United States Department of Energy
Office of Hearings and Appeals

In the Matter of Jon B. Sharpe	)	
	)	
Filing Date: March 28, 2024	)	Case No.: WBA-23-0002
	)	
	)	

Issued: June 28, 2024

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 March 14, 2024, denying a Complaint of Retaliation filed by Jon B. Sharpe against his former employer, United Cleanup of Oak Ridge, LLC (UCOR), and URS/CH2M Oak Ridge, LLC,[1] under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). On appeal, Mr. Sharpe alleges that denial was in error because the IAD "failed to properly consider the totality of the evidence presented at the hearing." Statement of Issues from Jon B. Sharpe to OHA (April 11, 2024) (hereinafter Appeal). 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 high tier contractor, information that [the employee] reasonably believes reveals (1) a substantial violation of a law, rule, or regulation; (2) a

[1] In May 2022, UCOR took the place of URS/CH2M Oak Ridge, LLC, a DOE contractor that previously held the contract.

> 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" and must be filed "by the 90th day after the date [the complainant] knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. §§ 708.13, 708.15(a).

This filing deadline, however, is tolled while an employee is attempting to resolve the dispute through an internal company grievance-arbitration procedure and during time spent resolving jurisdictional issues related to a complaint the employee files under State or other applicable law. *Id.* § 708.15(b), (c). Additionally, the regulations provide that the DOE Employee Concerns Program (ECP) has the discretion to accept an untimely complaint for processing when the complainant provides "any good reason he may have had for not filing" within the 90-day period. *Id.* § 708.15(d).

II. Background

In June 2020, Mr. Sharpe was hired to work at Oak Ridge National Laboratory (ORNL) by UCOR's predecessor in the newly created position of Electrical Safety Program Manager. *Jon B. Sharpe*, OHA Case No. WBH-23-0002 at 2–3 (2024). In this role, Mr. Sharpe oversaw the electrical safety program (ESP), and his primary job was to ensure "electrical code compliance with the National Electrical Code (NEC)" and other relevant regulations. *Id.* at 3. Mr. Sharpe was also in the process of submitting an application to DOE to become UCOR's Electrical Authority Having Jurisdiction (EAHJ), a position in which he would have the ability to enforce the electrical code without directly involving DOE. *Id.* at 4. He reported to Thomas Morgan, the chief engineer, and his second-level manager was Eric Abelquist, the manager of technical engineering and nuclear safety. *Id.* at 3. As part of his job, Mr. Sharpe was also expected to work with Larry Perkins, a DOE employee whose role included oversight of UCOR's electrical safety. *Id.*

Mr. Sharpe met Mr. Morgan for weekly one-on-one meetings. *Id.* at 4. Around March of 2022, Mr. Morgan began to provide "coaching" during his regular meetings[2] with Mr. Sharpe because of concerns he and other members of UCOR's management had about Mr. Sharpe's ability to move projects forward and achieve big picture organizational goals that required cooperation. *Id.* For example, Mr. Morgan specifically mentioned that Mr. Sharpe had taken "months" to get up a job listing to replace an electrical engineer who had departed. Hearing Transcript, OHA Case No. WBH-23-0002 (Tr.) at 415. This task was one of several that Mr. Morgan noted that Mr. Sharpe was assigned but not progressing on. *Id.* at 414–19. Mr. Morgan also testified that there was a general feeling that Mr. Sharpe was "abdicat[ing] his responsibility." *Id.* at 415. He further

[2] Mr. Morgan took contemporaneous notes during his meetings with Mr. Sharpe. Tr. at 405.

explained that Mr. Sharpe "had a habit of saying that, you know, that's their problem not [ESP's]." *Id.* at 421. The coaching included giving suggestions on how Mr. Sharpe could improve his performance and providing feedback on specific issues Mr. Sharpe was having in the workplace. *Sharpe* at 4. Mr. Morgan also noted that at one point while giving Mr. Sharpe this kind of feedback, he expressed concern to Mr. Sharpe that although Mr. Sharpe was agreeing when Mr. Morgan explained concerns, Mr. Morgan had not seen any progress on the particular projects. Tr. at 422. Mr. Abelquist testified that around May or June of 2022, he joined meetings with Mr. Morgan and Mr. Sharpe because of concerns about the performance of the ESP. *Sharpe* at 4. Mr. Sharpe testified that he did not recall being coached in his meetings with Mr. Morgan and described one meeting where Mr. Abelquist asked if Mr. Sharpe was "going to be a team player" as "bizarre." *Id.*; Tr. at 215–16. On June 14, 2022, Mr. Morgan sent an email to Mr. Sharpe about "Shifting the Focus" of the ESP. *Sharpe* at 5. The email included a document that outlined issues with the program, goals to address those concerns, and metrics to show steps were being taken to meet the goals. *Id.* Mr. Sharpe saw this document as an attempt to fix perceptions of the ESP program, which had been struggling long before he started working for UCOR. *Id.* Mr. Abelquist saw the email as a performance rubric for Mr. Sharpe. *Id.*

On July 21, 2022, Mr. Sharpe was informed by some UCOR engineers of several issues that made UCOR Building 3517 "not-code compliant." *Id.* at 6. On July 31, 2022, Mr. Sharpe sent an email to several people, including his supervisor Mr. Morgan, recommending that a meeting be held to discuss the condition of Building 3517 so that it could be determined whether the building presented a safety concern. *Id.* After receiving no response, Mr. Sharpe sent another email on August 2, 2022. *Id.*

On that same day, Mr. Sharpe filed a Corrective Action Management System entry (CAMS) to document the concerns about Building 3517. *Id.*; Tr. at 16. The CAMS was assigned to Mr. Sharpe, who was asked to complete an extent of condition evaluation. Tr. at 61–62. Upon receiving the assignment, Mr. Sharpe sent an email saying that he felt that assigning him the CAMS was inappropriate and created a chilled work environment. *Sharpe* at 8. Mr. Morgan replied to the email stating that he was unsure how the CAMS assignment was punitive because the issue was "clearly within [Mr. Sharpe's] expertise and job responsibilities to resolve." *Id.*; Hearing Exhibit (Ex.) 4 at 1.

Christian Strom, then an Area Project Manager for UCOR, sent an email on August 3, 2022, stating that he would reach out to UT-Battelle[3] to address a path forward on Building 3517 and another building that Mr. Sharpe had identified, Building 3571. *Sharpe* at 7; Tr. at 686. Both Mr. Sharpe and Mr. Abelquist took Mr. Strom's email to mean that Mr. Strom and his team would work to resolve the issues with the two buildings. *Sharpe* at 7.

Shortly after the email conversation between Mr. Sharpe and Mr. Morgan, Mr. Morgan reached out to Mary Douglass, a Human Resources (HR) employee with UCOR, about Mr. Sharpe's allegation and other concerns UCOR management had about Mr. Sharpe. *Sharpe* at 8. Mr. Abelquist specifically noted that UCOR management viewed Mr. Sharpe's response to being assigned the CAMS as showing that Mr. Sharpe was not interested in taking a leadership role as

[3] UT-Battelle is the management and operating contractor for ORNL.

he was expected to do. *Id.* at 8–9. Mr. Abelquist and Mr. Morgan met with Ms. Douglass on August 17, 2022, and determined that it would be appropriate to issue Mr. Sharpe a written warning. *Id.* at 10.

Around the end of August, Mr. Morgan began to feel that Mr. Sharpe's approach to the issue with Building 3517 and his failure to use his influence to work with others to determine a path forward was another example of his lack of leadership. Tr. at 431–32. When Mr. Morgan asked Mr. Sharpe about progress on the issue, Mr. Sharpe responded by saying that he had no power to fix it on his own. *Id.* at 432. Mr. Morgan believed that Mr. Sharpe should have used his influence on other parts of the organization to take action. *Id.*

On September 22, 2022, Mr. Sharpe was given a letter with the heading "Written Warning Discipline – Failure to Meet Job Performance Expectations" (Written Warning). *Sharpe* at 13. The Written Warning stated that Mr. Sharpe's supervisors had had several documented discussions with him regarding his job performance, specifically citing failure to accept responsibilities, inability to obtain desired results, unprofessional behavior towards supervisors, coworkers, and customers, and failure to develop a professional relationship with the DOE customer. *Id.* In addition to the concerns referenced above, the Written Warning reflected concerns that Mr. Sharpe was not in the field often and, thus, not known to electricians in the field and that there was a perception among UCOR employees and management that Mr. Sharpe had a bad relationship with the DOE representative Mr. Perkins. *Id.* at 10–13. The Written Warning explained that if Mr. Sharpe did not address these concerns, he could be subject to additional discipline up to and including termination. *Id.*

On October 3, 2022, UCOR employees, including Mr. Sharpe, had a meeting with Mr. Perkins to discuss UCOR's decision to disconnect the power to Building 3517. *Id.* at 14. Mr. Perkins did not agree with Mr. Sharpe's assessment of the danger in Building 3517 and asked for the extent of condition evaluation, which UCOR did not have. *Id.* at 14–15.

On October 18, 2022, DOE sent a letter requesting a Corrective Action Plan from UCOR due to four concerns that Mr. Perkins identified related to the ESP. *Id.* at 16. Mr. Sharpe testified that he felt the concerns in the letter did not involve his team. *Id.* at 16–17. However, Mr. Morgan testified that he felt that strengthening the ESP would lead to other teams considering electrical safety in the course of their own work. *Id.* at 17. Mr. Abelquist felt that the letter made it clear that UCOR had not been successful in convincing DOE that ESP's performance had improved and, as such, moved forward on terminating Mr. Sharpe after receiving it. *Id.* at 18.

A Disciplinary Review Board (DRB) meeting regarding Mr. Sharpe was held on October 26, 2022. *Id.* The DRB meeting focused on Mr. Sharpe's relationship with Mr. Perkins, lack of leadership, and failure to meet performance expectations. *Id.* at 19. Those at the meeting determined that neither the coaching nor the Written Warning changed Mr. Sharpe's performance, and, as such, termination was appropriate. *Id.* Ms. Douglass testified that the DRB did discuss moving Mr. Sharpe to a different role, but ultimately determined that given his salary and performance issues, there was no appropriate place for him. Tr. at 648. On October 26, 2022, Mr. Sharpe was informed that his employment with UCOR had been terminated. *Sharpe* at 20.

On January 18, 2023, Mr. Sharpe filed a complaint (Complaint) with the DOE's Oak Ridge Office of Environmental Management. The Complaint was referred to OHA on March 14, 2023, and an OHA attorney (Investigator) began a Part 708 investigation. On May 11, 2023, the Investigator issued a Report of Investigation (ROI). The OHA Director appointed an Administrative Judge in this matter on May 15, 2023.

UCOR filed a motion for summary judgment on October 16, 2023. The Administrative Judge denied this motion on October 27, 2023, explaining that at the time of the motion, there remained genuine issues of material fact that were in dispute. Summary Judgment Order, *Jon B. Sharpe*, WBH-23-0002 at 5 (Oct. 27, 2023). Specifically, the Administrative Judge determined that that there remained issues of material fact as to (1) the strength of UCOR's reasons for personnel action excluding the whistleblowing; (2) whether UCOR had any motivation to retaliate for the whistleblowing; and (3) whether UCOR had taken any action against similarly situated employees. *Id*. at 4–5.

The Administrative Judge held a four-day hearing beginning on October 30, 2023. The parties submitted over 150 exhibits and presented fourteen witnesses. Mr. Sharpe argued that he made several protected disclosures and that in retaliation for making those disclosures, UCOR gave him a formal written warning[4] and eventually terminated him. UCOR argued that Mr. Sharpe did not make any protected disclosures and that it could show by clear and convincing evidence that it would have terminated Mr. Sharpe for poor performance notwithstanding any protected disclosures that he had made.

Ultimately, the Administrative Judge determined that: (1) Mr. Sharpe reasonably believed that he disclosed a substantial violation of a law, rule, or regulation; (2) Mr. Sharpe's disclosure was a contributing factor to his termination because his supervisors were aware of the disclosure and because there was temporal proximity between the disclosure and termination; and (3) UCOR showed by clear and convincing evidence that it would have taken the same action against Mr. Sharpe irrespective of his protected activity.[5]

On March 28, 2024, Mr. Sharpe filed a Notice of Appeal, challenging the IAD. Notice of Appeal of IAD (Mar. 28, 2024). On appeal, Mr. Sharpe argues that the IAD did not consider the totality of the evidence and asserts two main points of appeal: (1) that the Administrative Judge erred when he failed to find that Mr. Sharpe disclosed a "substantial and specific danger to employees or to public health or safety"; and (2) that the Administrative Judge erred when he found that UCOR met its burden of showing that it would have terminated Mr. Sharpe regardless of his alleged protected disclosures. Appeal at 3, 10–11. On May 14, 2024,[6] UCOR filed a response to Mr.

[4] The Administrative Judge determined that Mr. Sharpe's Complaint regarding the Written Warning was untimely because Mr. Sharpe filed the complaint 118 days after that incident occurred. *Sharpe* at 23–24.

[5] For a more detailed record of the facts underlying these conclusions, refer to Section III of the IAD. *Sharpe* at 3–20.

[6] UCOR requested an extension on the due date of its response to Mr. Sharpe's Appeal. Mr. Sharpe did not object to this extension, and, subsequently, I granted the request pursuant to 10 C.F.R. § 708.42.

Sharpe's Appeal. Response (May 14, 2024). UCOR argued that the IAD correctly found that UCOR terminated Mr. Sharpe based on his performance issues. *Id*. at 2.

III. Analysis

In considering an appeal, we review an Administrative Judge's findings of fact for clear error. 10 C.F.R. § 708.22(b)(2). The conclusions of law are considered *de novo*. *Id*. Accordingly, absent extraordinary circumstances, we review the record as it existed at the time the Administrative Judge made their decision. *See Shou Yuan Zhang*, OHA Case No. WBA-17-0011 at 2 (2019).

A. Whether Mr. Sharpe Disclosed a Substantial and Specific Danger

On appeal, Mr. Sharpe argues that the Administrative Judge erred in finding that Mr. Sharpe did not disclose a substantial and specific danger regarding Building 3517. Appeal at 3. Because Mr. Sharpe succeeded in shifting the burden to UCOR to prove by clear and convincing evidence that it would have taken personnel action against him regardless of his disclosure, this determination is only relevant to the extent that it could affect what "whistleblowing" must be excluded when considering the reasons for UCOR's personnel actions. In my review of the record, I find that Mr. Sharpe did not show that he disclosed a substantial and specific danger.

As explained in the IAD, Mr. Sharpe was required to show by a preponderance of the evidence that he disclosed a concern that presented a substantial and specific danger. Whether a concern is considered a substantial and specific danger depends on (1) the likelihood of harm resulting from the danger; (2) when the harm may occur; and (3) the potential consequences of the harm. *Sharpe* at 22 (citing *Brien Williams*, OHA Case No. WBH-22-0003).

As to the first factor, the IAD found that all of the electrical engineers at UCOR, other than Mr. Sharpe, believed that an electrical danger like the one Mr. Sharpe described would only occur under very rare circumstances, and thus, the likelihood of harm was relatively low. *Id.* Mr. Sharpe contends that because several UCOR employees testified that the condition of the building increased the likelihood of a fault that there was a high likelihood of harm. Appeal at 4–6. He also argues that the IAD incorrectly characterized Building 3517 as "unoccupied" at the time Mr. Sharpe expressed his concern. *Id.* at 7. Initially, it should be stated that just because the condition of Building 3517 increased the probability of a fault, does not mean that such an event was likely to happen. As Mr. Sharpe explained, several other electrical engineers and electricians understood and believed that the conditions in Building 3517 increased the probability of a fault; however, none of these individuals thought that such an event was likely to occur. Tr. at 793, 930–31, 958. The likelihood of harm was further lessened by the fact that, unlike nearby Building 3571,[7] Building 3517 was not regularly occupied. *Id.* at 945. To the extent that the IAD calls Building 3517 "unoccupied," that is error. However, in light of the other record evidence supporting the IAD's finding that the likelihood of harm was relatively low, the fact that Building 3517 was not "unoccupied" does not in and of itself demonstrate that it was clear error for the IAD to conclude that the likelihood of harm resulting from the danger identified by Mr. Sharpe was relatively low. Therefore, this factor weighs against Mr. Sharpe.

[7] Testimony on the matter appears to indicate that Building 3517 was "low activity" rather than unoccupied. Tr. at 944. Building 3571, in contrast, was still an operational facility. *Id.* at 697.

Secondly, the IAD found that Mr. Sharpe had not sufficiently shown when the harm may occur because while he characterized the concern as "imminent," he did not display commensurate concern with solving the problem. *Sharpe* at 22–23. Mr. Sharpe contends that this finding is in error because (1) a health and safety concern does not need to be an "imminent danger" to be a substantial and specific danger under Part 708, and (2) Mr. Sharpe did not have the power to fix the problem himself. Appeal at 8. I agree that a health and safety concern need not be an "imminent danger" to be substantial and specific danger. However, here, it was Mr. Sharpe's burden to show when harm may occur from the danger that he disclosed because "[a] harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future." *Vincent E. Daniel*, OHA Case No. WBH-13-0006 at 22 (2013) (quoting *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1369 (Fed. Cir. 2010)). As the only allegation Mr. Sharpe made as to when the harm would occur was that it was "imminent," it was proper for the IAD to consider whether his behavior reflected this level of urgency in its analysis. Further, despite Mr. Sharpe's repeated contention that he did not have the authority to address the condition, several other witnesses testified to the contrary. Mr. Strom specifically testified that although he did not agree with Mr. Sharpe's characterization of the danger posed, he immediately addressed the condition when Mr. Sharpe declared the issue an imminent danger. Tr. at 702, 706–07. Chris Grundt, a senior electrical engineer at UCOR who had less authority than Mr. Sharpe, testified that if his assessment of the danger posed by Building 3517 was the same as that of Mr. Sharpe, he would have immediately taken action. *Id.* at 963–64. Additionally, Mr. Morgan said in his testimony that Mr. Sharpe had the power to enter a work order about his concerns if he believed immediate action was necessary. *Id.* at 441.

Further, if Mr. Sharpe, a subject matter expert and the Electrical Safety Program Manager at UCOR, truly believed the electrical conditions in Building 3517 were such that they presented a substantial and specific danger to life and safety, it defies belief that he would wait over a month to propose a solution to an electrical problem rather than immediately working with his colleagues to implement a solution. None of Mr. Sharpe's colleagues denied that the issues presented a danger that needed to be addressed in time, but Mr. Sharpe's testimony was the only support presented for his contention that the threat was imminent and that assertion was undercut by his own behavior. In the absence of evidence to show that the harm was imminent or anticipated in the near future, the IAD was not in error to find that this factor weighs against Mr. Sharpe.

Finally, both the IAD and Mr. Sharpe agreed that the conditions in Building 3517 could present a shock hazard or even death in particular circumstances. *Sharpe* at 22; Appeal at 4. This factor weighs in Mr. Sharpe's favor. However, many DOE sites contain hazards that could, in certain circumstances, result in death. In order for such a hazard to be considered a substantial and specific danger, it is critical to show that the other factors assessed above are sufficiently present to warrant protection. On balance, in consideration of the IAD's aforementioned findings which were not clearly erroneous, I find that the IAD correctly concluded that Mr. Sharpe failed to prove by a preponderance of the evidence that he had disclosed a substantial and specific danger. Without further evidence that the potential harm was likely to occur or would happen in the near future, Mr. Sharpe's claim here must fail.

B. Whether UCOR Would Have Terminated Mr. Sharpe Regardless of His Alleged Protected Disclosures

Mr. Sharpe alleges that the Administrative Judge made clear errors in several of the factual determinations related to the *Kalil* factors, and, as a result, incorrectly found that UCOR proved by clear and convincing evidence that it would have terminated him regardless of his protected disclosures. *See Anthony T. Rivera*, OHA Case No. WBA-17-0010 at 24 (citing *Kalil v. Dep't of Agric.*, 479 F.3d 821, 824 (Fed. Cir. 2007) (describing the three factors as "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"). I address his concerns related to each factor in turn.

1. Strength of the Employer's Reasons for Personnel Action Excluding the Whistleblowing

a. Weight of Evidence

As an initial matter, I address Mr. Sharpe's general contention that the Administrative Judge failed to consider certain evidence or improperly credited certain testimony. Appeal at 7, 11–14, 20–21, 25–27. "Mere disagreement with the Hearing Officer's[8] factual determinations is not sufficient [ ] to overturn his findings." *Curtis Hall*, OHA Case No. TBA-0042 at 27 (2008). It is well settled law that the trier of fact is in the best position to weigh the evidence and judge the credibility of witnesses. *Id.* It is the role of the Administrative Judge to assess the credibility of various witnesses and their determinations on those matters should not be disturbed absent an indication an actual mistake was made. When witnesses provide different testimony, an Administrative Judge choosing to credit one account over the other is not clear error, but rather is the Administrative Judge exercising their discretion. *See, e.g. Garland v. Ming Dai*, 593 U.S. 357, 373 (2021) ("[T]he factfinder . . . makes the findings of fact, including determinations as to the credibility of particular witness testimony.").

Mr. Sharpe first argues that the IAD's determination that the testimony of members of UCOR's management team was credible is in error because the testimony of Mr. Sharpe's supervisors[9] was "*post-hoc*." Appeal at 11–12. As I explained above, disputes about the credibility of various witnesses are not clear error. Further, all testimony is, by its very nature, "*post-hoc*," so I fail to see how that particular fact would make the Administrative Judge's reading of the testimony erroneous. The Administrative Judge determined that the contemporaneous notes from Mr. Sharpe's supervisors and the testimony of those supervisors were sufficient to make a finding that Mr. Sharpe was being coached prior to his CAMS entry. *Sharpe* at 25. To disturb that finding

[8] Prior to regulatory changes in 2013, the person who presided over OHA's Whistleblower hearings was called a Hearing Officer rather than an Administrative Judge. *Compare* 10 C.F.R. § 708.2 (2024) *with* 10 C.F.R. § 708.2 (2012).

[9] The Appeal repeatedly describes testimony from UCOR management and employees as "self-serving." Appeal at 11, 14, 25. As each witness in this proceeding testified under oath, absent evidence that a witness actually lied, it is not appropriate for me to second guess the fact-finding determinations of the Administrative Judge.

would be to allow Mr. Sharpe to attempt to reargue his entire case on appeal, which is not what the regulations intend.

Next, Mr. Sharpe asserts that UCOR's management decisions throughout 2022 contradict the testimony of UCOR's management, and, therefore, the IAD's determination that Mr. Sharpe's alleged performance issues predated the CAMS was in error. Appeal at 13–14. To the extent that Mr. Sharpe identifies any specific fact that he alleges to be erroneous here, again I must note that the Administrative Judge was in the best position to weigh evidence and determine which facts are the most important among contradictory pieces of evidence. There is certainly evidence in the record that supports Mr. Sharpe's contention that UCOR was happy with his performance, but there is also abundant evidence that his supervisors had concerns about his performance prior to his August 2, 2022, CAMS entry. Because the record contains evidence supporting both conclusions, Mr. Sharpe has failed to show that the Administrative Judge committed clear error.

Mr. Sharpe also asserts that it is relevant that his supervisors had the power to reassign him the CAMS. *Id.* at 16. He argues that Mr. Morgan and Mr. Abelquist "implied they had nothing to do with the assignment of CAMS," but other witnesses provided contrary testimony. *Id.* at 17. He says that this contrary testimony "calls into serious question the creditability of those supervisors." *Id.* It is unclear what specific error he alleges in the IAD here, beyond his opinion that contradictory testimony from other witnesses should impeach all of the testimony from Mr. Abelquist and Mr. Morgan. *Id.* at 17. Regardless, credibility determinations are best made by the trier of fact, so I have no basis to overturn the IAD's findings here.

Mr. Sharpe contends that the IAD erred when it failed to find that the Written Warning was "vague and ambiguous." Appeal at 17–18. Citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 102 (2002), he argues that this is relevant because the Written Warning is an untimely prior act of retaliation that may serve as "background evidence to support a timely claim." Appeal at 18 n.12. While it is true that the Written Warning may be used as evidence, such a finding would not show that the IAD's conclusion that UCOR had serious concerns about Mr. Sharpe's performance was clear error, and, thus, I do not disturb the IAD's findings.

Next, Mr. Sharpe disputes the IAD's finding that UCOR management was "embarrassed" by his conduct at the October 3 meeting. Appeal at 20. He says this finding "is contradicted by contemporaneous proof." *Id.* In my review of the record, I do not find any evidence that Mr. Sharpe presented that contradicts UCOR's characterization of the meeting; instead, the bulleted list that Mr. Sharpe provided gives a list of reasons why Mr. Sharpe does not believe the issues at that meeting were his fault. *Id.* at 20–21. That does not indicate clear error.

Mr. Sharpe offers many reasons why testimony from UCOR employees should not be credited. *Id.* at 25–27. He particularly disputes the IAD's findings that other UCOR employees had a negative view of Mr. Sharpe's work performance. *Id.* at 25. While he does present some contradictory evidence, none of the reasons he presents show that the determinations made in the IAD were clear error. As previously explained, it is not my role to substitute my judgment of credibility and importance for that of the Administrative Judge.

b. Mischaracterization of the IAD's Findings

Mr. Sharpe next contends that the IAD's finding that his attitude towards Mr. Perkins was a critical part of UCOR's decision to terminate him was in error. Appeal at 14. He argues that because Mr. Perkins testified that he did not have any issues with Mr. Sharpe and no finding was made that Mr. Perkins was not a credible witness, the finding must be error. *Id.* at 14–16. I disagree with Mr. Sharpe's characterization of the findings here. The IAD did not find that UCOR terminated Mr. Sharpe because Mr. Perkins actually disliked him. The Administrative Judge found that UCOR terminated Mr. Sharpe, at least in part, because his supervisors and colleagues perceived that Mr. Sharpe's behavior toward Mr. Perkins was not appropriate given Mr. Perkins's role as DOE's representative. *Sharpe* at 26. UCOR management also expressed the view that the relationship between Mr. Sharpe and Mr. Perkins was not good enough to fix the issues that Mr. Perkins perceived ESP to have. *Id.* Whether or not Mr. Perkins felt he had a good relationship with Mr. Sharpe was never at issue; the critical fact here was that UCOR management did not think the relationship was strong enough for Mr. Sharpe to help UCOR achieve its goals. As such, I cannot find this determination to be in error.

To the extent that Mr. Sharpe alleges that the IAD failed to "exclude the whistleblowing" from its determination that UCOR showed it would have terminated Mr. Sharpe regardless of his protected activity, I disagree. Appeal at 28–29. Here, the Administrative Judge found that Mr. Sharpe made a protected disclosure when filing the CAMS. The act of Mr. Sharpe filing the CAMS was not part of the basis for the Administrative Judge's determination that UCOR had non-retaliatory reasons for its personnel actions. Any other action that Mr. Sharpe alleges was a protected disclosure need not be excluded from the Administrative Judge's consideration because Mr. Sharpe did not meet his burden to prove that those actions were protected disclosures. To find otherwise would be to allow alleged whistleblowers to exclude pertinent facts related to their on-the-job conduct by alleging that those facts were part of a protected disclosure.

c. October 18 Letter

Mr. Sharpe's Appeal made several assertions relating to the letter DOE sent UCOR on October 18, 2022. Appeal at 18–19, 21–25. First, he argues that because UCOR was aware of the concerns that DOE raised in the letter, using that letter as a rationale to terminate Mr. Sharpe must be pretextual. *Id.* at 19. He goes on to say that the fact that UCOR was aware of these issues "proves that Sharpe was disciplined <u>twice</u> . . . for the same alleged conduct" and that UCOR had previous opportunities to discipline Mr. Sharpe for the issues brought up in the letter. *Id.* at 19–20 (underline in original). I cannot find that the Administrative Judge erred when he did not make these specific findings. As the IAD noted, Mr. Abelquist testified that the October 18 letter showed UCOR that it had not made progress on convincing DOE that the ESP program was improving. *Sharpe* at 18; *see also* Tr. at 577. The IAD appears to take this characterization at face value. *Sharpe* at 26. Mr. Sharpe has not pointed to any facts that show this determination was in error.

Later, Mr. Sharpe again argues that because UCOR was already aware of the problems in the October 18 letter, the letter could not present proper cause for his termination. Appeal at 21. It is unclear to me why Mr. Sharpe believes that the fact that the concerns in the October 18 letter were known to UCOR make that letter impermissible grounds for termination. As discussed above, the

letter made it clear to UCOR management that progress was not being made regarding DOE's perception of ESP. As Mr. Sharpe was ultimately responsible for ESP, and, thus, DOE's perception of that program, it is not surprising that UCOR management would feel personnel action was an appropriate response to a clear sign that DOE was displeased with the program. He continues to say that it was error that the Administrative Judge did not find that the issues raised in the letter were not Mr. Sharpe's fault. *Id.* at 22. The Administrative Judge is not required to make a determination on every factual issue raised, particularly if he does not feel it is relevant to the ultimate determination. It is clear from the IAD that the Administrative Judge did not determine whether the issues in the letter were actually Mr. Sharpe's fault because, in his view, UCOR did not decide to terminate Mr. Sharpe because it felt that those issues were his fault, but because the letter itself was indicative of Mr. Sharpe's failure to change DOE's perception of his program. *Sharpe* at 26–27.

Ultimately, after reviewing the record, the facts in the record show that UCOR had a strong non-retaliatory motive for terminating Mr. Sharpe and that this factor weighs in their favor.

2. Strength of Any Motive to Retaliate for the Whistleblowing

The IAD determined that because UCOR showed that CAMS were regularly filed without issue and Mr. Perkins was not concerned about the electrical issue Mr. Sharpe presented, UCOR showed that it did not have a strong motivation to retaliate against Mr. Sharpe. *Sharpe* at 27–28. Mr. Sharpe alleges that the IAD's reasons for determining that UCOR did not have a strong motive for retaliating against him were erroneous. Appeal at 29. He also argues that the Administrative Judge neglected to mention several other reasons that UCOR may have been motivated to retaliate against him, and that that failure is in error. *Id.* at 29–31.

Firstly, I do not find the Administrative Judge's decision not to address every single piece of evidence from a four-day trial to be error. As discussed, *supra*, the Administrative Judge is best positioned to weigh facts and make determinations about the relevance of testimony and exhibits. Secondly, Mr. Sharpe did not identify any plausible reason why UCOR would want to retaliate against him[10] for submitting the CAMS that the Administrative Judge did not address. Instead, Mr. Sharpe provided a bulleted list that restates facts already found in evidence. My review of the exhibits and testimony lead me to the same conclusion the Administrative Judge reached. While concern about Mr. Perkins's reaction to a safety concern could be seen as a motive to retaliate against Mr. Sharpe, UCOR provided testimony that showed hundreds of CAMS entries are filed every year at UCOR, and it was not irregular for these CAMS to be assigned to the person who identified them for resolution. Tr. at 799, 889. Several other employees testified that they did not feel that they could not file a CAMS for fear of retaliation. *Id.* at 889, 913, 963. Further, UCOR clearly showed that at the time the determination to terminate Mr. Sharpe was made, Mr. Perkins was no longer concerned about the issue in Building 3517; he was concerned with longstanding issues tangentially related to ESP that had not improved during Mr. Sharpe's tenure. *Id.* at 304. As such, the Administrative Judge was not in error to find this factor weighs in UCOR's favor.

[10] Mr. Sharpe does seem to assert that UCOR was concerned that Mr. Perkins would take back the EAHJ powers from UCOR if he was unhappy with ESP. Appeal at 31. As there was not a UCOR employee with EAHJ powers at the time and there was no testimony to support this theory at the hearing, I do not find this claim plausible.

3. Any Evidence of Similar Action Against Similarly Situated Employees

The IAD found that UCOR had presented evidence to show that a previous EAHJ had lost that title due to a letter criticizing electrical safety from DOE. *Sharpe* at 28. It also found that since UCOR's current contract began in 2020, there had not been any employees terminated for unsatisfactory performance as Mr. Sharpe had been. *Id.* at 28–29. Ultimately, the Administrative Judge determined that because of these countervailing pieces of evidence, the third *Kalil* factor was neutral. *Id.* at 2. Mr. Sharpe asserts that that the Administrative Judge erred in finding that the third *Kalil* factor was neutral because UCOR had the burden to prove it had taken similar action against similarly situated employees, and it failed to do so. Appeal at 32. I agree with Mr. Sharpe that UCOR failing to show that it had taken similar disciplinary steps against a similarly situated employee must weigh against UCOR. However, UCOR did show that it had taken personnel action after receiving a letter from DOE expressing concern about ESP on one previous occasion. Tr. at 769–71. After receiving a letter from DOE, UCOR took the EAHJ title away from an employee and hired Mr. Sharpe. *Id.* at 770. Considering the totality of the evidence, this factor weighs against UCOR, but not heavily. UCOR is correct when it asserts that the absence of a direct comparator does not automatically lead to a finding that the contractor failed to prove by clear and convincing evidence that it would have taken the same actions. Response at 12 (citing *Martinez v. Dep't of Homeland Security*, 2017 WL 4120044, MSPB (2017)). Therefore, I find that this particular factor must weigh against UCOR, but that finding is not determinative.

Here, UCOR provided strong evidence that it had non-retaliatory reasons to take personnel action against Mr. Sharpe. UCOR provided contemporaneous notes from Mr. Sharpe's supervisor about how he and other members of the UCOR management team attempted to coach Mr. Sharpe and improve his performance. The record included an email with measurable goals for Mr. Sharpe and ESP to improve on, created prior to any of Mr. Sharpe's alleged whistleblowing. When UCOR management continued to feel that they were not seeing eye to eye with Mr. Sharpe, they issued the Written Warning, which explained the expectations they had of Mr. Sharpe in his role as a leader at UCOR. Approximately one month after issuing the Written Warning, UCOR received a letter from DOE which indicated that the attempts to improve DOE's perception of ESP had not been effective. Because Mr. Sharpe was in charge of ESP, UCOR then decided that the letter showed that Mr. Sharpe's management of ESP and his presentation of ESP to DOE had not been successful. Because there was no appropriate way to demote Mr. Sharpe or move him to a different position, UCOR determined that termination was the appropriate recourse. UCOR also showed that it had little motivation to retaliate against Mr. Sharpe for filing a CAMS report. UCOR employees file hundreds of CAMS reports each year, and several employees and managers stated that UCOR did not discipline people for filing a CAMS. Further, UCOR provided evidence that the DOE employee that monitored UCOR did not see the electrical issue that Mr. Sharpe presented as a particularly dangerous hazard. If Mr. Perkins did not see this CAMS as presenting a large problem for ESP, it is unclear how the issue would provide UCOR motivation to terminate Mr. Sharpe, particularly when there is no evidence UCOR took issue with other employees filing CAMS. Finally, UCOR failed to provide a comparator employee, though it did show that UCOR had taken personnel action against a previous EAHJ after receiving a letter from DOE outlining concerns about ESP. The absence of a true comparator means that this factor does weigh against

UCOR, but the previous personnel action shows that it was typical for UCOR to take personnel actions in response to an expression of concern from DOE.

Weighing the strength of the first two factors against the relative weakness of the third, I find that the Administrative Judge was not in error to determine that UCOR demonstrated by clear and convincing evidence that it would have terminated Mr. Sharpe regardless of any protected disclosures that he made.

IV. Conclusion

Based on the foregoing, the determination of the Administrative Judge should be affirmed. Accordingly, it is Ordered that the Appeal filed by Jon B. Sharpe, Case No. WBA-23-0002, is hereby denied.

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