

2. Responses to the IAD

We observe that Mr. Rivera's remaining challenges to the findings of fact fall into the following categories, wherein Mr. Rivera asserts that the AJ's statements in the IAD were: (1) "incomplete description[s]," (2) not credible, (3) "not completely accurate," (4) "partially correct," (5) accurate, but not logical, (6) "not the point," (7) "not compelling," (8) "troubling," (9) an "out of context generalization," and (10) inaccurate. Statement of Issues at 6-15.

We initially note that with regard to two findings that Mr. Rivera deems to be inaccurate, the AJ expressly acknowledged in the IAD that the facts were disputed, using language such as "LLNS claims" and "Mr. Rivera allegedly replied." *Id*. at 9, 12. As such, we cannot find the AJ's recitation of the events to be clearly erroneous when the AJ made no finding as to the truth of the matter, but solely retold the version of events as it was presented by each party. Additionally, there is another group of findings with which Mr. Rivera indicates disagreement with the AJ's description or interpretation of the events at issue. In his response, Mr. Rivera merely provides a "more accurate description of events," an explanation or comment in response to the AJ's statement, or his own interpretation. *See id*. at 10, 12. A mere disagreement or varied interpretation without anything more does not rise to the level of "clearly erroneous" and are thus not subject to being overturned on appeal.

In examining one final grouping of findings that Mr. Rivera deems to be inaccurate, it appears that Mr. Rivera takes issue with the AJ's acceptance of LLNS' versions of events rather than his own. *See id*. at 13. It is on this basis that Mr. Rivera contends that the AJ may have overlooked certain portions of the record or relied on "disinformation." *Id*. However, these findings are credibility determinations within the proper purview of an AJ's role. As we have stated, this is not a basis on which to overturn a finding of fact. As such, we find that there is no basis on which to overturn the twenty-seven findings of fact disputed by Mr. Rivera as none of them are clearly erroneous. *See Hall* at 5.

D. Conclusion of Law: Clear and Convincing Evidence

On appeal, Mr. Rivera does not take issue with any of the AJ's conclusions of law with regard to the protected disclosures; thus, we will only address his contention that the AJ erred in determining that LLNS showed, by clear and convincing evidence, that it would have terminated Mr. Rivera in the absence of his protected disclosures.[2] Statement of Issues at 17.

An employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she has made a disclosure or refused to participate as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's protected activity. 10 C.F.R. § 708.29.

"Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See David L. Moses*, OHA Case No. TBH-0066 at 19 (2008). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the protected conduct was a contributing factor to the alleged retaliation. *Denise Hunter*, OHA Case No. WBH-12-0004 (2012) at 13.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against an employee in the absence of that employee's protected conduct. Among those factors are the strength of the employer's reasons for the personnel action excluding the whistleblowing, the strength of any motive to retaliate for the whistleblowing, and any evidence of similar action against similarly situated employees. *Dennis Patterson*, OHA Case No. TBH-0047 (2008) (quoting *Kalil v. Dept. of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*Kalil*)).

In the IAD, the AJ determined that although Mr. Rivera had engaged in protected activity with regard to his disclosures involving the spark gap switches and the B327 situation, LLNS demonstrated, by clear and convincing evidence that it would have terminated Mr. Rivera in the absence of his protected disclosures due to his misconduct and insubordination. *Rivera I* at 27, 29-30. Specifically, the AJ found that Mr. Rivera engaged in misconduct as the result of his inappropriate mass email communications and his disrespectful verbal exchanges with members of his supervisory chain. *Id*. at 27. The AJ additionally determined that Mr. Rivera was insubordinate due to his refusal to attend meetings with management and his refusal to perform duties assigned to him by management. *Id*. at 28-29.

In conducting his analysis, the AJ noted that LLNS did not submit any significant evidence of similar actions taken against similarly situated employees; however, the AJ found that the strength of LLNS' reason for firing Mr. Rivera outweighed the lack of evidence in this regard. *Id*. at 30. Further, in examining the strength of LLNS' motive to retaliate, the AJ determined that Mr. Darbee and Ms. Lane, the two individuals who made the decision to terminate Mr. Rivera, were not directly

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[2] We note that Mr. Rivera appears to argue that because the AJ concluded that he made protected disclosures, he should be entitled to relief. Statement of Issues at 1. As we explain in this section, the legal analysis does not terminate when an AJ concludes that an individual made a protected disclosure.

implicated in the safety hazards he disclosed and thus had little motive to retaliate. *Id.* at 29. Although the AJ did note that there was "abundant evidence of personal animus between Mr. Darbee and Mr. Rivera," the AJ clarified that this animus stemmed not from Mr. Rivera's status as a whistleblower but from his insubordinate behavior. *Id*.

Here, Mr. Rivera specifically takes issue with LLNS' "fail[ure] to submit any significant evidence of similar actions taken against similarly situated employees." Statement of Issues at 17. Mr. Rivera contends that this should have been a "pivotal finding" and appears to argue that LLNS did not meet its burden due to the absence of this evidence. *Id*. However, the examination of whether the employer takes similar action against similarly situated non-whistleblowers is but one factor an AJ may consider, *see Kalil*, and the absence of this factor is not in and of itself dispositive, requiring the conclusion that the employer failed to prove by clear and convincing evidence that the same personnel action would have been taken in the absence of a protected disclosure. *See Martinez v. Dep't of Homeland Security*, 2017 WL 4120044, MSPB (2017) ("The absence of a comparator alone does not automatically lead to a finding that the agency failed to prove by clear and convincing evidence that it would have taken the same actions against the appellant in the absence of his protected disclosures."). We conclude that the AJ did not err in determining that LLNS demonstrated, by clear and convincing evidence, that it would have terminated Mr. Rivera in the absence of his protected disclosures.

V. Conclusion

We find that Mr. Rivera's arguments in opposition to the Initial Agency Decision lack merit. Accordingly, based on the foregoing, we find that the determination of the Administrative Judge should be affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Anthony T. Rivera, Case No. WBA-17-0010, is hereby denied.

(2) This Decision shall become a Final Agency Decision unless a party files a Petition for Secretarial Review with the Office of Hearings and Appeals within 30 days after receiving this decision, pursuant to 10 C.F.R. § 708.18(d).

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: December 14, 2017