



**Issue Date: 09 January 2020**

CASE NOs.: 2015-ERA-00003  
2015-ERA-00004

*In the Matter of:*

**KIRTLEY CLEM,**  
*Complainant,*

v.

**COMPUTER SCIENCES CORPORATION,**  
*Respondent.*

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*In the Matter of:*

**MATTHEW SPENCER,**  
*Complainant,*

v.

**COMPUTER SCIENCES CORPORATION,**  
*Respondent.*

**DECISION AND ORDER ON REMAND**

These claims, consolidated for hearing, arise under the Energy Reorganization Act, 42 U.S.C. §§ 5801 *et seq.*, as implemented by the regulations codified at 29 C.F.R. Part 24 (2015). Kirtley Clem and Matthew Spencer (together “Complainants”) brought these claims against Computer Sciences Corporation (“CSC” or “Respondent.”) I held the hearing in Kennewick, Washington, on February 18, 2016. On October 4, 2016, I issued a Corrected Decision and Order (“D&O”).<sup>1</sup> Respondent petitioned for review by the Administrative Review Board (“Board”), which issued a Decision and Remand Order (“Remand”) on September 17, 2019.

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<sup>1</sup> The original Decision and Order contained a clerical error.

## I. ISSUES ON REMAND

In the initial Corrected Decision and Order I found

1. Complainants engaged in protected activity, including:
  - (i) meeting with the Department of Energy (“DOE”) on August 10, 2012;
  - (ii) reporting problems with OHM software to Mr. Elsethagen and others at CSC; and
  - (iii) Mr. Clem meeting with DOE again on September 13, 2012.
2. Respondent knew of the protected activity.
3. Respondent took adverse employment actions against both Complainants when it
  - (i) suspended them without pay on September 20, 2012;
  - (ii) did not pay them special pay;and against Mr. Clem when it,
  - (iii) failed to retain him;
  - (iv) failed to hire him for analyst positions in December, 2012 and October, 2013.

(D&O, pp. 21-26.)

The Board affirmed the above findings. But the Board held I erred in describing the contributing-factor causal standard and the same-action defense standard. (Remand, pp. 14-15.) Specifically, the Board reversed the below findings:

1. The circumstances support a reasonable inference that the protected activity was a contributing factor to Respondent’s suspension of Complainants without pay, decision to withhold special pay, decision not to retain Mr. Clem after Mr. Elsethagen and Mr. Spencer resigned, and failure to rehire Mr. Clem.
2. Respondent’s evidence of justification was not clear and convincing.

(D&O, pp. 21-26.)

In addition to directing me to apply the correct standards on remand, the Board also ordered me to fully analyze the record, weigh evidence, and make revised findings of fact on the issues.

## II. BACKGROUND

I incorporate fully the statement of the case from the initial D&O. For convenience I will give a brief overview of the parties and actions at issue, with a focus on the facts relevant to contribution and Respondent's same-action defense.

### 1. Respondent's Business Structure

The Complainants, Kirtley Clem and Matthew Spencer, were employed by Respondent Computer Sciences Corporation. Respondent hired Mr. Clem as a Senior Programmer Analyst on June 20, 2011 (HT, pp. 67-68; CX 9), and Mr. Spencer as a Senior Programmer Analyst on July 11, 2011. (HT p. 490; CX 10). Respondent had a contract with the DOE to provide IT for the medical clinic at Hanford, a decommissioned nuclear site in eastern Washington. (CX 2). It subcontracted some of its obligations to a subcontractor, HPM Corporation. Eric Elsethagen led the IT team for the site. The team consisted of Mr. Clem, Mr. Spencer, Mr. Johnston, Ms. Riley, and Mr. Matthews. Kim Conley was the director of the medical clinic for which the IT team worked. (Initial D&O, p. 3.) Ms. Conley reported to Ms. Lisa Poulter, who was CSC's Public Health Sciences Manager. (Initial D&O, p. 3.) Mr. George Baxter was the principal manager at the clinic.

In 2011 Respondent began producing an electronic records management program called Occupational Health Management ("OHM"), which integrated clearances and medical records to manage worker assignments. Respondent's IT employees collaborated with HPM employees to implement the system. (HT, pp. 79-80, 497.) One anticipated function of the program was to determine whether, based on medical records, it was proper for an employee to be in a particular location at a specific time. To accomplish that purpose, CSC had to merge an older database so the information it contained would be accessible to users of OHM. Both Complainants worked on the production of OHM, along with other HPM and CSC employees. Respondent scheduled OHM to go live on August 20, 2012. The implementation of OHM was required by the DOE, and Respondent's rating on their Performance Evaluation Measurement Plan depended in part on the successful implementation of the system. (HT, p. 1124.)

In 2012 Respondent's prime contract with the DOE expired, and on re-bid, the previous subcontractor, HPM, won the new prime contract. Cleve Mooers was HPM's transition manager. (Initial D&O, p. 4.) HPM announced in July, 2012, that Respondent needed to layoff three programmers by October 1, 2012. Ms. Conley interviewed each of the six IT members for the three remaining positions. She had the final say in deciding which employees would be offered a continuing position. (HT,

p. 1136.) On August 7, 2012, Ms. Conley offered the positions to Mr. Elsethagen, Mr. Johnston, and Mr. Spencer. On August 22, 2012, Mr. Clem was officially told he would be laid off on September 27, 2012. (HT, p. 453.) Two of the employees who had been chosen for the three remaining IT positions, Mr. Elsethagen and Mr. Spencer, resigned from their positions before the new contract period began. Mr. Elsethagen resigned on September 4, 2012, and Mr. Spencer resigned on September 13, 2012. (CX 66, p. 10.) This left two IT positions open. On September 18, 2012, following the resignation of Mr. Spencer and Mr. Elsethagen, Ms. Conley selected Ms. Riley, an off-site IT worker, to fill the newly available position. Ms. Conley also offered a position to Mr. Matthews, a junior developer. Mr. Clem was still not offered a position.

## 2. Complaints to the DOE

Both Mr. Clem and Mr. Spencer made ongoing complaints about the functionality of OHM (particularly in merging older databases for use with OHM), and asserted OHM would not perform reliably by the go-live date. At an IT team meeting in July, 2012, Complainants brought up concerns with OHM's completion to the team leader, Mr. Elsethagen. (HT, pp. 974-975.) Mr. Elsethagen responded, "it's our jobs to fix issues like this, this is why we get a paycheck . . . so, to me, it's go out and do your job." (HT, p. 986.) Complainants were unsatisfied with CSC's response to their complaints, and on August 10, 2012, they anonymously emailed a complaint to the Department of Energy employee-concerns program. The DOE transferred the complaint to an assistant manager who performed an inquiry at the site on August 15, 2012, and found the concern unsubstantiated.

Mr. Clem also sent an anonymous email to his co-worker, Ms. Riley, stating he had filed an employee concern with the DOE, and asking if she would be willing to discuss the issue. On the same day, Mr. Elsethagen sent an email to the IT team members stating "there has been great confusion recently on CSC's implementation of OHM in regards to the impacts to recipients of our data," and emphasizing "we at CSC understand the impacts to the worker/company if an employee is allowed to work in an area they shouldn't because of an issue with a Clearance or other medical condition." (CX 31, p. 1.) He further clarified that "CSC is committed to the safety of the workers and would not put into place any solution unless we are confident of the outcome." (CX 31, p. 1.) Mr. Elsethagen sent this email thirty minutes before Ms. Riley forwarded him the anonymous email from Mr. Clem. (CX 32, p. 1.) Once Mr. Clem identified himself to Ms. Riley, she also forwarded that email to Mr. Elsethagen, stating she was shocked the Complainants had "resort[ed] to secretive enrollment of co-conspirators to derail the project." (CX 37, p. 1.)

### 3. Reports from Mr. Johnston

Mr. Johnston, a fellow IT worker who had no supervisory responsibility, was concerned Mr. Spencer was speaking with HPM about OHM. He was concerned because “he felt that because he was the most senior person . . . he felt everything should be filtered through him.” (HT, p. 760.) On September 6, 2012, Mr. Spencer met with Ms. Conley to discuss Mr. Johnston’s complaints. (HT, p. 739.) In the meeting Ms. Conley advised Mr. Spencer that he should not speak with Mr. Joe Vela, an HPM employee who was the Quality Assurance Director at the clinic, about the OHM system. (HT, p. 760.) Mr. Spencer testified that he had to talk to Mr. Vela to successfully implement OHM, and that he “remember[ed] coming out of that [meeting] feeling that [he] could talk to Joe, related to OHM related issues, because he was the QA manager.” (HT, p. 760.) On September 14, 2012, Mr. Johnston, again emailed Ms. Conley to express concern about Mr. Clem and Mr. Spencer spending a lot of time “behind closed doors.” (RX 34, p. 72.)

### 4. Complaints Following Implementation

Respondent delayed the go-live date for OHM to September 17, 2012, because the tool was not ready for production by the scheduled August 20, 2012, date. On September 17, 2012, CSC implemented OHM. Mr. Spencer notified Mr. Elsethagen that he received numerous error messages from the new system, and the system crashed three times within the first two days. (CX 59, pp. 1-2.) In his emailed response Mr. Elsethagen acknowledged the errors were important, but questioned why Mr. Spencer did not identify them before the implementation date. (CX 59.) Mr. Spencer explained that he had “brought this up on numerous occasions to Lisa, OHM, and you and no one seem[ed] to think it was an issue.” (CX 59.)

### 5. Meeting with HPM

On September 18, 2012, the Complainants met off-site at a restaurant with Mr. Mooers, the HPM employee in charge of the transition, and Mr. Joe Vela, who was HPM’s Quality Assurance Director. (HT, p. 539.) At the meeting HPM requested IT information from Mr. Clem and Mr. Spencer, and the Complainants discussed their concerns related to OHM. Mr. Vela remembered discussing “any pitfalls or concerns or issues that [HPM] may need to be aware of going into the transition.” (HT, p. 823.) Mr. Mooers recalled talking about the IT system, including the OHM system. (Mooers Deposition, p. 14.) Mr. Spencer recounted discussing concerns regarding OHM, including “the errors and the crashes, stuff that I was working on in regards to OHM,” (HT, p. 539), and Mr. Clem remembered speaking about their complaint to DOE and discussing the data issues and staffing concerns related to OHM. (HT, p. 115.) Mr. Spencer also agreed to write a report about OHM for HPM. (HT, p. 115.)

## 6. Meeting with Ms. Conley

Following the meeting with HPM on September 18, Mr. Clem asked to meet with Ms. Conley. On September 20, 2012, Complainants met with Ms. Conley to discuss their ongoing concerns with OHM. Ms. Conley described the meeting in a statement to Human Resources, Employee Relations. (CX 66, pp. 3-5.) She described how the meeting began with Mr. Spencer and Mr. Clem voicing concerns about ongoing issues with the newly-implemented OHM system. *Id.* It then transitioned into Mr. Spencer discussing his concerns with the plan to subcontract to Lockheed Martin, and the resulting reduction in current IT staff who had first-hand knowledge of how the system operated. *Id.* He then mentioned he had spoken to Lockheed Martin and HPM personnel about the IT transition. Ms. Conley followed up with questions as to how often they had met with HPM, what types of information were discussed, why HPM met with them instead of CSC management, and why Complainants thought it was acceptable to meet with HPM. (CX 66, pp. 3-5.) Ms. Conley described her interpretation of Complainants' meeting with HPM, stating

They said they provided information and details about the current systems and applications and that they would be asked to report OHM status and any risk concerns regarding OHM and other systems/applications managed under the current contract . . . I asked them why they believed that what they were doing . . . was an acceptable thing to do. They said they thought it was ok because HPM would become the new prime contractor beginning October 1.

(CX 66, pp. 3-5.)

In his statement to Employee Relations, Mr. Clem asserted the purpose of meeting with Ms. Conley was "to make sure she understood what risks the clinic faced by the IT staff being cut to one person." *Id.* He further explained that in late July, 2012, Mr. Elsethagen had told the IT group that if an HPM employee "had IT questions as needed for transition purposes to go ahead and provide the information unless it was going to take more than an hour or so." (CX 66, p. 8.) Mr. Spencer also offered a statement to HR regarding the September 20 meeting with Ms. Conley. (CX 66, p. 9.) Mr. Spencer asserted he had "spoken to Lockheed Martin management/staff on multiple occasions, sometimes initiated by [him]self and other times initiated by them, in regards to business operations." (CX 66, p. 9.)

## 7. Respondent's Response

Later in the afternoon on September 20, 2012, Ms. Conley suspended Complainants without pay. Ms. Conley testified Ms. Poulter directed her to suspend the Complainants, but Ms. Poulter testified she "didn't decide to suspend them. Em-

ployee relations decided to suspend them.” (HT, p. 1147; Lisa Poulter Deposition, pp. 68-69.) In her summary of the incident Ms. Kobra Martinez, the HR Employee Relations employee assigned to the case, detailed how “Conley stated that she will not take action to terminate the employees because they were already schedule[d] for termination but wanted to remove them immediately from the work site.” (CX 66, p.6.)

In an email sent on September 20, at 2:05PM Ms. Poulter informed HPM director of transition, Mr. Mooers, that if HPM needed the assistance of any CSC staffer it should “contact Kim and she will be happy to coordinate with you.” (CX 60.) That afternoon Mr. Mooers emailed Ms. Poulter, copying parties including Ms. Conley, asking if CSC had fired IT professionals for talking to HPM. (CX 61, p. 1.) Ms. Poulter replied “no.” At 5:00PM on the same day Mr. Mooers responded he was “told that [she] prohibited any of [her] IT professionals from talking with HPMC,” and directed her that “if discussing IT with the current IT folks is troublesome to [her] please let [him] know.” (CX 60.)

In her summary of the incident the HR employee also described a call between herself, Mary Ruth Solomon, and Adair Beldsoe<sup>2</sup> on September 25, 2012. (CX 66, p. 6.) In the call Mr. Beldsoe stated that “only but *sic* so much information could have been shared with HPM . . . HPM already has access to the meetings, CSC employees and the client, it’s not unusual for employees to talk among themselves about work related subjects.” (CX 66, p. 6.) But Mr. Beldsoe went on to state the already-planned termination actions should take place as scheduled. (CX 66, p. 6.) Ms. Martinez testified that Employee Relations never reached a final conclusion as to wrongdoing. (Martinez Deposition, p. 42.)

After Ms. Conley suspended them without pay, both Complainants returned to the DOE to file a complaint of retaliation against CSC. (HT, pp. 154-156.) When Mr. Clem re-applied for two positions Ms. Conley decided to hire other people even though she found him eligible. (HT, p. 1163.) She stated she had a problem with hiring Mr. Clem because of reliability and trust issues based on his prior communications with HPM. (HT, p. 1164.)

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under the Act an employer may not "discharge" or "otherwise discriminate" against an employee "with respect to his compensation, terms, conditions or privileges of employment" because the employee has engaged in certain protected activities. To prevail on their claims, Clem and Spencer must prove by a preponderance of the evidence they (1) engaged in protected activity, (2) Respondent knew about the

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<sup>2</sup> Mary Ruth Solomon was Ms. Martinez’s supervisor in Employee Relations. Ms. Martinez testified Ms. Solomon, along with an individual from the legal department, would review Ms. Martinez’s reports. (Martinez Deposition, p. 36.) Ms. Martinez testified she was not sure of the name of the person from the legal department, but based on his notes I can conclude it was Mr. Beldsoe. *Id.*

activity (3) Respondent took adverse action against them, and (4) their protected activity contributed to the adverse action. The Board affirmed my findings that Complainants established the first three elements: protected activity, knowledge, and adverse action. But on remand, I must re-analyze whether they proved by a preponderance of the evidence that their protected activity contributed to the adverse actions against them.

If Complainants succeed in establishing contribution, then Respondent may escape liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

### Contributing Factor

In analyzing contribution in the initial D&O I used the term “reasonable inference,” and on this basis the Board held I failed to apply the correct burden of proof. The correct burden of proof for contribution is by a preponderance of evidence. Thus, on remand I must determine whether Complainants demonstrated by a *preponderance of the evidence* that their protected activity<sup>3</sup> was a contributing factor to the adverse actions<sup>4</sup> against them. A complainant meets the preponderance of the evidence standard by demonstrating it is more likely than not that a certain proposition is true. *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-1, slip op. at 11 (ARB Apr. 25, 2014).

Contribution is a low benchmark. To succeed a complainant need not show protected activity was a primary or even a significant cause of an adverse action, but simply a contributing factor. *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014.) A “contributing factor” is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action. *Armstrong v. Flowserve US*, ARB No. 14-023, ALJ No. 2012-ERA-017, slip op. at 5-6 (Sept. 14, 2016); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). A complainant may demonstrate protected activity was a contributing factor by direct or circumstantial evidence. *Bobreski*, ARB No. 09-057, slip op. at 13. Circumstantial evidence may include temporal proximity, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in pro-

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<sup>3</sup> The Board affirmed my finding complainants engaged in protected activity when they contacted DOE with concerns about OHM and when they raised complaints about OHM to supervisors and to Ms. Conley. (Remand, p. 13.)

<sup>4</sup> The Board also affirmed my findings that suspension without pay, failure to pay special pay, failure to retain Mr. Clem, and failure to re-hire Mr. Clem were adverse actions.

tected activity. *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011). Proving causation through circumstantial evidence “requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-00001, slip op. at 11-12 (Nov. 5, 2013.) A complainant may prevail by showing that the respondent’s proffered reason, while true, is only one of the reasons for its conduct, and another contributing factor is the protected activity. *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 18 (ARB Mar. 30, 2007), *aff’d*, 302 F. App’x. 708 (9th Cir. 2008.) On remand the Board directs my attention to several areas of analysis for contribution, including temporal proximity and pretext.

## 1. Suspension without Pay

### a. Temporal Proximity

In my initial D&O I listed temporal proximity as a ground for finding protected activity contributed to Mr. Clem and Mr. Spencer’s suspension without pay. (D&O, p. 23.) In its closing brief, Respondent contended the temporal proximity between the protected activity and adverse action was severed by the intervening event of Complainants’ violation of CSC’s alleged policy barring communication with HPM. (RCB, p. 18.) In its Decision and Remand Order the Board highlights this argument, agreeing that “the circumstantial value of temporal proximity, as CSC argues, is greatly reduced where there is an intervening event to account for.” (Remand, p. 19.) With the Board’s guidance in mind I re-analyze the impact of temporal proximity.

An inference of causation can be drawn when the adverse action happened as few as two days later, to as much as about one year after the protected activity. *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 1991-ERA-13 (Sec’y Oct. 26, 1992); *Thomas v. Ariz. Pub. Serv. Co.*, 1989-ERA-19 (Sec’y Sept. 17, 1993). But temporal proximity is not always dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). Where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, there is no longer a logical reason to infer a causal relationship from temporal proximity between the activity and the adverse action. *See Robinson*, ARB No. 04-041, slip op. at 9 (ARB Nov. 30, 2005). In its remand the Board cites to *Feldman*, in which the 4th Circuit held a complainant’s action of criticizing his boss during a meeting, coupled with the passage of a significant amount of time after the protected activity, constituted an intervening cause which severed the causal connection between the protected activity and the adverse action. *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014.) When there are intervening events that might explain the adverse action, the question becomes “whether the intervening events . . . negate a

finding that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("Rudolph I"). "Determining what, if any, logical inference may be drawn from the temporal relationship . . . is not a simple and exact science but requires a 'fact intense' analysis," and in evaluating causation, the ALJ should "evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action." *Id.* at 10-11.

On September 20, 2012, Complainants met with Ms. Conley to express their concerns about staffing and the OHM program. They also informed Ms. Conley of their out-of-office meeting with HPM personnel, and their sharing of information with Lockheed Martin ("LM"). That afternoon Ms. Conley informed Complainants they were suspended without pay. (D&O, p. 20.) The adverse action against Complainants, their suspension without pay, occurred the same day they engaged in the protected activity of voicing ongoing concerns with the newly-implemented OHM system. But it also occurred on the same day Respondent learned Complainants had met and shared information with HPM, conduct Respondent allegedly viewed as wrongdoing.<sup>5</sup> Thus, it is difficult to determine the independent impact of the two.

Despite this difficulty, I do not find Complainants' disclosure of their meeting with HPM employees outside of work an intervening event that independently could have caused the adverse action against them. First, the record indicates CSC and HPM employees had a history of working cooperatively together, and thus the alleged gravity of the meeting with HPM is undermined. (*See generally* D&O, p. 5.) First, CSC personnel had previously given employees permission to provide IT information to HPM.<sup>6</sup> Further, as recorded by the HR employee, Complainants were not in a position to have any proprietary information to provide to HPM since HPM already had access to meetings, CSC employees, and the client. (CX 66, p. 6.) The record also indicates CSC and HPM employees worked together closely throughout the transition, sharing the same building and talking on a daily basis. (Baxter Deposition, p. 149.) HPM's transition manager, Mr. Mooers, held weekly transition meetings which CSC employees sometimes attended. (Mooers Deposition, p. 41.) There is some evidence to suggest the relation between CSC and HPM had become more reserved after HPM won the prime contract. But the high level of interaction

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<sup>5</sup> On remand the Board asserted "the issue to be decided by the ALJ, on CSC's affirmative defense in particular, is whether CSC genuinely believed that complainants colluded and shared proprietary information and suspended Clem and Spencer for this reason and not for activity protected under the ERA." (Remand, p. 19.) In my same-action defense analysis below, I address whether Respondent held a good-faith belief this was a violation of company policy that warranted suspension, and find it did not.

<sup>6</sup> Mr. Elsethagen told the IT group that if an HPM employee "had IT questions as needed for transition purposes to go ahead and provide the information unless it was going to take more than an hour or so." (CX 66, p. 8.)

between CSC and HPM employees, including during the transition period, make it implausible that a meeting with the HPM transition manager and other HPM employee would on its own suddenly result in suspension. Further, the discussion at the September 18th meeting with HPM personnel, Mr. Mooers and Mr. Vela, in part included Mr. Clem and Mr. Spencer's concerns about the OHM system. In their meeting with Ms. Conley they specifically mentioned they had discussed OHM concerns with HPM, and thus the alleged wrong-doing of meeting with HPM and the protected activity of voicing concerns about OHM cannot be separated.

Temporal proximity alone, particularly with the complicating factor of the meeting with HPM, may not establish contribution. But proving causation through circumstantial evidence "requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor." *Citationshares Management, LLC*, ARB No. 12-029. In combination with other evidence, including inconsistent explanations and failure to admit to the decision-making, which I discussed in the initial D&O and further analyze below, I draw an inference of causation based on temporal proximity. I find the temporal proximity between Complainants' protected activity and their suspension supports a finding it is more likely than not that their protected activity contributed to the adverse action against them.

#### b. Pretext

The Board opines that my "findings of fact appear to implicitly support a finding that CSC's stated reason for the adverse actions were pretextual," and directs that if I do find CSC's stated reasons pretextual, then I must explicitly state so and explain why. (Remand, pp. 20-21.) The Board ordered me to further analyze "the evidence concerning the role that Employee Relations played in the investigation and CSC's disciplinary process." (Remand, p. 21.) On remand I clarify that I find Respondent's reasons for its adverse actions against Complainants pretextual.

Under the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist. Thus an employee need not demonstrate that an "employer's proffered non-discriminatory reasons are pretext." *Coates v. Grand Trunk Western Railroad*, ARB No. 14-019, ALJ No. 2013-FRSA-003, slip op. at 4 (July 17, 2015). Nonetheless, "[s]howing that an employer's reasons are pretext can of course be enough for the employee to show protected activity was a 'contributing factor' in the adverse personnel action." *Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53-54 (Sept. 30, 2016). The critical inquiry in a pretext analysis is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge. *See Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008) ("The relevant 'falsity' inquiry is whether the employer's stated reasons were held in good faith at the time [the adverse action was taken], even if they later prove to be

untrue . . .”) A shifting explanation for an adverse action indicates it is a pretext for retaliation. *See Speegle v. Stone & Webster Construction, Inc.*, ARB No. 06-041, 2005-ERA-6 (ARB Sept. 24, 2009). A finding of pretext is supported where an employer is unable to demonstrate any other employees were fired for the same conduct. *See Priest v Baldwin Associates*, 84-ERA-30 (Sec'y June 11, 1986).

Respondent asserts Complainants were suspended for “violating company policy by breaching confidentiality and aiding the competition.” (RCB, p. 21.) I find Respondent did not have a good-faith belief that complainants colluded and shared proprietary information and suspended Clem and Spencer for this reason, and thus find this proposed basis pretextual. Respondent asserts Complainant’s “clandestinely m[et] with HPM offsite after hours . . . [and] provided information and input for a LMSI bid for the clinic’s IT scope.” (RCB, p. 22.) But there is no evidence Complainants provided any such information. On September 18, 2012, the Complainants met off-site at a restaurant with Mr. Mooers, the HPM employee in charge of the transition, and Mr. Joe Vela, who was HPM’s Quality Assurance Director. (HT, p. 539.) The four individuals’ description of the meeting drastically departs from Respondent’s version of the events. All four recalled discussing the ongoing issues with OHM. Mr. Vela remembered discussing “any pitfalls or concerns or issues that [HPM] may need to be aware of going into the transition,” and Mr. Mooers recalled talking about the IT system, including the OHM system. (HT, p. 823); (Mooers Deposition, p. 14.) Mr. Spencer recounted discussing concerns regarding OHM, including “the errors and the crashes, stuff that I was working on in regards to OHM,” (HT, p. 539), and Mr. Clem remembered speaking about their complaint to DOE and discussing the data issues and staffing concerns related to OHM. (HT, p. 115.) Both Mr. Mooers and Mr. Vela denied that they discussed the rate of pay for any CSC employees or any other proprietary business information. (HT, p. 824.) They did discuss the possibility Lockheed was bidding on the IT scope, and Mr. Clem remembered that Mr. Mooers had confirmed the possibility. (HT, p. 117.) But there is no evidence to suggest Complainants provided any confidential information to the HPM employees or to Lockheed. Based on the above I find the allegations for which Complainants were suspended were not based on fact. But the question I must determine is not whether the belief was factual, but whether Respondent actually believed it and took the action on that basis.

Respondent’s proffered reason for the adverse action – that Complainants committed wrongdoing by disclosing business information to a competitor – is not credible. First, the testimonial evidence establishes Complainants did not have access to any proprietary information, and CSC had no reason to think otherwise. Even Employee Relations documented in its report that “only but [sic] so much information could have been shared with HPM . . . HPM already ha[d] access to the meetings, CSC employees and the client, it’s not unusual for employees to talk among themselves about work related subjects.” (CX 66, p. 6.) Moreover, as discussed above in the temporal proximity section, the record indicates CSC and HPM

employees had a history of working cooperatively together. (See generally D&O, p. 5.) The high level of cooperation makes it unlikely Respondent had a good-faith belief that Complainants' meeting with the HPM transition manager constituted a violation of policy that would result in suspension. Ultimately, it was not Complainants' communication with HPM or discussions with LM, but rather their persistent complaints regarding the shortfalls of OHM, including relaying those concerns to HPM, that distinguished them from the other employees, and singled them out for Respondent's decision to suspend without pay. See *White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-1 (ARB Aug. 8, 1997). There is no evidence of CSC's having suspended any other employee for communicating with HPM.

Further, none of Respondent's personnel were willing to take responsibility for the decision to suspend Complainants. (D&O, p. 24.) Employee Relations' summary of the incident detailed how "Conley stated that she will not take action to terminate the employees because they were already schedule[d] for termination but wanted to remove them immediately from the work site." (CX 66, p.6.) Ms. Conley testified Ms. Poulter directed her to suspend the Complainants, but Ms. Poulter testified she "didn't decide to suspend them . . . Employee relations decided to suspend them." (HT, p. 1147); (Lisa Poulter Deposition, pp. 68-69.) Presumably, an employer would be willing to admit to an adverse action with a legitimate basis. A decision to suspend Complainants was obviously made, and thus I find the unwillingness of any CSC personnel to admit to making the decision indicative of improper motives. I find this unwillingness supports a finding Respondent did not have a good-faith belief, and that the allegation Complainants committed wrongdoing by disclosing business information to a competitor that warranted suspension was pretextual.

## 2. Special Pay

Likewise, I find Complainants' protected activity contributed to Respondent's decision not to provide them with "special pay." Respondent promised special pay for extra work hours, but asserts the special pay was discretionarily withheld by Mr. Baxter because "neither Clem nor Spencer were giving 100% to the work necessary for the contract transition." (RCB, p. 48.) But the special pay was supposed to be given for extra work hours, not for "giving 100%." Respondent has introduced no evidence that these hours were not performed, or that any other employees were denied special pay for not giving 100%. Thus I find Respondent's reason for withholding the pay pretextual, and find that Complainants' protected activity contributed to the decision.

## 3. Failure to Retain

The employer's misjudging the qualifications of an employee "may be probative of whether the employer's reasons are pretexts for discrimination." *Blake v. Hatfield Electric Co.*, 1987-ERA-00004 (Sec'y Jan. 22, 1992). As I stated in the initial D&O, Respondent initially selected three senior programmer analysts to stay on

after October 1. (D&O, p. 24.) When Mr. Elsethagen and Mr. Spencer resigned, Respondent chose Ms. Riley and Mr. Matthews as replacements rather than Mr. Clem. Mr. Matthews was a more junior Program Analyst than Mr. Clem, but was chosen by Ms. Conley on September 18 for a position on the understaffed IT team. Respondent argues Mr. Matthews was chosen because he had a lower salary and performed more help-desk work. (RCB, pp. 40-41.) But I find the decision to choose a less experienced IT person for a short-staffed team counterintuitive. Thus, I look to other motives for the decision. The decision not to retain Mr. Clem was made before Respondent became aware of Mr. Clem's alleged wrongdoing on September 18, but after Mr. Clem had made ongoing complaints about the lack of progress in development of OHM, and after Mr. Johnston had emailed Ms. Conley to express concern about Mr. Clem and Mr. Spencer spending a lot of time "behind closed doors." (RX 34, p. 72.) Ms. Conley was thus aware that Mr. Clem had made complaints about OHM. Given that I do not find credible the proffered reason for not retaining Mr. Clem, I find it more likely than not that Mr. Clem's protected activity contributed to the decision.

#### 4. Failure to Rehire

Based on a similar rationale as the failure to retain, that Mr. Clem was qualified and had done the job before, I find Respondent's proffered reason for not rehiring him – that they received stronger resumes – incredible and unsupported. I also find contribution supported by temporal proximity. He was not rehired in December, 2012, or October, 2013, both within approximately a year of the protected activity and first adverse action of suspension without pay. I find Mr. Clem demonstrated his protected activity play a role in Respondent's decision not to rehire him in December, 2012, and October, 2013.

A "contributing factor" is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action. *Armstrong v. Flowserve US*, ARB No. 14-023, ALJ No. 2012-ERA-017, slip op. at 5-6 (Sept. 14, 2016); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). Complainants did not need to demonstrate there were no other factors that played a role in the adverse actions against them, but merely that their protected activity was *one* of the factors. Based on temporal proximity, coupled with evidence suggesting Respondent's proffered basis for the adverse actions was pretextual, I find it is more likely than not that Complainants protected activity contributed to Respondent's decision to suspend them without pay, not give them "special pay," and to not offer a position or rehire Mr. Clem.

## Same-Action Defense

Complainants met their burden of demonstrating by a preponderance of the evidence that their protected activity contributed to Respondent's adverse actions against them. Thus, the burden shifts to Respondent to show by clear and convincing evidence it would have taken the same actions absent any protected activity. In my initial D&O, I found Respondent did not succeed in establishing the same-action defense, but the Board held I erred in my analysis. In the initial D&O I incorrectly shifted the focus of my analysis to whether Respondent proved by clear and convincing evidence that it was *justified* in taking its actions, when the proper analysis is whether Respondent would have taken the same adverse actions against Complainants in the absence of the protected activity, whether or not its actions were justified. (Remand, p. 15.) Specifically, the Board rejected my conclusion that "Respondent ha[d] not produced clear and convincing evidence to show that the protected activity *did not contribute* to Ms. Conley's choice of R.M. over Clem, after Messrs. Elsethagen and Spencer resigned." (Remand, p. 15); (D&O, p. 27.) The Board emphasized that this analysis double-credited my earlier finding of contribution, but failed to give the employer the benefit of the same-action defense. On remand I re-examine the same-action defense, and as the Board directed, I pay particular attention to Respondent's good-faith belief as to Complainants' wrongdoing and Respondent's decision-making process.

### The Standard

Respondent will escape liability if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" protected activity. 29 C.F.R. § 24.109(b)(1); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 14-027, ALJ No. 2009-ERA-7 (ARB Feb. 25, 2015). "Clear" evidence means the employer presented evidence of unambiguous explanations for the adverse actions in question. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014). "Convincing" evidence demonstrates a proposed fact is "highly probable." *Id.* The burden of proof under the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard, and denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain. *Id.* In addition to the high burden of proof, the express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done" not simply what it "could have" done. *Id.*; *see also Duprey v. Florida Power & Light Co.*, ARB No. 00 070, ALJ No. 2000-ERA-00005 (ARB Feb. 27, 2003) (affirming the ALJs finding of clear and convincing evidence where Respondent had a progressive discipline policy and Complainant had exhibited regular and continual excessive absenteeism despite counseling).

The Board directs me to "re-analyze the record and address CSC's argument and supporting evidence that CSC . . . suspended Clem and Spencer under the belief

that they were colluding with HPM in furtherance of HPM's interests." (Remand, p. 20.) In performing this analysis I must reevaluate where Respondent had a good-faith belief that Complainants violated its policy, including CSC's contention it warned employees not to work with HPM on transition-related activities without permission. Next, to determine if Respondent would have taken the same actions absent the protected activity, I must assess testimony related to the decision-making that took place on September 20, 2012. (Remand, p. 20.)

### Good-Faith Belief

First, I must determine whether Respondent had a good faith belief that Complainants violated company policy by meeting and sharing information with HPM. On remand the Board emphasized "that CSC is not required to prove that Clem and Spencer shared proprietary information," explaining

It is not a question of whether Clem and Spencer actually shared proprietary information or whether CSC had an applicable policy prohibiting employees from colluding with competitors. Rather, the issue to be decided by the ALJ, on CSC's affirmative defense in particular, is whether CSC genuinely believed that complainants colluded and shared proprietary information and suspended Clem and Spencer for this reason and not for activity protected under the ERA.

(Remand, p. 19.)

As I discussed briefly above, I find Respondent did not have a good faith belief Complainants provided proprietary business information in violation of company policy. Complainants were not in a position to have any pertinent business information to provide, and more importantly, Respondent had no reason to believe they did. Ms. Poulter asserted Complainants "undermined CSC's competitive position in the course of negotiating the subcontract with the prime," but offered no examples or details of how they undermined it. (Poulter Deposition, p. 81.) HPM already had access to meetings, CSC employees, and the client. (CX 66, p. 6.) The HR employee investigating the incident recorded in her report that a CSC legal official stated "only but [sic] so much information could have been shared with HPM . . . HPM already has access to the meetings, CSC employees and the client, it's not unusual for employees to talk among themselves about work related subjects." (CX 66, p. 6.) Further, the record establishes Complainants did not discuss pricing information or any proprietary information at the meeting with HPM, and Respondent had no reason to think they did. (HT, p. 824.) Ms. Conley asserted they were suspended to stop them from taking business proprietary information, but when asked what business proprietary information they could have taken she did not have an answer. (HT, p. 1152.) Both Mr. Mooers and Ms. Conley agreed that they did not think Complainants would have any CSC proprietary information. (HT, p. 1109); (Mooers Deposition, p. 15.) Ms. Conley testified she suspected the pricing data

would be stored on a wholly separate server not accessible to clinic employees, and had no evidence that Complainants ever had access to this information. (HT, pp. 1109-1110.) Based on Respondent's knowledge of Complainants' lack of access to proprietary information, I find Respondent did not genuinely believe Complainants colluded and shared proprietary information, and did not suspend them for this reason.

But even if Respondent believed in good faith that Complainants were colluding with HPM and shared proprietary information in furtherance of HPM's interests, I still find Respondent would not have taken the same adverse actions absent the protected activity.

### Same-Action Analysis

To evaluate Respondent's "same-action" affirmative defense, I must attempt to construct the counterfactual scenario in which the protected activity is absent, but all else remains the same. Then I must ask whether the evidence of record is such that it is "highly probable or reasonably certain" that Respondent would have acted in the same way in that scenario as it did in the actual course of events. When there are multiple, independent contributing factors, the inquiry is fairly straightforward. For example, if a complainant reported an injury but also had multiple absences without excuse, I would ask if the respondent would have imposed the same discipline if the complainant had multiple absences without excuse but did not report an injury. But when the protected activity and adverse action are connected, it is more difficult. Here, the analysis is complicated by the fact that Complainants' protected activity, expressing concerns about the OHM system, is coupled with their alleged wrongdoing of meeting and sharing information with HPM representatives. At the same time Respondent learned Complainants met with HPM, they also learned Complainants had engaged in the protected activity of expressing concerns about OHM. The question becomes whether if Respondent had only learned about the off-site meeting with HPM, without any connection to complaints about OHM, it would have taken the same adverse action against Complainants.

#### 1. Suspension without Pay

Complainants and Respondent agree that Complainants engaged in discussions with HPM, but disagree as to the acceptability of those discussions. Respondent contends the relation between HPM and CSC had become increasingly hostile, and Complainants knew of this hostility and should have known not to provide business information to them. Specifically, Respondent contends "Complainants were aware that there was animosity between HPM and CSC and that their management was deliberately withholding information regarding OHM and the transition." (RCB, p. 31; HT, pp. 326-27.) But I find this assertion on shaky evidential ground. The record indicates CSC and HPM employees had a history of working co-

operatively together. (*See generally* D&O, p. 5.) While it is plausible this cooperation eroded when HPM won the new bid for prime contractor, the evidence as a whole suggests otherwise. In mid-to-late July, 2012, Mr. Elsethagen told the IT group that if an HPM employee “had IT questions as needed for transition purposes to go ahead and provide the information unless it was going to take more than an hour or so.” (CX 66, p. 8.) HPM’s transition manager, Mr. Mooers, held weekly transition meetings which CSC employees sometimes attended. (Cleve Mooers Deposition, p. 41.) Further, Mr. Baxter, the principal manager of the clinic, testified that CSC and HPM employees worked together closely throughout the transition, sharing the same building and talking on a daily basis. (George Baxter Deposition, p. 149.) When he learned of Complainants’ suspension, Mr. Mooers emailed Ms. Poulter, asking if CSC had fired IT professionals for talking to HPM. (CX 61, p. 1.) He followed up with an email saying he was “told that [she] prohibited any of [her] IT professionals from talking with HPMC,” and directed her that “if discussing IT with the current IT folks is troublesome to [her] please let [him] know.” (CX 60.) These emails suggest there was no established or well-known policy that CSC employees could not exchange information with HPM, and undermines Respondent’s argument that a violation of this alleged policy would be a sufficient basis for the adverse actions against Complainants. These emails reinforce the normalcy of HPM and CSC employees’ meeting and discussing IT issues.

Additionally, I find the decision-making process undermines Respondent’s argument it would have taken the same actions based solely on Complainants’ alleged wrongdoing. In the initial D&O, I emphasized the discrepancies in testimony relating to the decision-making process. On remand, the Board directed me to further address Ms. Conley’s testimony, Ms. Poulter’s deposition, and Employee Relations’ role in the disciplinary process. After Ms. Conley met with Complainants on September 20, she informed Mr. Baxter of the conversation, and together the two called Ms. Poulter. Ms. Conley testified Ms. Poulter directed her to suspend Mr. Clem and Mr. Spencer, stating “she said we need to remove them from the clinic, where they have access to information and access to our systems.” (HT, p. 1147.) But Ms. Poulter denies this. (HT p. 1147). Ms. Poulter testified she “didn’t decide to suspend them . . . Employee Relations decided to suspend them,” and that she “told [Ms. Conley] that, you know, we needed to get employee relations involved, and she did that.” (Poulter Deposition, p. 68.) Mr. Baxter did not recall who decided to suspend the Complainants, but was sure he did not do it. (Baxter Deposition, p. 139.) The only portion of the decision-making process admitted to by Respondent is that Ms. Conley was the one who informed complainants of their suspension. She did not provide them with any written notification, but instead told them verbally because she was “instructed by Employee Relations of what to do . . . [t]hey told [her], you know, verbally, let them know what they were being suspended for.” (HT, p. 1166.)

The role of Employee Relations in the decision-making is unclear. Kobra Martinez, the Employee Relations worker who handled Complainants’ incident, explained that Employee Relations becomes involved in cases when a manager opens

a ticket because he or she wants to take action against an employee. (Martinez Deposition, p. 24.) She agreed she would have to rely upon the manager to inform her of any protected activity or concerns raised by the employee. (Martinez Deposition, p. 25.) As discussed above, Ms. Poulter asserted Employee Relations decided to suspend Complainants, but in her written summary of the incident Ms. Martinez recorded that “Conley stated that she will not take action to terminate the employees because they were already schedule *[sic]* for termination but wanted to remove them immediately from the work site.” (CX 66, p.6.) Ms. Martinez testified she did not remember whether she gave any instruction that the employees should be suspended. (Martinez Deposition, p. 32.) But she knew she was not consulted or involved in the decision that the suspensions would be unpaid. (Martinez Depo., p. 37.) She clarified that Employee Relations does not have to be involved in the suspension of a worker, and that its level of involvement varies. (Martinez Depo., p. 33.) I find the evidence pertaining to Employee Relations’ role, while not entirely clear, indicates Ms. Conley was likely the individual who decided to suspend Complainants. Although she contacted Employee Relations to open up an investigation, she did not wait for the results of that investigation before suspending Complainants. As detailed above, I find Ms. Conley’s unwillingness to admit to making the decision indicative of improper motives, and overall I find it undermines Respondent’s same-action defense.

In rejecting Respondent’s same action defense, I also highlighted an email exchange between Ms. Poulter and Mr. Mooers. (D&O, p. 24.) On September 20, 2012, when Mr. Mooers asked Ms. Poulter via email if she suspended employees for “aiding the competition,” Ms. Poulter responded “no” (CX 61). On remand, the Board directed that if I relied on Ms. Poulter’s response as evidence she did not claim responsibility for decision-making, or was admitting that CSC had another reason for suspending them, I must also address other emails accompanying this discussion. In an email sent at 2:05PM, Ms. Poulter informed Mr. Mooers that if HPM needed the assistance of any CSC staffer it should “contact Kim [Conley] and she will be happy to coordinate with you.” (CX 60.) At 5:00PM Mr. Mooers responded he was “told that [she] prohibited any of [her] IT professionals from talking with HPMC,” and told Ms. Poulter that “if discussing IT with the current IT folks is troublesome to [her] please let [him] know.” (CX 60.) Considered as a whole I find these email exchanges between Ms. Poulter and Mr. Mooers signal that Mr. Mooers was surprised by the suspension of Complainants, and was not aware of any prohibition on information sharing between HPM and CSC. If Respondent had a strong desire to prohibit such meetings, I expect it would have made its policy more well-known. Mr. Mooers’ response undermines Respondent’s argument that it would have taken the same adverse actions based solely on Complainants meeting with HPM, and suggests that Complainants concerns with OHM played a significant role in the adverse actions against them.

The meeting between Ms. Conley and Mr. Spencer on September 6, 2012, is the strongest evidence supporting Respondent’s argument that providing infor-

mation to HPM was suspension-worthy. At the meeting Ms. Conley advised Mr. Spencer that he should not speak with Mr. Joe Vela, an HPM employee who was the Quality Assurance Director, about the OHM system. (HT, p. 760.) Mr. Spencer's notes from the meeting describe it as "meeting to discuss my commitment to OHM/CSC," and list as a bullet point "told not to discuss OHM w/ Joe/HPM." (CX 26.) This evidence indicates that despite previous high levels of cooperation, Mr. Spencer should have been aware that speaking with HPM personnel was now discouraged. This exchange supports Respondent's argument a violation was a basis for adverse action. But the problem with this command by Ms. Conley, to not speak with Mr. Vela "about OHM stuff," is that it was directed at restricting Complainant's protected activity, not at protecting proprietary business information. (HT, p. 760.) As Mr. Spencer testified, he had to talk to Mr. Vela to successfully implement OHM, a system which was connected to worker safety and which Complainants feared was being developed inadequately. In his notes he specifically recorded he was not to discuss OHM, but did not make any mention of disclosing business information generally. (CX 26.) Contrary to proving Respondent would have taken the same adverse actions against Complainants based solely on meeting with HPM and allegedly sharing proprietary information, this evidence supports a conclusion that Respondent's main concern regarding Complainant's discussions with HPM was their complaints about OHM. Based on the above, I find Respondent failed to prove by clear and convincing evidence that they would have taken the same adverse action of suspending Complainants without pay absent their complaints about OHM.

## 2. Special Pay

Likewise, Respondent failed to conclusively demonstrate it is highly probable or reasonably certain that it would not have given Complainants special pay absent their protected activity. As discussed above, Respondent promised special pay for extra work hours, and then did not provide it. Respondent contends the special pay was discretionarily withheld by Mr. Baxter because "neither Clem nor Spencer were giving 100% to the work necessary for the contract transition." (RCB, p. 48.) But I do find this clear and convincing. The special pay was supposed to be given for extra work hours, not for "giving 100%," and there is no evidence that these hours were not performed. In addition to the high burden of proof, the express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done" not simply what it "could have" done. *Duprey v. Florida Power & Light Co.*, ARB No. 00 070, ALJ No. 2000-ERA-00005 (ARB Feb. 27, 2003). Even if the special pay was "discretionary," the evidence suggests it would have been given to complainants if they had not made complaints about OHM. The special pay was given to their co-worker, Mr. Johnston. There are no records supporting any difference in their hours worked, and Mr. Johnston did not engage in similar protected activity. I find Respondent failed to demonstrate it is reasonably certain that it would have withheld Complainants special pay even if they had not engaged in protected activity.

### 3. Failure to Retain

I also find Respondent failed to prove by clear and convincing evidence that it would have made the same decision not to hire Mr. Clem for one of the remaining IT positions absent his protected activity. Respondent argues it chose Ms. Riley and Mr. Matthews for the IT positions after Mr. Elsethagen and Mr. Spencer resigned because of the “available mix of skills.” (RCB, p. 40.) But I am unconvinced. It is counterintuitive to select a more junior developer and a remote worker for an IT team with low staffing. Moreover, the initial three selections for the position had all been senior programmers, while Mr. Matthews was a junior developer. Mr. Clem’s qualifications more closely matched those who were initially offered the position, and thus I am skeptical of the decision to offer it to a less qualified candidate.

Respondent contends protected activity played no role in the selections because they all occurred before Complainants met with Ms. Conley on September 20, and Ms. Conley was unaware of who filed a concern with the DOE when she made the selection on September 18. (RCB, p. 42.) On August 10, 2012, Complainants anonymously emailed a complaint to the Department of Energy employee concerns program, and on August 15 an investigator came to the worksite. While Ms. Conley may not have been completely certain of the identities of the employees who complained, she surely had a hunch. On September 6, Ms. Conley had met with Mr. Spencer and warned him not to discuss OHM- related issues with HPM. On September 14, Mr. Johnston again emailed Ms. Conley to express concerns about Mr. Clem and Mr. Spencer spending a lot of time “behind closed doors.” (RX 34, p. 72.) Thus, when Ms. Conley decided not to select Mr. Clem for one of the positions on September 18, she was aware of his protected activity. Respondent has failed to introduce sufficient evidence to show by a clear and convincing standard that absent this protected activity Ms. Conley would not have chosen Mr. Clem for one of the remaining positions.

### 4. Failure to Rehire

Finally, I find Respondent failed to show by clear and convincing evidence it would not have rehired Mr. Clem for analyst positions in December, 2012 and October, 2013, even if he had not engaged in protected activity. When Mr. Clem re-applied for two positions Ms. Conley decided to hire other people even though she found him eligible. (HT, p. 1163.) She asserted she had a problem with hiring Mr. Clem because of reliability and trust issues based on his prior communications with HPM. (HT, p. 1164.) I find her explanations for the adverse action in question ambiguous, and fail to show it is highly probable she would not have hired Mr. Clem for the position even if he had not made complaints about OHM. *Speegle*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014).

## **IV. DAMAGES**

In my initial D&O I awarded specified amounts to each Complainant. On remand the Board vacated my damage awards. In a footnote the Board explained it would not address the propriety of my awards because any damage issues were not yet ripe in light of their remand of the contribution and same-action issues. (Remand, p 9.) The Board did not address my analysis, or suggest any error relating to my conclusions. The findings above result in the same liability as the initial D&O, thus I fully incorporate the analysis and findings of my initial damage award.

## V. ATTORNEY'S FEES AND COSTS

The Complainants' are entitled to recover attorney fees and costs reasonably incurred in this action. Complainants' counsel must file a fee petition within 30 days. *See Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), 2004-WL-1955436, slip op. at 10-11). Respondent must file its objections, or a statement of non-opposition, within 14 days of service of the fee petition. Within 14 days of service of objections, the parties must meet in person or telephonically to discuss and attempt to resolve any objections. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Complainants' counsel must file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

## VI. ORDER

Respondent must pay damages as follows:

1. To Mr. Clem: back pay totaling \$172,889.21<sup>7</sup>, including
  - a. \$2,716.95 in pay lost because of his suspension;
  - b. \$1,728.80 in special pay withheld;
  - c. \$7,884.24 in employer contributions to his 401(k); and
  - d. \$160,559.22 in lost wages.

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<sup>7</sup> This amount must be combined with interest, compounded quarterly, and calculated under *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 19-20 (ARB May 17, 2000).

2. To Mr. Spencer: back pay totaling \$3,191.12<sup>8</sup>, including
  - a. \$1,701.92 in pay lost because of his suspension; and
  - b. \$1,489.20 in special pay withheld
3. Compensatory damages in the amount of
  - a. \$30,000.00 to Mr. Clem, and
  - b. \$10,000.00 to Mr. Spencer
4. The Complainants' attorney fees and costs reasonably incurred in this action.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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<sup>8</sup> This amount must be combined with interest, compounded quarterly, and calculated under *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 19-20 (ARB May 17, 2000).

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been

taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor.

If a timely petition for review is filed with the Board, and the Board issues an order notifying the parties that the case has been accepted for review, this Decision and Order will be inoperative unless and until the Board issues an order adopting my decision. However, that portion of my Decision and Order that orders relief (except any order awarding compensatory damages) is effective immediately upon receipt and will remain effective while review is conducted by the Board, unless the Board grants a motion by the Respondent to stay the order based on exceptional circumstances. See 29 C.F.R. §§ 24.109(e) and 24.110.