DECISION AND ORDER AWARDING DAMAGES

This matter arises under the employee protection provisions of the Federal Railroad Safety Act, as amended, 49 U.S.C. § 20109 (“FRSA” or the “Act”), with implementing regulations at 29 C.F.R. Part 1982. The FRSA prohibits an employer from discriminating against, or taking an unfavorable personnel action against, an employee for reporting a work-related injury or engaging in other protected activity. In this case, Complainant contends that Respondent retaliated against him for reporting a workplace injury and for following the treatment plan of a treating physician.
PROCEDURAL HISTORY

I held a formal hearing in this matter on February 11-12, 2021, and February 17, 2021, via Microsoft Teams. Both parties were provided a full and fair opportunity to present evidence and argument as proved by the law and applicable regulations. At the hearing, I read J. Stips. 1-13 into the record and admitted the following exhibits: ALJX 1-6; JX 1-16; CX 1-8, 10, 11; RX A-E, G-L, M-1, M-3 through M-9, and M-34. Tr. at 12-24, 210, 460-462, 575-579, 623-627. The parties also stipulated that Complainant was unavailable to work from September 10, 2020, to December 13, 2020, for medical reasons unrelated to this matter. Id. at 628-629. Both parties submitted closing argument briefs on April 30, 2021.

ISSUES

At the hearing, I summarized the issues for adjudication:

1. Whether Complainant can establish by a preponderance of the evidence that he engaged in protected activity;
2. Whether Complainant can establish by a preponderance of the evidence that he suffered an unfavorable personnel action;
3. Whether Complainant can establish by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action;
4. If Complainant establishes the first three issues, can Respondent establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant’s protected activity; and
5. What remedies, if any, are appropriate.

Id. at 11-12.

FACTUAL BACKGROUND

Complainant began working for the Amtrak Police Department (“Respondent” or “APD”) on February 27, 2017, as a probationary police officer. J. Stips. 1. Complainant previously worked as a police officer for the Baltimore City Police Department and was considered a lateral hire at APD. Tr. at 183-184, 219-221, 441; see CX 7 at 3. Complainant received his Maryland Police Training Commission (“MPTC”) in July 2012 and his railroad commission on April 20, 2017. Tr. at 216, 220. A railroad commission allows Complainant to enforce laws on the federal railroads, whereas the MPTC allows him to enforce the state and local laws in Maryland. Id. at 220.

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1 Citations to the record are abbreviated as follows: Hearing Transcript (“Tr.”), Joint Stipulations (“J. Stips.”), Complainant’s Exhibits (“CX”), Respondent’s Exhibits (“RX”), Joint Exhibits (“JX”), and Administrative Law Judge’s Exhibits (“ALJX”).
While Complainant was an officer with APD, he was a member of the Fraternal Order of Police ("FOP") labor union and was covered by a collective bargaining agreement ("CBA"). Id. at 233-234; J. Stips. 2. Rule 31(A) of the CBA states:

Applications of new employees will be approved or disapproved within one (1) year after applicants begin work, provided that employees have successfully completed their initial training (both classroom and field training) and are successfully commissioned. If the employee is not successfully commissioned or is unable to successfully complete training (both classroom and field training) on the first attempt, his application may be disapproved even if the one (1) year has expired.

JX 1 at 56. APD has variously interpreted this rule as probation commencing on the date an officer begins work, the date the officer receives a railroad commission, and the date after the officer has been commissioned and completed both classroom and field training. Compare Tr. at 176 with Tr. at 134, 344, 406, 469, 540 and Tr. at 583-584. It is also a practice in APD to use Rule 31(A) as authorization to extend the probationary period of officers. Id. at 42, 585-586. Probationary police officers ("PPOs") are not entitled to the disciplinary and grievance procedures set forth in the CBA because they are not full officers. Id. at 42-43; 569-570, 592-593.

The uniform for PPOs prior to being commissioned is a gray polo shirt, blue BDU pants, a black garrison belt, and black boots. Id. at 354. After PPOs begin field training, they are issued a standard police uniform with a blue button-up shirt, BDU pants, a duty belt, a vest, a jacket with a police insignia, a badge, and a nameplate. Id. at 355-356. Field training is typically 12 weeks, but Complainant participated in an eight-week program for experienced officers. Id. at 55. In the first phase of field training, the PPO observes his or her field training officer ("FTO") conducting day-to-day business such as responding to calls, how to use the police radio, and other basic functions. Id. at 351. In the second phase of field training, the FTO supervises the PPO while he or she takes a more active role in daily operations by answering calls for service, operating police vehicles, etc. Id. In the final solo/shadow phase, the PPO answers all incoming calls, and the FTO is only there to observe the PPO. Id. at 56, 351. PPOs are evaluated daily during field training and then monthly once training is successfully completed. Id. at 351-354.

Approximately four weeks prior to the end of a PPO’s probationary period, APD’s hiring committee\(^2\) convenes to discuss the officer. JX 15 at 8; Tr. at 538-539. Members of the hiring committee hold various ranks within APD and are located throughout the country. Tr. at 538. Before the panel convenes, the PPO’s commander reviews the officer’s file and writes a “rail letter” or memo detailing the PPO’s background, evaluations, training, and whether the commander believes the PPO should transition to a permanent officer. Id. at 45, 58, 115-116. The commander presents this information to the committee, which then collectively determines whether the PPO should transition to a permanent officer. JX 15 at 8. The panel sends its recommendation to the chief of police for final approval. Tr. at 551-552. Officers receive an increase in pay after completing training and probation. Id. at 185.

\(^2\) “Hiring committee” and “hiring panel” are used interchangeably. Tr. at 551.
Complainant injured his wrist on July 3, 2017, while he was in field training. *Id.* at 236; J. Stips. 4. Complainant was patrolling Union Station in Washington, D.C. with Officer Shaunta Bond\(^3\) when they responded to a call for a theft. RX L at 76-77. After approaching the suspect, a scuffle ensued, and Complainant was pulled down to the ground. *Id.* at 86-87. Complainant noticed a sharp pain in his wrist after placing the suspect in a holding cell and reported his injury to Sgt. Kevin Dauphin. *Id.* at 88. Sgt. Dauphin escorted Complainant to the Howard University Hospital emergency room, and x-rays revealed that Complainant sprained his wrist. *Id.* at 89. Complainant was discharged from the hospital then returned to Union Station to fill out an injury report with Sgt. Dauphin. *Id.* at 89-90; see JX 2. Complainant took a few days off work, then returned on full duty in a splint. RX L at 93-94.

Complainant Googled doctors and found Dr. Bruce Wolock, who eventually operated on his wrist. *Id.* at 92-93. Complainant’s first appointment with Dr. Wolock was on August 9, 2017. J. Stips. 5. Dr. Wolock gave Complainant a cortisone shot and after administering an MRI determined that Complainant had torn ligaments in his wrist. RX L at 97-98. Complainant officially went out on injury leave on August 25, 2017, and had surgery on his right wrist on October 26, 2017. *Id.* at 98-99; Tr. at 240; J. Stips. 6, 8. Complainant was still a probationary officer when he went out on leave. J. Stips. 7.

Complainant was in a cast for two months after his surgery, and he had follow-up visits with Dr. Wolock every four to six weeks. Tr. at 242-243. Dr. Wolock would check Complainant’s pain level, perform strength testing, and test his motion ability. *Id.* After each visit, Dr. Wolock gave Complainant a certificate listing the date of his appointment and stating that Complainant was unable to return to work. *Id.* at 243; see, e.g., JX 5. Complainant faxed each certificate to Michele MacDonald, a Senior Case Management Specialist for Amtrak, who would circulate it to Deputy Chief Maureen Powers and Complainant’s other supervisors. Tr. at 244. Complainant received injury on duty (“IOD”) benefits while he was out on leave, which was 100% of his salary for the first three months, then 80% of his salary for the remainder of the time he was out. RX L at 99-100.

Amtrak has a return to work program for injured employees called the Right Care Day One program. Tr. at 497. The program encompasses Amtrak employees from all different crafts, not just those who work for APD. *Id.* at 474, 518-519. Right Care Day One includes Innovative Claims Strategies (“ICS”), a third-party vendor for Amtrak that operates a 24/7 injury hotline and provides nurse case management and bill payment services. *Id.* at 19-20, 497-498. When an employee is cleared to return to work, Ms. MacDonald contacts their department to determine how they can return to work within their medical restrictions. *Id.* at 500. Ms. MacDonald mailed Complainant a letter on August 28, 2017, explaining Right Care Day One and how Complainant could return to work in a modified capacity under its Transitional Work Program while he was recovering from his injury. *Id.* at 508; JX 16 EX 10. Complainant did not recall receiving this letter. Tr. at 313-314.

Complainant periodically received phone calls from APD management to check on his status while was on injury leave. *Id.* at 251; RX I at 70. Complainant received some calls from

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\(^3\) Shaunta Bond has held several ranks within APD during the relevant time period in this case and is variously referred to as Officer Bond, Inspector Bond, Sergeant Bond, and Special Agent Bond. All refer to the same person.
Captain Glen Cosner, Sgt. Little, and Sgt. Molina, but he primarily spoke to Sgt. Dauphin. Tr. at 251-252; RX I at 70. Sgt. Dauphin states that Complainant stopped returning his calls in November 2017 and that he attempted to call Complainant 12 times between November 20, 2017, and March 23, 2018, with no response. JX 11 at 5. No one in APD management or supervision, including Sgt. Dauphin, ever said anything to Complainant about the unreturned calls. Tr. at 91-92, 143, 265-266, 333, 436-438.

On April 4, 2018, Deputy Chief Lisa Shahade emailed FOP President David Pearlson requesting that Complainant’s probation be extended nine months, to run from his return to work on full duty. JX 4; J. Stips. 9. APD generally requests probation extensions if a PPO has been out on leave due to injury or other reasons. J. Stips. 10. FOP is supposed to notify a PPO when their probation is extended, but Complainant did not find out that his probation had been extended until after he left APD and filed a complaint with the Occupational Safety and Health Administration (“OSHA”) in February or March 2019. Tr. at 267-268, 549-550, 590-591.

Complainant had an appointment with Dr. Wolock on July 23, 2018, and he was given a certificate (“July 23 certificate”) stating that he could not return to work until September 6, 2018. Id. at 244-245; JX 5. On July 24, 2018, Complainant’s ICS Nurse Case Manager, Phyllis Perrotta, sent Dr. Wolock a letter stating that Complainant’s treatment “has been excessive,” and inquiring why he was unable to return to work in any capacity. Tr. at 247; JX 6. Dr. Wolock sent Ms. Perrotta a revised certificate on July 27, 2018 (“July 27 certificate”), stating that Complainant could return to work on July 30, 2018, on light duty status with no lifting over 10 pounds. JX 7. Complainant did not have an appointment with Dr. Wolock on July 27. Tr. at 246.

On July 30, 2018, Ms. MacDonald called Complainant to inform him that Dr. Wolock cleared him for light duty. 4 Id. at 245, 515. Complainant told Ms. MacDonald that the last certificate he had was from July 23, and he would need to speak with Dr. Wolock before returning to work. Id. at 247, 515. Deputy Chief Shahade mailed Complainant a letter on August 23, 2018, stating that his IOD benefits would be suspended effective September 3, 2018, because he declined light duty during his conversation with Ms. MacDonald. JX 15 at 49-51; see JX 10. Deputy Chief Shahade did not contact Complainant or Dr. Wolock prior to sending the letter, nor was she aware that Dr. Wolock had previously issued the July 23 certificate with a different return to work recommendation. JX 15 at 49-51.

On September 10, 2018, Complainant returned to work on light duty. J. Stips. 11. The uniform for a light duty officer is a gray polo shirt, blue BDU pants, and black boots, or civilian business casual attire. Tr. at 85-86, 122-124; see RX B. Light duty officers are not permitted to carry a gun or wear anything that says “police,” and they are typically restricted to administrative functions. Tr. at 420, 475. Amtrak adjusts the schedules of light duty officers to accommodate their physical therapy sessions and other medical appointments. Id. at 119-120.

On October 1, 2018, Complainant arrived at work wearing a black hoodie, BDU pants, and boots. Id. at 255-258; JX 11 at 1. Captain Theodore McLaughlin saw Complainant and informed Sgt. Matthew Lindeman that Complainant was not wearing the proper uniform; Sgt.

4 “Light duty” and “restricted duty” are used interchangeably.
Lindeman then went to speak to Complainant. Tr. at 363-364. There is some dispute as to what exactly was said during this conversation, but Complainant and Sgt. Lindeman both recalled that Complainant mentioned his attorney in some capacity, Complainant told Sgt. Lindeman that he wore the hoodie because his gray polo shirt was uncomfortable, and Complainant responded “no” when Sgt. Lindeman asked if Complainant was disobeying a direct order. Id. at 256-257, 292-294, 366, 368, 380-381; see JX 11 at 3. Sgt. Lindeman drafted a memo (“October 1 memo”) to Captain McLaughlin memorializing his interaction with Complainant. Tr. at 363-364; JX 11 at 3.

On or about October 5, 2018, either Deputy Chief Powers or Captain Cosner asked Sgt. Dauphin to draft a memo (“October 5 memo”) documenting his attempts to contact Complainant while he was on injury leave. Tr. at 90, 441; see JX 11 at 5. On October 15, 2018, Deputy Chief Powers drafted a memo (“October 15 memo”) synthesizing the contents of Sgt. Lindeman’s October 1 memo and Sgt. Dauphin’s October 5 memo. JX 11 at 4. At the end of her October 15 memo, Deputy Chief Powers recommended “that Allan Neita’s conditional offer of employment be withdrawn for unsatisfactory performance during his probationary period.” Id.

Following Deputy Chief Powers’ recommendation, the hiring panel convened to discuss Complainant on October 22, 2018. Id. at 1; Tr. at 552. At the time, the panel consisted of Associate General Counsel Jared Garth, Deputy Chief Shahade, Inspector Tracy McCain, Inspector Cindy Allen, Inspector Kevin Amberg, and Deputy Chief Powers. CX 5 at 1; Tr. at 551. Deputy Chief Powers presented the October 1, October 5, and October 15 memos to the panel, and they agreed that Complainant’s application should be disapproved. Tr. at 552-557. Deputy Chief Shahade emailed the committee’s recommendation to Assistant Chief Dotson and Chief Neil Trugman, which Chief Trugman approved on October 24, 2018. Id. at 557-558; JX 11 at 1.

On October 30, 2018, Complainant was called into a meeting with Captain McLaughlin and Captain Cosner. Tr. at 263-264. Complainant was given a letter stating that, effective immediately, his application had been disapproved and he was no longer employed by APD. Id.; JX 12; J. Stips. 12. Neither the letter nor the captains gave Complainant any reason for his application being disapproved. Tr. at 264-265; JX 12. Complainant handed in his items, was escorted out of the building by the Special Operations Unit, “and that was it.” Tr. at 264.

Complainant’s medical insurance was cancelled on October 31, 2018, but Respondent paid all medical bills he incurred due to his injury until his last appointment with Dr. Wolock on November 26, 2018. Id. at 309-311, 334.

On December 10, 2018, Sgt. Dauphin, Special Agent Bond, and Sgt. Barry Durm each drafted memos detailing various interactions they had with Complainant after he returned from injury leave. JX 13. It is unclear when or why these officers were asked to draft the memos. Deputy Chief Powers was asked several times why the memos were written nearly two months after Complainant left APD. See Tr. at 94-101. She eventually answered, “It wasn’t two months after, sir. It was me, unfortunately, not getting them beforehand. So, things of this nature aren’t

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5 Mr. Dotson was promoted to chief of police in July 2020. Tr. at 631.
taken lightly, you know, and when there’s statements are made [sic] and you follow it up in writing, you know, that’s just our standard course.” *Id.* at 101. Assistant Chief Dotson, on the other hand, stated that the officers were asked to draft the memos in response to an EEOC complaint filed by Complainant in November 2018. *See id.* at 640-642.

**Deposition Testimony**

*Allan Neita*

Complainant filed a Federal Employers’ Liability Act (“FELA”) claim arising out of his injury, and he was deposed by Respondent in that matter on September 18, 2019. RX L.

Complainant testified that when he returned to work on September 10, 2018, his supervisors gave him assignments that were outside of his light duty restrictions “and even being at a podium when I wasn’t a full duty officer, which was deemed unsafe.” *Id.* at 103. Complainant testified that he never refused to perform any assignments, “[e]ven though the doctor’s orders said just strictly desk work only.” *Id.* at 104.

Complainant testified that he was never disciplined or written up in any manner before or after his injury, and he did not experience any difficulties with his supervisors when he returned from leave. *Id.* at 104-105. Complainant later testified, however, that Deputy Chief Powers “gave [him] the cold shoulder” when he returned to work, and she would not acknowledge him when he tried to say hello. *Id.* at 116.

At the time of the deposition, Complainant testified that he was still experiencing some tightness and sharp pains in his wrist, but he could not receive treatment because he did not have medical insurance. *Id.* at 122. Complainant was asked if he is still capable of being a police officer, and he testified, “I mean it was a traumatizing injury. So, I would like to try, but I’m not sure if I can.” *Id.* at 126. Complainant applied for other law enforcement jobs, but “it’s tough to get a police job once you’ve been let go from another agency . . . It doesn’t look good.” *Id.* at 127-128.

Complainant was also deposed by Respondent in this matter on August 5, 2020. RX I.

Complainant testified that he never received the July 27 certificate from Dr. Wolock clearing him to return to work on light duty, and he did not have an appointment with Dr. Wolock on the 27th. RX I at 56, 58. Complainant spoke to Dr. Wolock on July 30 or 31, and “[h]e told me Amtrak called him, and he’s never heard from them prior to that from the whole time my treatment was being taken care of. That was the first that he heard of them, and it had to be on the 27th.” *Id.* at 59-60.

Complainant reiterated that he was assigned tasks “outside of what my doctor prescribed” when he returned to work on light duty, specifically citing crowd control and having to deliver car batteries to another train station. *Id.* at 77-78. Complainant testified that when Sgt. Lindeman confronted him about wearing a hoodie on October 1, he told Sgt. Lindeman that he was being assigned duties outside of his work restrictions and that he would have to speak with
his attorney about those assignments. *Id.* at 87-93. Complainant testified that Deputy Chief Powers, Sgt. Lindeman, and Sgt. Dauphin were hostile towards him upon his return because he did not come back as a full duty officer, and APD had a staffing shortage. *Id.* at 81-86.

**Bruce Wolock**

Bruce Wolock was deposed by Respondent on September 2, 2020. JX 14. Dr. Wolock is Board certified in orthopedic surgery and has a certificate of added qualification in hand surgery. *Id.* at 12.

Dr. Wolock testified that during a July 23, 2018 appointment, Complainant informed him that he would like to try to return to work by September 11, 2018. *Id.* at 27; see JX 14 EX 7. Dr. Wolock gave Complainant the July 23 certificate stating that Complainant could not return to work until September 6, 2018, because he did not know light duty was an option. JX 14 at 34; see JX 14 EX 6. Dr. Wolock did not know if ICS regularly inquired about Complainant’s treatment, but he did recall that between July 23 and July 30, 2018, a nurse asked if Complainant could return to work on light duty. JX 14 at 25. Dr. Wolock informed Complainant that he was cleared for light duty during a July 30 appointment and gave Complainant a certificate stating the same. *Id.* at 31-32. Dr. Wolock testified that it is normal for insurance providers to inquire about a patient’s treatment and that he changes return to work recommendations after a few days “all the time.” *Id.* at 36, 44-45.

On cross-examination, Dr. Wolock was asked whether he thought Ms. Perrotta questioned his diagnosis in an April 12, 2018 letter by asking if Complainant could return to work because six months had elapsed since his surgery. *Id.* at 38; JX 14 EX 5. Dr. Wolock testified, “I think that’s a legitimate question that she asked me. He had surgery on 10/26/17. This is a surgery that most people have full recovery in three months.” JX 14 at 39. Dr. Wolock did not respond to Ms. Perrotta’s letter, but he thought she gave an accurate summary of Complainant’s health status. *Id.* at 40. Dr. Wolock testified that he gave two different recommendations on July 23 and July 27 because “[Ms. Perrotta] asked me a question, and I answered it . . . It was a long overdue question. He probably could have gone back to work light duty months before this.” *Id.* at 43; Compare JX 14 EX 6 with JX 14 EX 9. Dr. Wolock testified that Complainant “really was off work for quite an excessive period of time.” JX 14 at 49. Dr. Wolock was asked whether he believed Ms. Perrotta was qualified to question him about his treatment plan for Complainant. *Id.* at 53. Dr. Wolock responded, “She can say whatever she wants. Doesn’t faze me. She doesn’t tell me what to do. I do what I think is appropriate for the patient.” *Id.*

**Lisa Shahade**

Deputy Chief Shahade is the Deputy Chief of Strategic Operations for APD, and she was deposed by Complainant on August 20, 2020. JX 15. Deputy Chief Shahade worked at APD for 33 years, and she testified that she took a voluntary severance package and would be an active employee until October 28, 2020. *Id.* at 12-13. Deputy Chief Shahade’s job duties include operations support, administrative functions, such as hiring and hiring coordination, and overseeing the National Communications Center, which is the 911 center for APD. *Id.* at 13.
Deputy Chief Shahade testified that the general supervision hierarchy over Complainant while he was at APD was sergeant, captain, then deputy chief. *Id.* at 21-22. Deputy Chief Shahade could not recall who Complainant’s sergeant was, but his captains were Teddy McLaughlin and Glen Cosner, and his deputy chief was Maureen Powers. *Id.* at 21-23. Deputy Chief Shahade was not one of Complainant’s supervisors, and she did not have the authority to discipline or terminate Complainant while he was at APD, aside from her input as a member of the hiring committee. *Id.* at 21, 23. Deputy Chief Shahade testified that only Chief Trugman had the ultimate authority to discipline or terminate Complainant. *Id.* at 24.

Deputy Chief Shahade testified that she “didn’t really have what I would call a relationship” with Complainant when he was at APD; she was not sure if she ever saw him, and she had no personal knowledge of his job performance. *Id.* at 35-36. Deputy Chief Shahade testified that Complainant’s application was disapproved because the hiring committee felt “he was not a good fit with the department.” *Id.* at 63-64. Complainant was not appropriately wearing his restricted duty uniform, and he had “just a general attitude that we just didn’t feel that he may be able to operate successfully in that type of environment, you know, giving orders and receiving orders, that type of environment. It was mainly an attitude of cooperation as I recall.” *Id.* at 64-65. Deputy Chief Shahade testified that she did not know how many times Complainant wore the incorrect uniform or how many times he was approached about his uniform. *Id.* at 66.

*Michele MacDonald*

Michelle MacDonald is a senior case management specialist with Amtrak’s Right Care Day One program, and she was deposed by Complainant on August 20, 2020. JX 16. Ms. MacDonald testified that when an employee is injured on the job, he or she reports the injury to a supervisor, who then calls it in to the injury hotline. *Id.* at 16-17. Ms. MacDonald contacts the employee’s supervisor to check on their work status, and a nurse case manager is automatically assigned based on the region in which the employee was injured. *Id.* at 17. Ms. MacDonald is responsible for helping injured employees with paperwork, applying for sickness and disability benefits, and notifying supervision about an employee’s change in work status. *Id.* at 21. The ICS nurse case manager serves as a liaison between the employee and the medical providers and is responsible for sending billing information, following up with providers about the employee’s treatment, and handling referrals for physical therapy and diagnostic testing. *Id.* at 21-22.

Ms. MacDonald testified that it is her understanding that Dr. Wolock issued the July 27 certificate clearing Complainant for light duty after issuing the July 23 certificate because Ms. Perrotta contacted Dr. Wolock’s office and “asked for clarification.” *Id.* at 31-35. Ms. MacDonald testified that she never contacted Dr. Wolock about Complainant’s return to work date, nor did she ask Ms. Perrotta to contact him. *Id.* at 36. After Ms. MacDonald informed Complainant that he could return to work, she received an August 1, 2018 letter from Complainant’s attorney, Chad Stelly, telling her not to contact Complainant directly and informing her that Complainant had not received the July 27 certificate. *Id.* at 43-45; see JX 16 EX 6.
Phyllis Perrotta

Phyllis Perrotta is a telephonic nurse case manager for ICS, and she was deposed by Complainant on September 23, 2020. Id. at 10-12. Ms. Perrotta assists Amtrak with on duty injuries occurring in Pennsylvania, Washington, D.C., and Maryland. Id. at 15. When an employee is injured, Ms. Perrotta reviews the injury report from ICS’s injury hotline center, sends billing information to the medical facility where the employee was treated, and contacts the employee for details of their injury and treatment. Id. at 14-15. Ms. Perrotta testified that her job is to review medical documentation, help schedule doctor’s appointments, and send billing information to medical providers, whereas Ms. MacDonald’s job with Right Care Day One is to help injured employees return to work on full or light duty. Id. at 18-20.

Ms. Perrotta was asked about a March 16, 2018 letter she sent to Dr. Richard Bombach, Complainant’s primary care physician, asking about the recovery time for his injury. Id. at 24; see CX 11 EX 1. Ms. Perrotta wrote that the standard recovery time for Complainant’s injury was 42 days, per the Official Disability Guidelines (“ODG”), but Dr. Bombach recommended that Complainant remain out of work for an additional two months. CX 11 EX 1. Ms. Perrotta testified that it is standard for ICS to contact physicians and inquire about their prognosis. CX 11 at 29. Ms. Perrotta sent a similar letter to Dr. Wolock on April 12, 2018, asking if Complainant could return to work because six months had elapsed since his surgery. CX 11 EX 2.

Ms. Perrotta testified that she does not know why Dr. Wolock issued Complainant the July 23 certificate stating that he could not return to work until September 6, but then issued the July 27 certificate clearing him for light duty beginning July 30. CX 11 at 33-35; see CX 11 EX 3; CX 11 EX 4. Ms. Perrotta contacted Dr. Wolock about the July 23 certificate, but she does not recall ever speaking with Dr. Wolock directly. CX 11 at 36; see CX 11 EX 5. Ms. Perrotta testified that she never intended to interfere with Complainant’s medical treatment or his ability to attain maximum medical improvement. CX 11 at 74.

Hearing Testimony

Maureen Powers

Maureen Powers is the Deputy Chief of Patrol for the Mid-Atlantic Division of APD. Id. at 38. Deputy Chief Powers has worked for APD since October 1994, and she has been Deputy Chief since May 2017. Id. at 39, 47.

Deputy Chief Powers testified that, despite the text of Rule 31(A) of the CBA, a PPO’s probationary period starts from the date of commission. Id. at 134, 146. Deputy Chief Powers also testified that, while not explicitly authorized in the CBA, it is standard practice in the department to extend a PPO’s probationary period if they are unable to be evaluated during that time. Id. at 42, 78. Deputy Chief Powers testified that Complainant’s probation had not ended as of April 2018 because he had not completed his classroom and field training, and he had not been fully evaluated. Id. at 80.
Deputy Chief Powers testified that Complainant had two separate incidents involving his uniform, the first during the week of September 24, 2018, and the second on October 1, 2018. *Id.* at 121-122; JX 13 at 1-2; JX 11 at 3. However, Deputy Chief Powers also testified that Complainant had always reported to work with the proper uniform prior to October 1, 2018. Tr. at 92. Deputy Chief Powers found Complainant’s uniform incidents to be “concerning” and “not consistent” with APD’s Operations Guide. *Id.* at 127-128.

Deputy Chief Powers testified about Sgt. Dauphin’s October 5 memo. *Id.* at 89; JX 11 at 5. Deputy Chief Powers testified that she did not know why Sgt. Dauphin sent her the memo several months after the events that are documented in it, “but we ask people to document situations and especially if they’re trying to reach one of our officers.” Tr. at 89-90. Deputy Chief Powers assumed that either she or the captain asked Sgt. Dauphin to write the memo, but she did not know who specifically asked for it or when the request was made. *Id.* at 90. Deputy Chief Powers could not recall when she became aware of the unreturned phone calls but that it was “early on,” and she asked Sgt. Dauphin to continue calling Complainant. *Id.* at 140.

Deputy Chief Powers made the recommendation to disapprove Complainant’s application, but Chief Trugman had the ultimate decision-making authority. *Id.* at 40, 91. Deputy Chief Powers chose not to wait until the end of Complainant’s probationary period to deny his application because he was behaving in a manner “contrary to the values that we have in the department.” *Id.* at 116-117. Deputy Chief Powers documented the reasons underlying her recommendation in her October 15 memo to Assistant Chief Dotson. *Id.* at 84-85; see JX 12; JX 11 at 4. At the hearing, Deputy Chief Powers testified that Complainant’s application was disapproved because he did not return Sgt. Dauphin’s phone calls while out on leave, he asked for directives to be placed in writing after he returned to work, he did not want to wear the proper uniform, and he questioned multiple directives by the sergeants. Tr. at 85. Deputy Chief Powers testified that no officer has had their application denied for uniform issues, and she was not aware of any APD supervisors issuing written correspondence to Complainant regarding the unreturned phone calls, his uniform issues, insubordination, or any other misconduct. *Id.* at 91-92, 107, 142-143.

**Anthony Daughtry**

Anthony Daughtry is a cybersecurity analyst and was previously a police officer with APD. *Id.* at 149-150. Mr. Daughtry was commissioned by the Maryland Police Training Commission, and he worked for the Baltimore Sheriff’s Office from July 2013 until August 2017, when he left for APD. *Id.*

Mr. Daughtry was injured on duty twice while he was working for APD, first in October 2017 and then again in May 2018. *Id.* at 156. Mr. Daughtry was on injury leave for four months after his second injury, and he returned to work on light duty at the end of September 2018. *Id.* at 156-157. On October 30, 2018, Mr. Daughtry was called into Deputy Chief Powers’ office and hand-delivered a letter of termination. *Id.* at 158. Mr. Daughtry testified that Captain Cosner and Captain McLaughlin told him that they did not have to give him a reason for his termination because he was on probation. *Id.* Mr. Daughtry later discovered from his union that

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6 Deputy Chief Powers did not specify the captain to which she was referring.
APD extended his probation after both of his injuries without notifying him. *Id.* at 159. Mr. Daughtry testified that Deputy Chief Shahade requested that his railroad commission be cancelled after he was terminated. *Id.* at 162.

**Tony Epps**

Tony Epps is the Sergeant of Patrol at APD. *Id.* 171. Sgt. Epps has been in his current position since 2005, and his primary duties are “scheduling, performing assignments [sic], evaluating the officers, checking on the officers, [and] daily administrative duties or assignments.” *Id.* at 171-172. Sgt. Epps is also a Field Training Officer/Coordinator, and he was responsible for overseeing the paperwork for PPO trainings in 2017. *Id.* at 181. Sgt. Epps is not involved in disciplining officers. *Id.* at 174.

Sgt. Epps testified that officers are on probation for one year from the day they begin work. *Id.* at 176. Sgt. Epps is not aware of a provision in the CBA or any other Amtrak documents that addresses probation extensions. *Id.* at 185.

Sgt. Epps interacted with Complainant once or twice per week during his training then once per week after Complainant finished his training and became a patrol officer. *Id.* at 172. Sgt. Epps testified that Complainant finished his field training, but he could not speak to Complainant’s other training. *Id.* at 177, 179. Sgt. Epps considered Complainant to be a “very capable officer,” and he did not recall Complainant being disciplined or admonished for nonconforming behavior prior to his application being denied. *Id.* at 191-192.

Sgt. Epps testified that a gray polo shirt, BDU pants, and boots are acceptable attire for light duty officers, but he has seen officers on light duty wearing T-shirts, jeans, and sneakers. *Id.* at 187-188.

**Allan Neita**

Complainant testified that he wore a gray polo, BDU pants, and black boots until he started field training in May 2017. *Id.* at 225-226. After he began field training, Complainant wore an APD uniform with Amtrak patches on the sides of his shirt, BDU pants, black boots, a gun belt, firearm, handcuffs, mace, espantoon, and a radio. Complainant testified that the last step of field training was the shadow phase, after which he gave a presentation in Deputy Chief Powers’ office on August 3, 2017. *Id.* at 222-223. Complainant operated as an independent officer after August 3, 2017. *Id.* at 223. Complainant testified that he never received a letter from Chief Trugman or anyone else at APD informing him that he was no longer on probation. *Id.* at 315-316; see RX E.

Complainant testified that he spoke to Sgt. Dauphin and Captain Cosner on the phone while he was out on injury leave. *Id.* at 250-251. Complainant did not recall receiving voicemails from Sgt. Dauphin between November 20, 2017, and March 23, 2018, but he testified that he spoke to Captain Cosner during that timeframe. *Id.* at 252-253; see JX 11 at 5. Complainant testified that he could not have blocked APD’s number because management

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7 Complainant testified that an espantoon is similar to a baton. *Tr.* at 241.
always called him from a private number, and it is not possible to block a private number. Tr. at 252; see JX 11 at 5. Complainant testified that no one at Amtrak ever emailed him and said that he was not returning phone calls. Tr. at 333.

Complainant testified that when he returned to work on September 10, 2018, he “was greeted by hostility or with hostility from Deputy Chief Powers.” Id. at 254. Deputy Chief Powers would not respond when Complainant would greet her, and she would immediately leave the roll call room after he entered. Id. Complainant did not have any issues with Deputy Chief Powers prior to going out on leave, and she called to wish him well before his surgery. Id.

While Complainant was on light duty, he was asked to transport two car batteries, each weighing between 20-25 pounds, from Union Station to New Carrollton. Id. at 255. Carrying the batteries required the use of both of Complainant’s hands, and he did not believe this assignment was in compliance with his light duty restrictions. Id. However, “I didn’t refuse, I didn’t question. I took the batteries as they asked me to.” Id. Complainant testified that he was also asked to perform crowd control after he returned to work, which he also deemed to be outside of his light duty restrictions. Id. at 290, 332. Crowd control involves patrolling a large crowd to ensure there is no rioting or disorderly conduct, and Complainant testified that only full duty officers should perform this task due to the risk of injury if any unruly conduct occurs. Id. at 332. Complainant testified that when Dr. Wolock cleared him to return to work, he was only supposed to work desk duty, but Complainant could not explain why a certificate restricting him to desk duty only was not in Dr. Wolock’s files. Id. at 282, 286.

Complainant testified that his understanding of the light duty uniform was “civilian attire, comfortable clothing,” or the polo shirt, BDU pants, and boots. Id. at 258. Complainant did not recall being confronted by anyone in APD management about issues with his uniform prior to October 1, 2018. Id. at 256. On October 1, Complainant testified that he arrived at work wearing a gray polo shirt, BDU pants, boots, and a black hoodie. Id. at 256-258. Complainant had not been told that he was not allowed to wear a hoodie over his uniform, and he did not think it would be an issue because he had seen other light duty officers wearing clothes outside of the prescribed uniform, including red T-shirts, green T-shirts, blue jeans, black sneakers, and hoodies. Id. at 258-259. Sgt. Lindeman confronted Complainant shortly after he arrived, and Complainant told Sgt. Lindeman that he was wearing the hoodie because he felt self-conscious about gaining weight while he was out on leave. Id. at 256-257. Sgt. Lindeman told Complainant that he would get him new shirts and a black fleece to wear with his uniform. Id. at 257. Sgt. Lindeman asked Complainant if he was refusing or disobeying a direct order; Complainant answered no, and the conversation ended. Id. Sgt. Lindeman called Complainant around 2:00 p.m. that day and told him that he had been switched to the 2:00 p.m. to 10:00 p.m. shift so he could go to physical therapy before coming to work. Id. Complainant testified that after the 2:00 p.m. conversation, he “thought everything was fine,” and thereafter reported to work wearing the gray polo shirt, black fleece, BDU pants, and field boots. Id. Complainant was not confronted by Sgt. Lindeman about his uniform after October 1, 2018. Id. at 259.

Complainant testified that he never refused to follow a directive because “that’s not who I am as a person, even though I was made to look that way, but I never disrespected any orders from anybody.” Id. Complainant was asked about an incident documented in a December 10,
2018 memo from Special Agent Bond. In the memo, Special Agent Bond states that she observed Complainant’s uniform “in disarray” during the week of September 24, 2018, and that he refused to tuck his shirt into his pants. Id. at 260-261; JX 13 at 1. Complainant testified that the incident never happened, and he never refused to tuck in his shirt. Tr. at 261. Complainant also testified that he never refused to sit at the Amtrak police podium, but he expressed his concerns that only full duty officers were authorized to sit there, after which he complied and sat at the podium. Id. at 262; see JX 13 at 3.

Complainant testified about the day his application was disapproved:

So, on the day of October 30th, it was weird, everybody was acting a little different and it was really—they just acted different as far as a little standoffish. And then I had to—then I remember Sgt. Bond coming to me saying that [Captain McLaughlin and Captain Cosner] want to see me upstairs, and while I was going upstairs—because they called Anthony Daughtry first, so while I was going upstairs, he said, “they fired me,” and that’s when I knew that the same thing was about to happen to me. So, when I went and sat down, they presented me with a letter and said—they never gave me an explanation. I asked them, “What’s the reason?” They told me to read the letter verbatim and to hand in all my stuff. And after that, I handed all my stuff in. We was [sic] escorted by SOU, which is the Special Operations Unit, and that was it.

Tr. at 263-264. Complainant testified that the letter he was given did not state any reasons for his termination. Id. at 264; see JX 12. Complainant was surprised by his termination because “I never seen anything happen like this before, ever. And I’ve seen many people get fired.” Tr. at 265. Aside from the October 1 uniform incident, Complainant had never been admonished for any nonconforming or unacceptable behavior, either verbally or in writing, and he “was completely blindsided by this whole thing.” Id. at 265.

Complainant testified that he understood there to be a disciplinary process at APD, consisting of non-punitive counseling, which is a verbal warning, punitive counseling with a write-up, then suspension. Id. at 266. Officers receiving non-punitive counseling are supposed to sign a documenting afterwards stating that they were counseled regarding the incident that occurred. Id. Complainant never received non-punitive counseling prior to his termination, and although he was confronted about the hoodie incident, he did not know that Sgt. Lindeman wrote a memorandum about it. Id. Complainant did not file a grievance after he was terminated because he never received a response when he contacted the union. Id. at 337-338.

Complainant testified about the impact his termination had on his personal life. Id. at 268. Complainant was terminated one month before his son was born, and he could not afford to buy diapers or feed his child. Id. at 268-269. Complainant was arguing with his girlfriend and could not find work, which impacted his mental health. Id. at 269. Complainant’s girlfriend could not use her full maternity leave because he was unable to afford childcare. Id. at 270. Complainant further testified:
So, the fact that I worked so hard to get this career and to be taken away from me for an injury that I incurred on the job and wearing a black hoodie, of course it’s devastating. And also, you know, the problem with being a black man in America and trying to—and the opportunities are not really given to us like this, and for me coming from where I came from and working hard to get where I came from, you know, my mom working two or three jobs so I can go to school and put food on the table and then me going to school and then beating all the odds, that is not given to us. And then working hard to get into law enforcement and then become a good law enforcement officer, and then going to a place where I had no issues and they just take it from me just like that, so how do I feed my family? How? I can’t do anything. So now I have to start all over. I have to start all over. For what? For no reason. For no reason at all.

Id. at 269. Complainant applied to the Greenbelt police, Bladensburg police, Hyattsville police, and various security companies but was unable to find another law enforcement job. Id. at 270-271. Complainant explained “one investigator told me ‘you had to do something wrong, no one would just fire you for no reason,’ so they couldn’t even believe that I did nothing wrong.” Id. at 270. Complainant testified that his credit and financial affairs took “a major hit,” which he also had to explain to potential employers. Id. 271.

Complainant was unemployed until July 1, 2019, when he began delivering food for DoorDash. Id. at 271-272. Complainant has been working as a court security officer for Paragon Systems since August 2020, but “that job is more of a retirement job, it has no pension or anything like that, as well as my pension being gone and lost. So now, God forbid if something happens, my son gets nothing.” Id. at 272. Complainant no longer has his railroad police commission because it was cancelled by Deputy Chief Shahade after he was terminated. Id. at 273. Complainant’s MPTC was also cancelled due to his railroad commission being cancelled, and if he wants to work as a police officer again “I have to start all over and possibly even go to another academy.” Id. at 273-274. Complainant testified that he is seeking reinstatement. Id. at 274.

On cross-examination, Complainant was asked about allegations made about him in various December 10, 2018 memos from APD sergeants. Id. at 302; see JX 13. Complainant denied ever telling Special Agent Bond that APD made him return to work against Dr. Wolock’s recommendation. Tr. at 302; see JX 13 at 1. Complainant also denied expressing negative opinions about APD on several occasions. Tr. at 303; see JX 13 at 1. Complainant denied asking for meetings with APD sergeants and captains about his work schedule and requirements, and he denied requesting his assignments to be sent to him via email. Tr. at 304-305; see JX 13 at 3. Complainant testified that he did not speak with Sgt. Durm about changing his schedule to accommodate his girlfriend’s pregnancy. Tr. at 306; see JX 13 at 4. Complainant denied telling Sgt. Durm that he did not want to drive a marked police car to pick up another officer and bring them back to Union Station. Tr. at 306-307; see JX 13 at 4. Sgt. Durm provided Complainant with an unmarked vehicle instead, but Complainant denied saying or suggesting to Sgt. Durm that he was only picking up the officer because Sgt. Durm was the one who asked him. Tr. at 307; see JX 13 at 4.
Matthew Lindeman

Matthew Lindeman is the Administrative Sergeant for the Mid-Atlantic Division of APD. Tr. at 343, 346. Sgt. Lindeman was hired by APD as a police officer in 2002 and was promoted to sergeant in 2005. Id. at 344. Sgt. Lindeman’s job duties include assisting with payroll, coordinating training, scheduling, overseeing Criminal Investigative Division functions, case tracking, assisting the human resources department with hiring new officers and the application process, and “tak[ing] stats, and a monthly report by the commander to the chief of police.” Id. at 346.

Sgt. Lindeman was not aware of Complainant’s work restrictions when he returned as a light duty officer in September 2018, but he occasionally gave Complainant administrative assignments, such as gathering and compiling statistical data. Id. at 357-358. Sgt. Lindeman testified that Complainant was probably asked to sit at the police podium while he was on light duty and that Amtrak employees in other crafts also sit at the podium as part of the Right Care Day One program. Id. 358-359. Sgt. Lindeman testified that if Complainant was given an assignment outside of his limited duty work restrictions, he could have informed the supervisor who gave him the assignment. Id. at 359-360. Sgt. Lindeman testified that Complainant never expressed any concerns to him about assignments. Id. at 360.

Sgt. Lindeman testified that he always saw Complainant in the proper uniform prior to October 1, 2018, but when he confronted Complainant about wearing a hoodie that day, Complainant “was acting very contrary towards my line of questioning.” Id. at 365, 386-387. Sgt. Lindeman elaborated:

He was—even though in the end of the letter he stated that he wasn’t going to refuse to do anything, it seemed that he was—that he had been—that he didn’t like the uniform of the day and that he was choosing to wear something other than that, and I just felt that it was just kind of a little—I don’t know how to describe it. The best way I could describe it is he was just being insubordinate. I mean, I don’t know how to describe it any better than that.

Id. Sgt. Lindeman testified that, to his knowledge, no other supervisors complained about Complainant’s uniform. Id. at 388-389.

Sgt. Lindeman testified that the other sergeants told him that Complainant “was questioning the sergeants’ ability to give him assignments based upon his restrictions,” and Sgt. Dauphin said that Complainant was requesting that all his assignments be put in writing. Id. at 369-370. Sgt. Lindeman testified that he cannot recall discussing any other issues regarding Complainant with the other sergeants. Id. at 370.

Kevin Dauphin

Kevin Dauphin is a patrol sergeant with APD. Id. at 395. Sgt. Dauphin began working for Amtrak as a PPO on November 15, 2001, and was promoted to his current rank in 2005. Id.
Sgt. Dauphin’s job duties include supervising the officers on the day shift and serving as a firearms instructor and the trace explosives detecting instructor. *Id.* at 404.

Sgt. Dauphin testified that he was with Complainant and Special Agent Bond when Complainant injured his wrist apprehending a suspect. *Id.* at 414. Sgt. Dauphin noticed Complainant wincing and holding his wrist after the suspect was handcuffed, so he notified the National Communication Center of Complainant’s injury and asked them to fill out an injury report. *Id.* at 415; *see* JX 2. Sgt. Dauphin reviewed the report and sent it to the injury reporting hotline then escorted Complainant to the Howard University Hospital. Tr. at 416.

Sgt. Dauphin called Complainant “about every couple weeks” while he was out on medical leave. *Id.* at 417. Sgt. Dauphin testified that when he spoke to Complainant on October 2, 2017, they discussed how Complainant was doing and when he would be returning to work. *Id.* at 417. Sgt. Dauphin and Complainant also spoke on November 9, 2017, and Complainant told Sgt. Dauphin that he had surgery and was in a cast. *Id.* at 418; *see* JX 11 at 5. Sgt. Dauphin then attempted to contact Complainant on 12 other occasions, but Complainant did not return his phone calls. Tr. at 418. Sgt. Dauphin believed Complainant blocked the Amtrak number he was using because the call went straight to voicemail when he tried to contact Complainant on December 18, 2017. *Id.*; *see* JX 11 at 5. Sgt. Dauphin did not attempt to reach Complainant by email or postal mail at his residential address, “but I did hear from some of the other officers that were still in contact with him knowing that he was still alive and doing okay.” *Id.* at 436-437.

Sgt. Dauphin testified that in addition to his October 5 memo, he also documented his attempts to contact Complainant in 10-day reports. *Id.* at 437. Ten-day reports are documents that are filled out after an officer is injured stating whether the officer came back to work or is out on leave and the officer’s status during the following 10 days. *Id.* Sgt. Dauphin testified that he did not draft his memo until October 2018 despite his phone calls to Complainant occurring in late 2017 and early 2018 because that is when he was asked for the memo. *Id.* at 441. Either Captain Cosner or Deputy Chief Powers asked Sgt. Dauphin to draft the memo, and he assumed it was for disciplinary reasons, but he did not ask why he was being asked to write it. *Id.* at 441, 443-444. Sgt. Dauphin later testified that either Deputy Chief Powers or Captain Cosner asked him to document his phone calls “[t]o make sure that I was doing them, I believe, and just in order to make sure that they were being done.” *Id.* at 447.

Sgt. Dauphin testified that he assigned Complainant various administrative assignments when he returned to work on light duty, such as sitting at the police podium, transporting items by train, or running errands in an unmarked police car. *Id.* at 422. On one occasion, Sgt. Dauphin asked Complainant to transport car batteries via train to another station. *Id.* Complainant did not complain about the assignment, but Sgt. Dauphin offered to have someone help carry the batteries to and from the train because Complainant said they were heavy. *Id.* at 423. Complainant was also assigned to the police podium, however he told Special Agent Bond that he did not feel safe sitting there because the podium said “police” on it. *Id.* at 426. Sgt. Dauphin spoke to Complainant and told him that people who are not police officers also sit at the podium and that Complainant did not have a problem doing so when he was “gray shirt status.” *Id.* Complainant sat at the podium after the conversation but on a few occasions Sgt. Dauphin
saw Complainant in the roll call room or in the breakroom when he was supposed to be at the podium. *Id.* at 433, 444.

Sgt. Dauphin testified that Complainant’s attitude changed after Mr. Daughtry returned to work from his injury leave:

He started complaining a lot more, started nitpicking about things. An example that I stated in there would be his uniform became itchy all of a sudden, it didn’t fit right, didn’t think that he should be wearing it, didn’t think he should be sitting at the police podium because it said “Police,” you know didn’t—you know, just things like that.

*Id.* at 428; see JX 13 at 3. Sgt. Dauphin testified that Complainant began asking for meetings with the sergeants and captains about his work assignments because he felt they were outside his light duty restrictions. Tr. at 429-430. Sgt. Dauphin overheard Complainant expressing his concerns about his assignments to other officers in the roll call room on more than two occasions. *Id.* at 431-433. Complainant and Mr. Daughtry also asked for daily emails with their assignments, but Sgt. Dauphin testified that “[i]t’s something that we normally don’t do and it’s almost as if he was trying to document things for a possible legal action.” *Id.* at 430-431. After Sgt. Dauphin received these requests from Complainant and Mr. Daughtry, he learned that Mr. Daughtry had filed a lawsuit against APD and tried to limit his interactions with them. *Id.* at 442; JX 13 at 3.

Sgt. Dauphin testified that Complainant not returning his phone calls and leaving the police podium or train platform when he was stationed there were acts of insubordination. *Id.* at 433. Sgt. Dauphin believed he reported these incidents to Captain McLaughlin and also discussed them with Sgt. Lindeman, Special Agent Bond, and Deputy Chief Powers. *Id.* at 434-435. Sgt. Dauphin did not have the authority to discipline Complainant, and the harshest action he could take was issuing a letter of instruction. *Id.* at 434. Sgt. Dauphin he did not issue a letter of instruction to Complainant regarding the phone calls because that was around the time he learned of Mr. Daughtry’s lawsuit and was trying to distance himself from Mr. Daughtry and Complainant. *Id.* at 438.

After Complainant left APD, Sgt. Dauphin drafted a December 10, 2018 memo documenting various interactions he had with Complainant. *Id.* at 427; see JX 13 at 3. Sgt. Dauphin testified that Captain Cosner asked him to document Complainant’s behavior upon returned from leave, and he assumed the memo was for disciplinary action. Tr. at 444-445, 447.

**Shaunta Bond**

Shaunta Bond is a special agent with APD. *Id.* at 464. Special Agent Bond began working at APD as a PPO on January 17, 2012, and was promoted to investigator in 2015, sergeant in June 2018, and special agent in June 2020. *Id.* at 465-467. Special Agent Bond is also an FTO, which requires her to monitor trainees, give them training and coaching briefs, and complete daily evaluations. *Id.* at 466-467. Special Agent Bond testified that she was one of
Complainant’s FTOs around the time of his injury, but he did not complete his field training with her. *Id.* at 474.

Special Agent Bond testified that after Complainant returned on light duty, he told her that APD forced him to come back from medical leave early against his doctor’s recommendation. *Id.* at 477-478; see JX 13 at 1. Complainant also told Special Agent Bond that he did not think Sgt. Lindeman and Sgt. Dauphin were treating him fairly, that he would rather speak to her instead of the other patrol sergeants, and that he was being assigned tasks outside of his job duties. Tr. at 478-480. Special Agent Bond testified that Complainant expressed these concerns and negative views of APD in the roll call room, which interfered with other officers’ abilities to do their jobs. *Id.* at 480-481.

Special Agent Bond testified that she observed Complainant’s uniform “in disarray” on two occasions. *Id.* at 481. On one occasion, Complainant was wearing a hoodie during the week of September 24, 2018, and on another “[h]is shirt was disheveled, the tail end of the shirt was out of the pants and partially tucked in.” *Id.* at 481-482. Special Agent Bond did not personally observe Complainant in a hoodie after that week. *Id.* at 482. Special Agent Bond deemed Complainant’s uniform incidents to be insubordination but not his negative comments about APD. *Id.* Special Agent Bond testified that she discussed Complainant’s uniform issues with Sgt. Lindeman and Sgt. Dauphin, and she had a separate conversation with Captain Cosner around September 28, 2018. *Id.* at 482-484.

On or about September 28, 2018, Special Agent Bond had a conversation with Complainant about his change in behavior, his uniform issues, and what she expected of him going forward. *Id.* at 484; see JX 13 at 2. Special Agent Bond testified that Complainant did not admit or deny any change in his behavior, but he told her that he was having legal issues with Amtrak. Tr. at 484.

Special Agent Bond testified that Captain Cosner asked her to draft a December 10, 2018 memo about Complainant. *Id.* at 488; see JX 13. Special Agent Bond documented Complainant’s uniform incidents, his concerns about having to return to work against his doctor’s recommendation, and his negative comments about APD. *See JX 13.* Special Agent Bond did not formally document these incidents before December 2018 because her conversation with Complainant about the hoodie was “an informal reminder,” and the conversation about his change in behavior was “a welfare check” that was not meant to be disciplinary. Tr. at 488-491. Special Agent Bond testified that she did not want the conversation about Complainant’s behavior to be disciplinary in nature because she considered him to be “a good officer with great potential.” *Id.* at 491.

*Michele MacDonald*

Ms. MacDonald testified that she started working at Amtrak as a transportation communications union clerk/steno in November 1980, and she has been in her current position as is a senior case management specialist for 13 years. *Id.* at 495-497. Ms. MacDonald testified that she is responsible for reviewing the injury report when an employee’s injury is called into the hotline. *Id.* at 499. Ms. MacDonald contacts the supervisor to find out the employee’s status,
and if the employee is out on leave, she contacts them to explain the Right Care Day One program. *Id.* The ICS nurse case manager reviews the employee’s treatment plan and notifies Ms. MacDonald if there is a change in their work status. *Id.* at 501. Ms. MacDonald does not contact an employee’s healthcare provider for updates on their treatment, but she can access the nurse case manager’s communications with the provider. *Id.* at 502-503.

Ms. MacDonald testified that she spoke to Complainant several times before and during his injury leave. *Id.* at 505-506. Ms. MacDonald testified that she received the July 23 certificate stating that Complainant was unable to work from July 23, 2018, to September 6, 2018, but she did not discuss it with Dr. Wolock because that is not her responsibility. *Id.* at 508-509; see JX 5 at 1. Ms. MacDonald spoke to Complainant on July 30, 2018, after she received the July 27 certificate clearing him for light duty. *Id.* at 515; see JX 7 at 1. Ms. MacDonald informed Complainant that APD had approved his return to work with restrictions, and Complainant told Ms. MacDonald that he was going to contact his attorney and that his returning on light duty was voluntary. Tr. at 515. Ms. MacDonald responded that she would tell the department he was not returning to work at that time. *Id.*

Ms. MacDonald testified that one of Complainant’s attorneys sent her an August 1, 2018 letter informing her that the last certificate he had from Dr. Wolock stated that Complainant could not return to work until September 2018. *Id.* at 526; see CX 3 at 1. On August 22, 2018, Ms. MacDonald faxed Complainant’s attorney the July 27 certificate from Dr. Wolock. Tr. at 527. Ms. MacDonald testified that she does not recall receiving a certificate from Dr. Wolock stating that Complainant was limited to desk duty when he returned to work. *Id.* at 522. In either October or November 2018, Ms. MacDonald received a note from Dr. Wolock clearing Complainant to return to work full duty. *Id.*

*Lisa Shahade*

Deputy Chief Shahade testified that the hiring panel received a request to review Complainant’s application in October 2018 and that it is not common for the panel to convene prior to the end of an officer’s probationary period. *Id.* at 551-552, 568. The panel reviewed the October 1, October 5, and October 15 memos but did not review any of Complainant’s monthly evaluations. *Id.* at 552-557, 572; see JX 11 at 3-5. Deputy Chief Shahade testified that her impression of Complainant after reviewing the memos was that he was insubordinate and not a good fit for law enforcement. Tr. at 553-556. The panel unanimously decided that Complainant’s application should not be accepted and that his conditional offer of employment should be withdrawn. *Id.* at 557. Deputy Chief Shahade emailed Chief Trugman the panel’s recommendation, and he agreed that Complainant’s application should be disapproved. *Id.* at 557-558; see JX 11 at 1.

Deputy Chief Shahade testified that she did not independently vet the allegations in the October memos, she did not have any personal knowledge of Complainant’s job performance, and she did not ask Sgt. Dauphin why he waited until October 2018 to document his attempts to contact Complainant in 2017. *Id.* at 563, 566-568. Deputy Chief Shahade testified that if she knew an employee was consistently not returning phone calls, she would have
contemporaneously documented those occurrences to either direct charges or begin the disciplinary process. *Id.* at 568.

*Richard Bush*

Richard Bush is the former lead labor relations specialist at Amtrak. *Id.* at 581-582. Mr. Bush joined Amtrak’s labor relations department in July 2013, and he retired in August 2019. *Id.* at 582. Mr. Bush testified that his duties as the lead labor relations specialist were to represent Amtrak in handling matters under various collective bargaining agreements, provide guidance to management, and to handle grievances, arbitrations, and mediations. *Id.* at 582-583.

Mr. Bush testified that while he was at Amtrak, Rule 31(A) of the CBA was interpreted to mean that an officer’s probationary period did not begin until the officer was commissioned and completed both classroom and field training. *Id.* at 583-584. Mr. Bush testified that the second sentence of Rule 31(A) “clearly expresses the parties’ intention to enter into an agreement to extend the probationary period beyond the one year.” *Id.* at 585-586. Mr. Bush testified that the chief of police choosing not to accept a probationary officer’s application is not a disciplinary action because the officer is merely an applicant who has not yet satisfied the conditions of employment. *Id.* at 595, 598.

*Neil Trugman*

Neil Trugman is the former Chief of Police for APD. *Id.* at 609. Chief Trugman worked in law enforcement for 47 years from July 9, 1973 until his retirement on July 24, 2020. *Id.* Chief Trugman joined APD in January 2006, was named as the interim chief of police in August 2016, and was appointed as chief in February 2017. *Id.* at 610-611.

Chief Trugman testified that when he was at APD he would send a letter to PPOs after they successfully completed their probationary period; Chief Trugman did not send a letter to Complainant. *Id.* at 612; see RX E. Chief Trugman approved the hiring panel’s recommendation to withdraw Complainant’s application because “he did not appropriately handle the probationary period, which is a very important thing for a young officer at that time.” *Id.* at 613. Chief Trugman testified that Complainant displayed “total insubordination” by failing to return phone calls from his supervisor and APD management. *Id.* at 614-615; see JX 11 at 5. Chief Trugman testified that he only relied upon the information that was sent to him by the panel when he approved their recommendation, and he did not have independent knowledge of the events documented in the October memos. Tr. at 621. Chief Trugman testified that it would not be appropriate for Complainant to be reinstated at APD, were he to prevail in this case:

You know, this was early on in someone’s probationary period and to have insubordination and a lack of responding to officials’ calls, it’s a forecast—you know, again, this is why we do probationary periods, and just like any other police department, it’s a very important part and if you don’t take that first year seriously, it could be a forecast to problems in the future that we need to avoid.
Id. at 617.

Chief Trugman testified that when an officer leaves APD for any reason, the department notifies the state that issued the officer’s commission, and it is cancelled. Tr. at 616. If the officer wanted to get a job with another police department, he or she would have to go through the entire commission process again. Id. at 617-618.

**Samuel Dotson**

Samuel Dotson is the Chief of Police for APD. Id. at 630-631. Chief Dotson was hired by Amtrak in August 2018 as an assistant chief and became chief in July 2020. Id. at 631.

Chief Dotson testified that there were several memoranda written by APD supervisors regarding Complainant in December 2018 to memorialize events that were the subject of an EEOC complaint that Complainant filed. Id. at 641-642; see JX 13. Chief Dotson testified that, were Complainant to prevail in this case, he does not believe reinstatement is appropriate:

In the context of the memos that are presented here, it’s clear that the officer, Mr. Neita, in this case had difficulty following orders, questioned orders, and believed that his way, if you will, was the appropriate way. In law enforcement, there’s many things that are done for reasons. One of them is a uniform. In our use of force continuum, command presence, which is very early in the use of force continuum, is very important because if an individual that you’re interacting with recognizes the authority of the uniform, then it helps to de-escalate situations many times. If the officer is disheveled in their uniform, not in compliance with the uniform, it creates confusion at times . . . So, starting there, having an officer come back to the organization which has challenges around the uniform certainly would become an issue. Following guidance and directions of fellow officers and superiors, managers, or supervisors, or commanders creates challenges, so this would not be a good fit in any law enforcement agency.

Tr. at 642-643.

**APPLICABLE LAW**


The first part of the framework focuses on the relation between the adverse action(s) suffered by an employee and that employee’s protected activity. See id. at 15; see also *Harp v. Charter Comms., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). The complainant bears the initial
burden of proof, and he or she must show, by a preponderance of the evidence, that: 1) he or she engaged in protected activity; 2) he or she suffered an adverse action; and 3) the protected activity was a contributing factor in the adverse action. *Palmer*, No. 16-035 at 16 fn. 74, 52; *Dietz v. Cypress Semiconductor Corp.*, No. 15-017, 2016 WL 1389927 at *4, *4 fn. 24 (ARB Mar. 30, 2016); see also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3d Cir. 2013); *Harp*, 558 F.3d at 723 (citing *Allen v. Admin. Review Bd., U.S. Dep’t of Labor*, 514 F.3d 468, 475-76 (5th Cir. 2008)); *Heim v. BNSF Ry. Co.*, 849 F.3d 723 (8th Cir. 2017) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014)).

8 If a complainant establishes by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action suffered, the burden then shifts to the employer. This second part, sometimes called the “same action defense,” allows the employer to escape liability if it establishes, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the employee’s protected activity. *Palmer*, No. 16-035, slip op. at 22-24. If the employer fails to meet its burden, the claim succeeds.

**DISCUSSION**

I. Protected Activity

The Act protects an employee from “discharge, demot[ion], suspen[sion], threat[s], harass[ment], or . . . [any other] discriminat[ion]” in retaliation for certain acts performed by the employee. 49 U.S.C. § 20109(a). These acts include:

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security[;]
(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part . . . or to testify in that proceeding;
(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;
(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;
(6) to furnish information . . . as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

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8 The circuit courts list a four-prong test, including a knowledge requirement, which the Administrative Review Board has avoided. *See Folger v. Simplex Grinnell, LLC*, No. 15-021, 2016 WL 866116 at *1 fn. 3 (ARB Feb. 18, 2016) (adopting a three-prong test). The ARB has specifically explained, for the purposes of the AIR-21 whistleblower framework, that there is no explicit knowledge requirement. *Id.* The ARB noted, however, that the knowledge requirement “might be implicit in the causation requirement.” *Id.*
(7) to accurately report hours on duty pursuant to chapter 211.

49 U.S.C. § 20109(a)(1)-(7). The Act further states:

(1) A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

49 U.S.C. § 20109(c).

A. Workplace Injury Report

Complainant injured his right wrist on July 3, 2017, while apprehending a suspect in Union Station. J. Stips. 4. Complainant reported his injury to Sgt. Dauphin a few hours after the incident and was escorted to the Howard University Hospital. Tr. at 238-239. Sgt. Dauphin confirmed that Complainant reported his injury to him that same day. Id. at 415-416. Complainant has therefore established by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C. § 20109(a)(4) by reporting a workplace injury to Respondent on July 3, 2017.

B. Interference with Medical Treatment

Complainant argues that Respondent interfered with his medical treatment when Ms. Perrotta contacted Dr. Wolock in July 2018 and coerced him to change Complainant’s return to work status from unable to work to available to work light duty. Complainant’s Brief (“CB”) at 21. Complainant asserts that such “aggressive and surreptitious interference” is a clear violation of 49 U.S.C. § 20109(c)(1). Id. at 24. Respondent argues that it did not interfere with Complainant’s medical treatment because he was escorted to the hospital after reporting his injury, and all of his medical bills were processed by ICS until his last visit to Dr. Wolock in November 2018. Respondent’s Brief (“RB”) at 33. Respondent further argues that it did not in any way influence Dr. Wolock to change Complainant’s return to work status, and Ms. Perrotta was acting well within her job description when she contacted Dr. Wolock about Complainant’s ability to return to work. Id. at 34. Respondent also notes that Dr. Wolock testified that Ms. Perrotta’s inquiries did not alter his recommendation, and he would not have cleared
Complainant to return to work unless he had a “very functional arm at that point to do light duty work.” *Id.* (citing JX 14 at 30).

In *Wevers v. Montana Rail Link*, the ARB held that § 20109(c)(1) is only applicable to the period of time immediately following a workplace injury:

Accordingly, we will no longer adhere to the interpretation of subsection (c)(1) that the Board had previously set forth in *Santiago*. Instead, we hold that subsection 20109(c)(1) prohibits an employer from denying, delaying, or interfering with medical treatment or first aid only in the temporal period immediately following a workplace injury. Subsection 20109(c)(1)’s provision for prompt “medical or first aid treatment” does not create a statutory right to ongoing or unlimited medical treatment of choice over the entire course of a treatment plan or recovery period for a workplace injury.

*Wevers v. Mont. Rail Link, Inc.*, No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 19 (ARB June 17, 2019) (per curiam) (footnotes omitted). While the ARB declined to quantify what constitutes “the temporal period immediately following a workplace injury,” *see id.* at fn. 8, I find that Ms. Perrotta’s communications with Dr. Wolock in July 2018 did not immediately follow Complainant’s workplace injury on July 3, 2017.

Even if I were to find that a one-year gap could be construed as the period immediately following Complainant’s injury, which I do not, I still would not find that Respondent interfered with Complainant’s medical treatment. Ms. Perrotta does not work for Respondent; she works for ICS, which is a vendor for Respondent. *See JX 16 at 19*. Ms. Perrotta testified that she did not need permission from Amtrak to contact Dr. Wolock, and no one from Amtrak asked her to contact him. CX 11 at 36-37. Moreover, Dr. Wolock flatly rejected any notion that Ms. Perrotta influenced his decision to change Complainant’s return to work status. Dr. Wolock testified that Ms. Perrotta asked him legitimate questions about Complainant’s ability to return to work because he “really was off work for quite an excessive period of time.” *JX 14 at 39, 49*. Dr. Wolock further testified that Complainant could have returned to work “months before,” but he did not know that light duty was available to Complainant. *Id.* at 34, 43.

Accordingly, I find that Complainant has not established by a preponderance of the evidence that Respondent interfered with his medical treatment in violation of 49 U.S.C. § 20109(c)(1).

**C. Following a Treatment Plan**

Complainant argues that Respondent extended his probation for following a medical treatment plan. CB at 32. The ARB has stated that a treatment plan “is commonly used to include not only medical visits and medical treatment, but also physical therapy and daily medication, among other things.” *Santiago v. Metro-N. Commuter R.R. Co., Inc.*, No. 10-147, ALJ No. 2009-FRS-00011, slip op. at 11 (July 25, 2012).
The parties stipulated that Dr. Wolock was Complainant’s treating physician and treated Complainant for his work-related injury beginning on August 9, 2017. J. Stips. 5. Dr. Wolock did not clear Complainant to return to work on light duty until July 30, 2018. JX 7. Therefore, at the time Complainant’s probation was extended on April 4, 2018, Complainant was out on injury leave at Dr. Wolock’s recommendation.

Accordingly, I find that Complainant engaged in protected activity under 49 U.S.C. § 20109(c)(1) by following Dr. Wolock’s treatment plan.

II. Adverse Action

Adverse actions under the Act refer to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” Fricka v. Nat’l R.R. Passenger Corp., No. 14-047, 2015 WL 9257754 at *3 (ARB Nov. 24, 2015) (citing Williams v. Am. Airlines, Inc., No. 09-018, 2010 WL 553815 at *8 (ARB Dec. 29, 2010)). The Board has noted that in determining whether an employee has suffered an adverse action, it refers to the Supreme Court’s decision in Burlington Northern & Santa Fe Railway Co., in which the Court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” Thorstenson v. BNSF Ry. Co., Nos. 2018-0059, 2018-0060, ALJ No. 2015-FRS-00052, slip op. at 7 (Nov. 25, 2019) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

A. Probation Extension

Complainant argues that he suffered an adverse action when his probationary period was “unilaterally and clandestinely” extended for following Dr. Wolock’s treatment plan. CB at 31-33. Complainant further argues that Respondent’s practice of extending the probationary period for injured PPOs is _per se_ unlawful under the Act. Id. at 32-33.

On May 11, 2021, Respondent filed a Request to File a Reply Brief (“Request”) seeking to address Complainant’s arguments that require interpretation of the CBA, such as when Complainant’s probation began and Respondent’s practice of extending PPOs’ probationary periods. Request at 1. Respondent argues that such claims are jurisdictional issues that are preempted by the Railway Labor Act (“RLA”) and subject to mandatory arbitration. Id.

I denied Respondent’s Request on June 28, 2021, but I will address its RLA arguments here.

The RLA governs the jurisdiction of federal district courts over certain railroad labor disputes. _Bhd. of R.R. Signalmen v. Nat’l R.R. Passenger Corp._, 310 F.Supp.3d 131, 137 (D.D.C. May 18, 2018). District courts have jurisdiction over major disputes, but minor disputes are subject to mandatory arbitration. _Id._ at 137-38. Major disputes seek to create contractual rights, whereas minor disputes seek to enforce them. _Id._ at 138 (citations omitted). “Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if
the action is *arguably justified* by the terms of the parties’ collective-bargaining agreement. Where, in contrast, the employer’s claims are frivolous or obviously insubstantial, the dispute is major.” *Id.* at 138 (citing *Consol. Rail Corp. v. Ry. Labor Execs. ’Ass’n*, 491 U.S. 299, 307 (1989)) (emphasis in original). There is a strong presumption to classify a dispute as minor, and if there is doubt about the classification of the dispute, then it is considered to be minor. *Id.* (citations omitted).

Complainant argues that there are no provisions in the CBA that authorize APD to extend an officer’s probation. *CB* at 33. Respondent counters that, although not explicit, Rule 31(A) has been interpreted by APD and FOP to authorize probation extensions. *RB* at 10.

In assessing a CBA, it is well established that an employer and a union may alter the terms of the agreement based on their past practice. *E.g.*, *Consol. Rail Corp.*, 491 U.S. at 311 (noting that CBAs may include both implied and express terms and that the parties’ “practice, usage and custom” are of significance when interpreting a CBA) (citations omitted); *Bhd. of R.R. Signalmen*, 310 F.Supp.3d at 138 (stating that a CBA term “can be implied from conduct ‘understood by the parties to at least impliedly serve as if part of the [CBA]’”) (citations omitted). Deputy Chief Powers and Deputy Chief Shahade testified that APD management and FOP had engaged in ongoing discussions about probation extensions and that it is common practice in the department to extend an officer’s probation when they go out on injury leave. *Tr.* at 42, 407, 546-550. APD and FOP considered making probation extensions automatic when an officer went out on injury leave, but Mr. Pearlson did not want to extend a PPO’s probation without prior notification. *Id.* at 543, 549. The issue of probation extensions is therefore a minor dispute because Respondent’s actions were “arguably justified” based on the past practice of APD and FOP.

Although I cannot interpret the CBA to ascertain the parameters of Complainant’s probationary period, it is not necessary for me to do so to adjudicate this claim. Whether Complainant was on probation or not, his probationary status cannot override the statutory protections to which he is entitled. The RLA “does not preempt causes of action to enforce rights that are independent of the CBA.” *Evermann v. BNSF Ry. Co.*, 608 F.3d 364, 367 (8th Cir. 2010) (quoting *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994)).

Accordingly, I decline to find that Respondent’s practice of extending the probationary period of injured officers is *per se* unlawful under the FRSA. I also do not find that Complainant suffered an adverse action when Respondent extended his probation on April 4, 2018. The parties stipulated that Respondent generally requests probation extensions for officers who have been out on leave due to injuries or other reasons, and several witnesses testified that it is common for APD to extend probationary periods due to military service, long-term disability, illness, receiving poor evaluations, if remedial training is necessary, etc. *J. Stips.* 10; *Tr.* at 354, 406-407, 471, 542-543. Additionally, Complainant testified that the only thing he would have done differently had he known his probation was extended in April 2018 would have been to ask the union why his probation was extended. *Tr.* at 274-275. I do not find that a reasonable employee would be dissuaded from reporting a workplace injury because his or her probation may be extended by the length of time they are out on injury leave. Therefore, Complainant has
failed to establish by a preponderance of the evidence that he suffered an adverse action when Respondent extended his probationary period.

B. Termination/Disapproval of Application

Complainant argues that he suffered another adverse action when he was terminated without reason on October 30, 2018. CB at 33. The ARB has held that “termination, discipline, and/or threatened discipline” are sufficient to establish an adverse action under the Act. *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, 2017 WL 4466937 at *6 (ARB Sep. 29, 2017) (citing *Vernace v. Port Auth. Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 n. 4 (ARB Dec. 21, 2012)).

Respondent has been adamant that Complainant was not terminated; rather, his application was “disapproved” or “withdrawn from consideration.” See, e.g., CX 5 at 1 (“Respondent further objects on the grounds that Complainant was not terminated by Amtrak”).

Regardless of the terminology used, Complainant’s involuntary separation from APD was a more than trivial employment action that would dissuade a reasonable employee from reporting a workplace injury. Accordingly, Complainant has established by a preponderance of the evidence that he suffered an adverse action when his application was disapproved on October 30, 2018.

III. Contributing Factor

The contributing factor standard is “broad and forgiving.” *Deltek, Inc. v. Dep’t of Labor, Admin. Rev. Bd.*, 649 Fed. App’x 320, 329 (4th Cir. 2016) (citing *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)). The protected activity “need only play some role in the adverse action, even an ‘[i]significant’ or ‘[i]substantial’ role suffices.” *Palmer*, No. 16-035, slip op. at 53 (brackets in original); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep’t of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). A complainant may satisfy this “rather light burden by showing that her protected activities tended to affect [her] termination in at least some way,” whether or not they were a primary or even a significant cause of the termination. *Deltek*, 649 Fed. App’x at 329 (quoting *Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original).


The contributing factor element may be established by direct or circumstantial evidence, such as temporal proximity, indications of pretext, 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 protected activity. *Cain v. BNSF Ry. Co.*, No. 13-006, ALJ No. 2012-FRS-00019, slip op. at 6 (ARB Sept. 18, 2014) (citation omitted). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski v. J. Givoo*
Where, as in this case, the employer argues that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer’s evidence of its nonretaliatory reasons, but only to determine whether the protected activity played any role at all. *Palmer*, No. 16-035, slip op. at 15. However, “because the level of causation that a complainant needs to show is extremely low . . . the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Id.* If the protected activity and non-retaliatory reasons both played a role, the employee prevails on the contributing factor question. *Id.* at 56.

**A. Temporal Proximity**

Complainant argues that temporal proximity establishes that his protected activity was a contributing factor in his termination because he was confronted about a “trivial” uniform violation 21 days after returning from injury leave, and he “was terminated without reason or explanation” less than a month after returning to work. CB at 34.

The ARB has noted that previous case law may help in determining whether there is a strong or weak temporal relationship between a protected activity and an adverse action, but there are no bright line rules to apply when evaluating temporal proximity. *Franchini v. Argonne Nat’l Lab.*, No. 11-006, ALJ No. 2009-ERA-00014, slip op. at 10-11 (ARB Sept. 26, 2012) (citing *Hicks v. Forest Preserve Dist. of Cook Cnty.*, 677 F.3d 781, 789 (7th Cir. 2012) (other citations omitted)). Close temporal proximity has been found in cases where the adverse action occurred two weeks to more than three months after a complainant engaged in protected activity. *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) (citing *Yartzoff v. Thomasi*, 809 F.2d 1371, 1376 (9th Cir. 1987) (three months); *Shih-Ping Kao v. Areva Inc.*, No. 16-090, 2018 WL 292767 at *1 fn. 3 (ARB Apr. 30, 2018) (approximately one month); *Pattenaude v. Tri-Am Transp., LLC*, No. 15-007, 2017 WL 512653 (ARB Jan. 12, 2017) (two weeks)). The closer the temporal proximity, the stronger the inference of a causal connection. *Riess v. Nucor Corp.*, No. 08-137, 2010 WL 4918427 at *4 (ARB Nov. 30, 2010).

As an initial matter, Complainant’s application was not disapproved less than a month after returning from leave; he returned to work on September 10, 2018, and his application was disapproved on October 30, 2018. J. Stips. 11, 12. Complainant also misconstrued the temporal window between his protected activity and the adverse action he suffered. Complainant engaged in protected activity when he reported his workplace injury, not when he returned to work from injury leave. I find that the temporal proximity between Complainant’s injury report on July 3, 2017, and his application being disapproved on October 30, 2018, is too attenuated to constitute circumstantial evidence that his protected activity was a contributing factor in the adverse action.
B. Shifting Explanations

Complainant argues that his protected activity contributed to his termination because Respondent attempted to retroactively document his alleged misconduct and proffered shifting explanations for his termination. CB at 35-37.

When the hiring panel convened to discuss Complainant on October 22, 2018, they reviewed Deputy Chief Powers’ October 15 memo, Sgt. Dauphin’s October 5 memo, and Sgt. Lindeman’s October 1 memo. JX 11. The reasons given in support of disapproving Complainant’s application were the unreturned phone calls and the October 1 uniform incident. Id. Based on the information contained in the three October memos, the panel determined that Complainant’s application should be disapproved, and Deputy Chief Shahade emailed the panel’s recommendation to Chief Trugman and then-Assistant Chief Dotson. Id. at 1. Chief Trugman approved the panel’s recommendation on October 24, 2018. Id.

At the hearing, however, Deputy Chief Powers testified that Complainant’s application was disapproved because he asked for his assignments to be placed in writing, he questioned directives, and he “constantly” had to be told to tuck in his shirt. Tr. at 85, 93-94. In its brief, Respondent cited Complainant making negative comments about APD, two other uniform violations during the week of September 24, 2018, and Complainant’s “unwillingness” to sit at the police podium and perform crowd control as additional reasons his application was disapproved. RB at 27-28.

“The fact that an employer offers shifting explanations for its challenged personnel action can itself serve to demonstrate pretext.” Vieques Air Link, Inc. v. U.S. Dep’t of Labor 437 F.3d 102, 110 (1st Cir. 2006); Bobreski v. J. Givoo Consultants, Inc., No. 09-057, ALJ No. 2008-ERA-00003, slip op. at 19 (ARB June 24, 2011) (citations omitted). Further damaging the credibility of Respondent’s shifting explanations is the fact that the additional justifications were not memorialized until December 10, 2018, six weeks after Complainant’s termination. JX 13; see Ameristar Airways, Inc. v. Admin. Review Bd., U.S. Dep’t of Labor, 650 F.3d 562, 569 (5th Cir. 2011) (“[n]ot until long after Clemmons’s discharge did Ameristar allege the other four reasons [for his termination], tending to suggest those reasons ‘are a mere litigation figment’”); Bobreski, No. 09-057, slip op. at 19 (“[p]retext can be demonstrated . . . by demonstrating that the proffered reasons were conspicuously missing from previous documentation”) (citations omitted).

Two of these post-hoc justifications, the negative comments and additional uniform violations, appear to be pretextual reasons for Complainant’s termination. No one from APD testified that Complainant’s application was disapproved for making negative comments. Even Special Agent Bond, who overheard the comments, testified that she did not deem them to be insubordinate. Tr. at 482. Furthermore, Deputy Chief Shahade and Chief Trugman specifically denied being aware of any uniform violations other than the October 1 hoodie incident. Id. at 621; JX 15 at 79. Deputy Chief Powers testified that she was aware of the additional violations, but in her own October 15 memo, she wrote that “PPO Neita had been reporting for duty wearing the proper attire in previous days but on October 1, 2018 arrived in attire that is not in compliance with the directive. It is unclear what prompted PPO Neita to disregard a directive
that he had been following without exception nor did he provide any reason.” JX 11 at 4 (emphasis added). It is unclear why Deputy Chief Powers would write that in her memo if she knew that Complainant had committed other uniform violations.

Accordingly, I find that Respondent’s shifting and pretextual explanations for Complainant’s termination constitute circumstantial evidence that his protected activity was a contributing factor to his application being disapproved. See Majali v. AirTran Airlines, No. 04-163, ALJ No. 2003-AIR-00045, slip op. at 12, n.11 (ARB Oct. 31, 2007) (“[w]here a respondent articulates more than one reason for its actions and a complainant proves at least one of those reasons false, a factfinder is permitted (though not required) to conclude that the complainant has shown that protected activity was at least a contributing factor to the decision”) (citing Wilson v. AM Gen. Corp., 167 F.3d 1114, 1120 (7th Cir. 1999)).

C. Disparate Treatment

Complainant argues that he was subjected to disparate treatment because he was terminated for wearing a hoodie on October 1 and no other officer has been terminated for uniform violations. CB at 35.

A whistleblower who argues disparate treatment must prove that similarly situated employees who were involved in or accused of the same or similar conduct were disciplined differently. Bankr. Estate of Donald M. Graff v. BNSF Ry. Co., No. 2021-0002, ALJ No. 2018-FRS-00018, slip op. at 12 (ARB Sept. 30, 2021) (per curiam) (citations omitted). The disparate treatment test “is a rigorous one.” Id. at 12, fn 105 (citations omitted). A complainant must demonstrate that all relevant aspects of his or her employment situation were nearly identical to those of the comparator and that the similarly situated employee was charged with offenses of comparable seriousness. Wheeler v. Georgetown Univ. Hosp., 812 F.3d 1109, 1116 (D.C. Cir. 2016) (citations omitted). Factors that bear on whether two employees are similarly situated are the similarity of the employees’ jobs and job duties, whether they were disciplined by the same supervisor, and the similarity of their offenses. Id. (citations omitted).

Complainant and Sgt. Epps both testified that they had observed officers on light duty wearing T-shirts, jeans, hoodies, and sneakers. Tr. at 187-188, 259. However, Complainant has not introduced any comparator evidence to establish that these officers were similarly situated to him, such as whether they were PPOs or full officers, who their supervisors were, whether they were disciplined, etc. In the absence of such evidence, I find that Complainant has not established that he was subjected to disparate treatment.

D. Change in Attitude

Complainant testified that after he returned from injury leave, he noticed that his supervisors’ attitudes towards him had changed. Id. at 254. Complainant testified that he was “greeted by hostility” from Deputy Chief Powers, she would not respond when he tried to say hello to her, and she would leave the roll call room as soon as he entered. Id. Complainant believed Deputy Chief Powers, Sgt. Dauphin, and Sgt. Lindeman were hostile towards him because he was injured and did not return to work as a full duty officer. RX I at 81, 85-86.
Complainant argues that Respondent’s change in attitude was evidenced by him being “suddenly reproached for a trivial uniform violation upon his return.” CB at 38.

Complainant has not put forth sufficient evidence to establish that Deputy Chief Powers, Sgt. Lindeman, or Sgt. Dauphin’s attitude towards him changed because he engaged in protected activity. Sgt. Dauphin admitted that he tried to distance himself from Complainant and Mr. Daughtry sometime after Mr. Daughtry returned from injury leave, but he testified that he did so because Mr. Daughtry filed a lawsuit against APD. Tr. at 438; see JX 13 at 3. Sgt. Lindeman testified that he confronted Complainant about wearing a hoodie because Captain McLaughlin told him that Complainant was not wearing the proper uniform and asked him to speak to Complainant. Tr. at 363-364. There is no evidence in the record that Sgt. Lindeman confronting Complainant about his uniform was an act of hostility or a manifestation of Sgt. Lindeman’s change in attitude toward Complainant. Lastly, even if Deputy Chief Powers was cold towards Complainant upon his return from leave, Complainant has not proffered any evidence to link this change in attitude with his protected activity. See Jones v. U.S. Enrichment Corp., Nos. 02-093, 03-010, ALJ No. 2001-ERA-00021, slip op. at 13 (ARB Apr. 30, 2004) (“even if Bucy’s attitude could be deemed antagonistic, Jones has not adduced sufficient facts for us to infer that this enmity existed because of his protected activity”).

Accordingly, I find that Complainant has failed to establish that Respondent changed its attitude towards him because he engaged in protected activity.

D. Conclusion

Taken as a whole, the circumstantial evidence establishes that Complainant’s protected activity was a contributing factor in the adverse action. Although there is weak temporal proximity and insufficient evidence of a change in attitude, I find that Complainant has satisfied his “rather light burden” by establishing that Respondent gave shifting and pretextual explanations for his application being disapproved.

Complainant has therefore satisfied his burden to show by a preponderance of the evidence that he engaged in a protected activity, he suffered an adverse employment action, and his protected activity was a contributing factor in his adverse employment action.

IV. Same Action Defense

Should a complainant meet his or her burden of proof, a respondent may still prevail if it shows, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of the protected activity. Palmer, No. 16-035, slip op. at 56-57. “It is not enough for the [respondent] to show that it could have taken the same action; it must show that it would have.” Id. at 57 (citing Speegle v. Stone & Webster Constr. Inc., No. 13-074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014)) (emphasis in original). Clear and convincing evidence is the “intermediate standard” between mere preponderance of the evidence and beyond a reasonable doubt. Addington v. Texas, 441 U.S. 418, 424 (1979). It requires that “the ALJ believe that it is ‘highly probable’ that the employer would have taken the same adverse action in the absence of the protected activity.” Palmer, No. 16-035, slip op. at 57
(citing Speegle, No. 13-074, slip op. at 11). Were the clear and convincing standard quantified, “the probabilities might be in the order of above 70% . . . .” Id. (quoting United States v. Fatico, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), aff’d 603 F.2d 1053 (2d Cir. 1979)) (omission in original).

Respondent argues that it has established its affirmative defense because all of its actions toward Complainant “were influenced by Amtrak’s standard procedures and by non-retaliatory concerns regarding Complainant’s insubordinate and unprofessional behavior upon his return from leave.” RB at 25, 32. However, Respondent deviated from standard procedure in the manner that it disapproved Complainant’s application. Deputy Chief Shahade explained the typical review process at the end of a PPO’s probationary period:

An officer. . . before the end of their probation, usually, maybe four weeks prior to their probationary period, they’re evaluated to determine whether or not we’re going to continue approving them for regular status or that we’re going to basically reject their application for employment. We have an opportunity to evaluate employees in that manner. So, at the time of the evaluation, we discuss the officer, how he’s been working out within the command, the command presents, and the team makes a determination on whether or not we would like to continue the person as an employee with Amtrak.

JX 15 at 8. Deputy Chief Shahade further testified that the panel would review the PPO’s “IA record, we would take a look at a number of other documents, and we would get input from the commander. The commander would need to provide an endorsement letter or provide some information on the status of the employee, all the information we reviewed, and then our group would make a recommendation to the chief and it would go up to the other chief for his final approval or rejection.” Tr. at 551-552. Deputy Chief Powers, who was Complainant’s commander, testified that the commander’s endorsement letter includes the officer’s background, training, and performance evaluations. Id. at 115-116 (“the evaluation throughout that probationary period is presented to the hiring panel”).

This is not the process that occurred with respect to Complainant. As an initial matter, the panel convened when Complainant still had nine months left in his probationary period. Deputy Chief Shahade, who had been on the committee since its inception in 2014, id. at 538, testified that it was rare for them to meet before the end of an officer’s probationary period:

Judge Almanza: In your experience, ma’am, how often is it for the hiring panel to meet before the end of a probationary police officer’s probationary period?
Deputy Chief Shahade: It’s not that common, but it’s been done at least one other time prior to—or it may have been subsequent to this one, I can’t be sure, but it’s been done. It’s not common, let’s put it that way, Your Honor.

Id. at 572. The panel also did not review any of Complainant’s performance evaluations before deciding that his application should be disapproved. Id.
Respondent also deviated from standard procedure by not following its own disciplinary policy. Respondent argues that it was not required to draft charges or issue write-ups to Complainant regarding his insubordination because PPOs are not entitled to the same disciplinary and grievance procedures afforded to permanent officers under the CBA. RB at 17. Regardless of whether Complainant could avail himself of the procedures in the CBA, the Amtrak Operations Guide, which contains the uniform policy Complainant is accused of violating, applied to Complainant notwithstanding his probationary status. See Tr. at 125 (Deputy Chief Powers testifying that the Operations Guide was in effect in 2018 and applies to all “Amtrak personnel assigned to the Amtrak Police Department”). The Operations Guide sets forth “Amtrak’s Counsel and Discipline Guideline,” which states:

Discipline is an educational tool, not to be used if more effective ways of communicating and changing unacceptable behavior are available. Except for serious infractions where discipline may be necessary, counseling should first be used to change behavior. When it is apparent that such counseling is not working, discipline may be utilized to change behavior.

Amtrak’s guidelines for dealing with offences [sic] generally provide for the following progression, depending on the circumstances:

Counseling:
1. Verbal
2. Written warning letter

Discipline:
1. Reprimand or suspension of three (3) days or less
2. Suspension of ten (10) days or less (more serious violations of operating rules involving hazards or accidents or major inconvenience to passengers may result in up to 30 days suspension)
3. Dismissal

Employees should understand that a ten-day (or 30 day) suspension is a very serious penalty and dismissal will be the likely result in any further action. For more serious offenses, this progression may start at Discipline steps 4 or 5 depending on the circumstances.

RX C at 8-9.\(^9\)

Respondent did not follow its own proscribed counseling/disciplinary procedure with respect to Complainant. Even if Sgt. Lindeman confronting Complainant about his uniform on October 1, 2018, constituted verbal counseling, Complainant never received any written correspondence admonishing him for nonconforming or unacceptable behavior. Tr. at 265. Deputy Chief Powers was not aware of anyone from APD issuing written correspondence to Complainant regarding his uniform issues, his insubordination, or any other misconduct. Id. at

\(^9\) I presume steps 4 and 5 refer to suspension and dismissal under the Discipline section, however the numbering was copied as it appears in the Operations Guide.
141. Sgt. Epps considered Complainant to be “very capable officer,” and he did not recall Complainant being disciplined or admonished for nonconforming behavior prior to his termination. *Id.* at 191-192. Sgt. Dauphin testified that he did not verbally confront Complainant about the unreturned phone calls, nor did he issue Complainant a letter of instruction. *Id.* at 437-438. Respondent has offered no explanation for why it did not adhere to its own Guideline.

Turning to the merits of Complainant’s application being disapproved, I have already found two of Respondent’s proffered reasons to be pretextual, but I will address the remainder in turn.

A. Questioning Directives

Deputy Chief Powers, Sgt. Lindeman, and Sgt. Dauphin testified that Complainant questioned his supervisors’ ability to give him assignments based on his light duty restrictions. Tr. at 85, 369-370, 429. Complainant testified that he voiced his concerns about sitting at the police podium because he thought only full duty officers were allowed to sit there, but he never refused a directive to sit at the podium, or any other directive. *Id.* at 259, 262.

Complainant was mistaken in his belief that only full duty officers were permitted to sit at the police podium. Amtrak’s Operations Guide specifically lists “podium/customer service duties” as an assignment light duty officers might be given. RX C at 3-4. However, Sgt. Lindeman, Sgt. Dauphin, and Special Agent Bond all testified that if Complainant thought he was being assigned a task that was outside of his light duty restrictions, he should have informed a supervisor. Tr. at 360, 425, 477. Sgt. Lindeman elaborated:

> So if a light duty officer stated that they could not perform a task due to their specific physical restrictions—and I’ve done this in the past—I’ve actually gone to my supervisor, which is a captain and/or the inspector and basically inquire what those restrictions are, if I didn’t know specifically, and just let them know what the task was, and if they concurred that either if it was outside of the restrictions or inside the restrictions, I would then go back to the light duty officer, and if it was outside the restrictions, then I would change the duty assignment, or if it was within the restrictions, I would advise the officer that the assignment was within the restrictions provided to medical services.

*Id.* at 360. And that is what Complainant did:

Ms. Setia: If Mr. Neita believed he was assigned work outside of his limited duty restrictions, what could he have done?
Sgt. Dauphin: Definitely told me, which is what he should have done.
Ms. Setia: It seems like he did that with the batteries, though, correct?
Sgt. Dauphin: I believe so, yes.
Ms. Setia: And then you gave him alternative option?
Sgt. Dauphin: That’s my recollection, yes.
Ms. Setia: And what was his response to that?
Sgt. Dauphin: Honestly, I don’t recall.
Ms. Setia: Did he ever tell you about any other concerns he had with assignments provided to him?
Sgt. Dauphin: He made mention through Special Agent Bond and some of the other sergeants that he didn’t feel safe being at the police podium because it said “Police” on it.
Ms. Setia: And did someone address that with him?
Sgt. Dauphin: Yes, I told him that, you know, there’s other people that sit out there that aren’t police, and you sat out there before you became a police officer while he was grey shirt status and didn’t have—he didn’t seem to have a problem with it back then.

***

Mr. Tolar: And isn’t it true that when he was asked to sit at that podium, he complied?
Sgt. Dauphin: I believe he did comply, yes, sir.

Id. at 425-426, 444. Deputy Chief Powers also testified that she was not aware of Complainant ever refusing to sit at the podium. Id. at 98 (“I can’t recall specifically hearing Sgt. Dauphin say that, you know, PPO Neita refused”).

It is illogical that Complainant was supposed to speak to his supervisors if he thought an assignment was outside of his work restrictions but then he had his application disapproved for speaking to supervisors about his assignments being outside of his restrictions. See Negron v. Vieques Air Link, Inc., 2003-AIR-00010, slip op. at 15 (ALJ Oct. 21, 2003) (“[t]he reasons for the suspensions are found to be pretextual . . . it does not make sense that Gonzalez would punish Complainant for comments he made at the March 19, 2002 meeting when the purpose of the meeting was to encourage pilots to present such complaints”), aff’d sub nom. Vieques Air Link, Inc. v. U.S. Dep’t of Labor, 437 F.3d 102 (1st Cir. 2006).

**B. October 1 Uniform Violation**

In its brief, Respondent stated, “[g]iven that Complainant had difficulty following a simple uniform requirement . . . Deputy Chief Powers found that his attitude was not becoming of a police officer.” RB at 19. Deputy Chief Powers presented the October 1 and October 15 memos to the hiring committee detailing Complainant’s uniform violation to support her recommendation that his application be disapproved. Chief Trugman testified that “in this day and age you just can’t have any insubordination basically in reference to a uniform.” Tr. at 614. Deputy Chief Shahade testified that Complainant’s application was disapproved because he was not appropriately wearing the light duty uniform. JX 15 at 64.

Despite the aforementioned, Deputy Chief Powers testified that Complainant’s application was not actually disapproved for uniform violations:

Mr. Tolar: Are you aware of any other officers at Amtrak who have been—whose applications have been denied for uniform issues?
Deputy Chief Powers: His application was not denied for uniform issues, sir, and I don’t believe I can recall specifics at this point.
Mr. Tolar: You don’t recall any individuals who were—whose applications were denied for uniform issues?
Deputy Chief Powers: No officer was denied their application for uniform issues, sir. I don’t have a specific on a name of any other probationary officers at this point that had their applications denied.

Id. at 116. These contradictions preclude a finding that Respondent established by clear and convincing evidence that Complainant’s application would have been disapproved for his uniform violation. See Huang v. Greatwide Dedicated Transp. II, LLC, No. 2019-0053, ALJ No. 2016-STA-00017, slip op. at 10 (ARB May 27, 2021) (finding affirmative defense not established where respondent’s witnesses contradicted each other as to why complainant was terminated). Deputy Chief Powers’ testimony is particularly enlightening when considered alongside Complainant and Sgt. Epps’ statements that they had both seen light duty officers not wearing the correct uniform.

C. Unreturned Phone Calls

Respondent also has not established by clear and convincing evidence that Complainant’s application would have been disapproved for the unreturned phone calls. Complainant testified that he spoke to Captain Cosner several times between November 2017 and March 2018, but he denied failing to return calls from Sgt. Dauphin during that timeframe. Tr. at 252-253. Assuming arguendo that the calls did occur, the actions of APD management do not suggest that they were significant. Deputy Chief Powers testified that she was aware that Complainant was not returning phone calls “early on,” but Sgt. Dauphin was not instructed to draft a memo about them until October 2018. Id. at 90, 140. Furthermore, no one seems to know why the October 5 memo was drafted in the first place. Deputy Chief Powers assumed either herself or “the captain” directed Sgt. Dauphin to draft it, but she did not know who specifically made the request or why it was made seven months after the last phone call was placed. Id. at 89-90. Sgt. Dauphin also could not remember who specifically asked him to draft the memo, nor did he know why he was being asked to draft it. Id. at 441, 443. Sgt. Dauphin first testified that he believed he was asked to draft the memo for disciplinary reasons but then later testified that he thought he was asked to draft the memo “just to make sure” he was calling Complainant, even though Complainant had already been back at work for three weeks. Compare Id. at 443 with Id. at 447.

Deputy Chief Powers wrote in her October 15 memo that “PPO Neita did not make any attempt to discuss or address the lack of response to APD supervision or management once on Amtrak property,” yet it is also true that no one in APD supervision or management ever confronted Complainant about the phone calls. Compare JX 11 at 4 with Tr. at 91-92, 265-266, 333, 437-438 (Deputy Chief Powers, Complainant, and Sgt. Dauphin all testifying that no one mentioned the calls to Complainant either in person or in writing). Sgt. Dauphin stated that he did not issue a letter of instruction to Complainant about the calls because he was trying to distance himself from Complainant due to Mr. Daughtry’s lawsuit, but Complainant returned to work before Sgt. Dauphin became aware of the lawsuit. Tr. at 442. Sgt. Dauphin also testified
that he did not even know what Mr. Daughtry’s lawsuit concerned, “just that there might’ve been pending legal action. I didn’t delve into what it might be or what it might involve.” Id. at 443. Sgt. Dauphin did not explain why his being informed of Mr. Daughtry’s possible lawsuit in October 2018 hindered his ability to issue a letter of instruction to Complainant for unreturned phone calls that occurred from November 2017 to March 2018.

Respondent’s handling of the phone calls is in stark contrast to how it dealt with other incidents involving Complainant. When Ms. MacDonald informed APD management that Complainant had declined restricted duty on July 30, 2018, Deputy Chief Shahade mailed a letter to his house on August 23, 2018, informing him that his IOD benefits would be suspended. Id. at 515; JX 10. When Complainant wore a hoodie with his uniform on October 1, 2018, he was immediately confronted by Sgt. Lindeman, who memorialized their conversation the same day. Tr. at 363-364; JX 11 at 3. When Complainant voiced his concerns about sitting at the police podium to Special Agent Bond, Sgt. Dauphin had a conversation with Complainant about the assignment. Tr. at 426. It strains credulity that Complainant engaged in conduct worthy of termination, conduct Chief Trugman described as “total insubordination,” Id. at 614-615, yet no one in APD supervision or management said anything about it to him for over seven months. Even when Complainant directly asked Captain McLaughlin and Captain Cosner why he was being terminated, their only response was telling him to read the letter they presented him, which listed no reasons for his termination. Id. at 263-264; see JX 12.

D. Assignments in Writing

I find that Respondent’s assertion that Complainant’s application was withdrawn for asking for assignments in writing is pretextual. “The critical inquiry in pretext analysis is ‘whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge,’ rather than ‘whether the employee actually engaged in the conduct for which he was terminated.”’ Bankr. Estate of Donald M. Graff v. BNSF Ry Co., No. 2021-0002, ALJ No. 2018-FRS-00018, slip op. at 14 (ARB Sept. 30, 2021) (per curiam) (citations omitted).

There is no evidence that Chief Trugman or the members of the hiring committee were aware that Complainant asked for assignments in writing. This allegation was contained in one of the December 10 memos, and the panel convened to discuss Complainant on October 22, 2018. Deputy Chief Powers claimed that she spoke to the committee about issues that were not documented in the three October memos, Tr. at 133, but that was contradicted by Deputy Chief Shahade, who testified that Deputy Chief Powers “just spoke to the documents we had in our possession.” Id. at 557. Chief Trugman likewise testified that he approved the panel’s recommendation based on “[j]ust what was sent to me through the panel and the command.” Id. at 621. Deputy Chief Shahade’s email to Chief Truman on behalf of the panel did not include any information outside of the three October memos. See JX 11 at 1.

The hiring committee could not have “in good faith believed” that Complainant asked for assignments in writing when they were not aware of the allegation in the first place. Accordingly, I find that this to be a pretextual reason for Complainant’s application being disapproved.
E. Conclusion

For the foregoing reasons, Respondent has failed to establish its same action defense. Respondent has not shown it is “highly probable” that it would have disapproved Complainant’s application in the absence of his protected activity. *Palmer*, No. 16-035, slip op. at 57 (citing *Speegle*, No. 13-074, slip op. at 11).

V. Damages

I have found that Complainant has met his burden of proof, and Respondent has failed to rebut Complainant’s case by means of the same action defense. Accordingly, Complainant is entitled to damages under the Act, including compensatory and punitive damages. 49 U.S.C. § 20109(e). The regulations state that an order may including the following:

Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of any compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees . . . The order may also require the respondent to pay punitive damages up to $250,000.

29 C.F.R. § 1982.109(d)(1). Complainant is seeking $144,000 in lost wages, $250,000 in compensatory damages for mental anguish, and $250,000 in punitive damages. CB at 38-42.

A. Reinstatement

Complainant testified that he was seeking reinstatement. Tr. at 274. Respondent argues that reinstatement is inappropriate in this case, given Chief Trugman’s testimony that Complainant’s behavior could lead to problems in the future and Chief Dotson’s testimony that Complainant was not a good fit for law enforcement. RB at 35-36; Tr. at 617, 642-643.

Reinstatement is the preferred remedy in whistleblower cases, to make the complainant whole and restore him or her to the economic position he or she would have occupied but for the unlawful conduct of the employer. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *see Dale v. Step 1 Stairworks, Inc.*, No. 04-003, ALJ No. 2002-STA-00030, slip op. at 4 (ARB Mar. 31, 2005) (citation omitted). Front pay may be awarded in lieu of reinstatement if reinstatement is not a viable option. *Wooten v. BNSF Ry.*, No. 19-35431, slip op. at 4-5 (9th Cir. June 22, 2020) (unpub.) (citations omitted). A party may make this showing by demonstrating “the impossibility of a productive and amicable working relationship or where reinstatement is otherwise not possible or impractical,” such as when the respondent no longer employs people in the complainant’s former job classification or does not have positions for which the complainant is qualified. *Dale*, No. 04-003, slip op. at 5. However, reinstatement should not be denied “merely because friction may continue to exist between the complainant and the company or its employees. Nor should it be denied because the employer may find it inconvenient to reinstate the former employee.” *Id.* (citation omitted).
Respondent has not provided sufficient evidence to establish that reinstatement is not feasible in this case. While Chief Trugman and Chief Dotson testified that Complainant should not be reinstated, this is not proof that reinstatement is impractical or that an amicable working relationship is impossible. Nor has Respondent argued that there are not probationary police officer positions available for Complainant. Accordingly, Respondent must present a bona fide offer of reinstatement to Complainant. At the time Complainant’s application was withdrawn on October 30, 2018, he was still a probationary police officer. Deputy Chief Shahade requested that Complainant’s probation be extended for nine months, running from the date he returned to full duty. JX 4 at 2. As Complainant’s application was disapproved while he was still on light duty, he must be reinstated as a probationary police officer with nine months left in his probationary period.

B. Back Pay


Complainant argues that he is entitled to “back and/or front pay” of $128,000 from November 1, 2018, to August 17, 2020, and an additional $16,000 from August 17, 2020, to the present. CB at 40-41. Respondent argues that Complainant is not entitled to any back or front pay, but if it is determined he is entitled to such an award, it should not be responsible for any payment from September 10, 2020, to December 13, 2020, when Complainant was out of work for medical reasons. RB at 37. Respondent has not argued that Complainant failed to mitigate his damages through subsequent employment.

The parties stipulated that Complainant was earning $35.0884/hour when he separated from APD on October 30, 2018. J. Stip. 13. Complainant testified that he received $1,440 per month in unemployment from November 1, 2018, to June 30, 2019, and he did not work during that timeframe. RX I at 19-20. Complainant worked as an independent contractor for DoorDash from July 1, 2019, to March 2020, and he earned around $4,000 in 2019. Id. at 16, 106; see also RX J at 1 (Complainant’s total income for 2019 listed as $4,954). At the time of Complainant’s August 2020 deposition, he testified that he had received $776 per week in pandemic “PUI” unemployment benefits since March 2020. Id. at 22-23.

Complainant began working as a contractor for the U.S. Marshals Service at Paragon Systems on August 17, 2020. Tr. at 272; RX M at 34. Complainant’s payroll records from Paragon Systems show that he earned $30.97/hour from August 17, 2020, to September 10,
2020. RX M at 34. The parties stipulated that Complainant was out of work for various medical reasons unrelated to this matter from September 10, 2020, to December 13, 2020. Tr. at 628-629. Complainant testified that he was earning $32/hour at the time he went out on leave, but he was not paid while he was not working. Id. at 318.

It is not clear how many hours per week Complainant works at Paragon. Complainant testified at his August 2020 deposition that he planned to work 40 hours/week, and his payroll records show that his first week at Paragon, August 17, 2020 to August 21, 2020, he did work 40 hours. RX I at 22; RX M at 34. As of the hearing in February 2021, however, Complainant testified that he was working between 20 and 40 hours per week. Tr. at 322. Accordingly, to calculate Complainant’s interim earnings in 2020 I will use a 40-hour workweek, and I will use a 30-hour workweek for 2021 and 2022.

I have determined that Complainant is entitled to $151,813.02 in back wages as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Lost Wages</th>
<th>Interim Earnings</th>
<th>Back Wages Owed</th>
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</thead>
<tbody>
<tr>
<td>2018</td>
<td>$11,228.29</td>
<td>$0</td>
<td>$11,228.29</td>
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<tr>
<td>2019</td>
<td>$72,983.87</td>
<td>$4,954.00</td>
<td>$68,029.87</td>
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<tr>
<td>2020</td>
<td>$54,737.90</td>
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<tr>
<td>2022</td>
<td>$11,228.29</td>
<td>$7,680.00</td>
<td>$3,548.29</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>$151,813.02</td>
</tr>
</tbody>
</table>

However, to properly compute damages in current dollars, Complainant must also receive interest on this amount. The Secretary has explained, and the ARB has confirmed, that interest on awards under the Act will be calculated according to the methodology for underpayments in 26 U.S.C. § 6621 (compounded daily). See Laidler v. Grand Trunk W. R.R. Co., No. 15-087, 2017 WL 3953476 at *9-10 (ARB Aug. 3, 2017). Moreover, the regulations at 20 C.F.R. § 1982.109(d)(1) explain that such back pay will be compounded daily.


To compensate Complainant most accurately, I apply daily compound interest using the average rates for each year. While this result may not be perfectly accurate, it is a reasonable way to account for the fluctuations in the interest rate. Upon determining that value, I then round the rate to the nearest full percent. See 26 U.S.C. § 6621(b)(3). Starting from the date Complainant’s application was disapproved, October 30, 2018, I find that Complainant is entitled to an additional $6,148.60 in interest. In sum, Complainant is entitled to $157,961.62 in back pay and interest.
C. Compensatory Damages: Emotional Distress

Complainant is seeking $250,000 in damages for mental anguish because he may never be able to work as a railroad policeman again, and he has “endured familial humiliation, domestic strife, embarrassment, and exhausting anxiety due to being fired immediately before the impending birth of his son.” CB at 40. Respondent argues that Complainant is not entitled to compensatory damages for mental anguish because has merely put forth “garden variety” claims of emotional distress, and he did not seek any treatment for his alleged emotional damages. RB at 37.


Complainant testified that he could not find work in law enforcement after he left APD, he could not afford to buy diapers or feed his newborn, and his girlfriend had to return to work from maternity leave early because they could not afford childcare. Tr. at 268-270. Complainant further testified that he needs therapy, which he cannot afford, because “[i]t’s been two years I’ve been thinking about this thing every day of my life. I’m tired of it.” Id. at 270-271.

“[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.” Hobby v. Georgia Power Co., Nos. 98-166, 98-169, ALJ No. 1990-ERA-00030, slip op. at 32 (ARB Feb. 9, 2001). Complainant’s request for compensatory damages is excessive. While Complainant credibly testified about the mental impact his separation from APD has had on him and his family, there is no evidence in the record to suggest Complainant suffered severe or pervasive emotional distress. Nor did Complainant demonstrate that he suffered from any objective manifestations of distress that would warrant an emotional distress award of the magnitude requested. Compensatory damages of $25,000 or more are generally awarded to complainants who suffered from more severe adverse effects than general stress and anxiety:

- Hobby, Nos. 98-166, 98-169, slip op. at 32-33, aff’d sub nom. Hobby v. U.S. Dep’t of Labor, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpub.): ARB affirmed $250,000 compensatory damage award where complainant’s reputation was severely damaged
following his termination, he could not find work in his field, he was underemployed and unemployed for more than eight years, was emotionally distressed from his depleted finances, and had to ask friends and family for money after previously earning over $100,000 per year.

- **Fink v. R&L Transfer, Inc.**, No. 13-018, ALJ No. 2012-STA-00006, slip op. at 4-5 (ARB Mar. 19, 2014): ARB affirmed $100,000 in compensatory damages where complainant’s termination had “a significant emotional impact . . . on his dignity and self-esteem,” he lost his house and had to move his family into a mobile home, they had to receive support from the state, borrow money from family, and complainant had “restless nights, and trouble sleeping wondering how he will be able to support his family.”

- **Ferguson v. New Prime Inc.**, 2009-STA-00047, slip op. at 12 (ALJ Mar. 15, 2010), aff’d No. 10-075 (ARB Aug. 31, 2011): complainant awarded $50,000 in compensatory damages after her house was foreclosed, she lost medical insurance, her phone and internet service were cut off, and she had to obtain food from a shelter following her termination.

- **Harvey v. Union Pac. R.R. Co.**, 2011-FRS-00039, slip op. at 39 (ALJ Feb. 12, 2015), petition for rev. dismissed, No. 15-036 (ARB May 29, 2015): complainant awarded $25,000 in compensatory damages because he was “extremely afraid, distraught, anxious, and distressed” due to his employer’s actions, and he had nightmares that his wife and stepdaughter, who had serious medical needs, would be refused treatment if he lost his health insurance.

I do find, however, that Complainant has established that he suffered more than minimal emotional distress and mental anguish and that he should receive compensation as a result. Complainant credibly testified that it was “devastating” losing his job a month before his son was born and that he was unable to afford diapers and childcare. Tr. at 268-270. Complainant also credibly testified that his credit was negatively impacted by his termination, and he could not find another law enforcement job because potential employers would not believe that he was fired for no reason. Id. at 270. Complainant’s testimony was unrefuted by Respondent. Compensatory damages of $10,000 or less have been awarded in cases where the complainants suffered from mental anguish similar to that described by Complainant:

- **Hobson v. Combined Transp., Inc.**, 2005-STA-00035, slip op. at 12 (ALJ Nov. 10, 2005), aff’d Nos. 06-016, 06-053 (ARB Jan. 31, 2008): complainant, who was already on medication for anxiety, awarded $5,000 in compensatory damages for “increased anxiety and stress” following his termination.

- **Jackson v. Butler & Co.**, 2003-STA-00026, slip op. at 10 (ALJ June 25, 2003), aff’d No. 03-116, 03-144 (ARB Aug. 31, 2004): complainant awarded $4,000 in compensatory damages because he was “moody, depressed and short tempered with a low self-esteem and sense of embarrassment compounded by financial concerns” following his termination.

- **Roberts v. Marshall Durbin Co.**, 2002-STA-00035, slip op. at 41-42 (ALJ Mar. 6, 2003), aff’d Nos. 03-071, 03-095 (ARB Aug. 6, 2004): complainant awarded $10,000 in compensatory damages where he testified that his termination was humiliating and embarrassing, strained his marriage, and hindered his ability to provide the same level of financial security for his wife.
• Griebel v. Union Pac. R.R. Co., 2011-FRS-00011, slip op. at 33-34 (ALJ Mar. 18, 2014), aff’d No. 12-038 (ARB Mar. 18, 2014): complainant awarded $5,000 in compensatory damages where his wife testified that he was devastated following his termination and they struggled to make ends meet, but there was no evidence of medical or psychological treatment and no evidence of “the usual physical manifestations of severe emotional harm,” such as sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown.

Accordingly, I find that Complainant is entitled to $5,000.00 in compensatory damages for emotional distress.

D. Punitive Damages

Complainant is seeking $250,000 in punitive damages because Respondent must be dissuaded from continuing its “department-wide policy of extending the probation of injured workers . . .” CB at 40-41. Respondent argues that punitive damages are not warranted because Complainant has not shown that it acted with malice, ill will, or a reckless disregard for the law. RB at 37-38.


In this case, Complainant was retaliated against for reporting a workplace injury and following his doctor’s treatment plan. While the exact mental state of Respondent is difficult to ascertain, several of Respondent’s actions are telling. Respondent took the unprecedented decision to convene the hiring committee nine months before the end of Complainant’s probation, did not review any of his performance evaluations, and would not give Complainant an explanation for his termination despite his direct inquiry. Respondent then gave shifting and pretextual justifications for disapproving Complainant’s application that were documented in memos postdating his termination by six weeks. The non-pretextual explanations proffered by Respondent were also dubious. Respondent purportedly disapproved Complainant’s application for wearing a hoodie, despite testimony from Sgt. Epps that he had seen other officers on light duty wearing clothes that were not business casual or the gray shirt uniform and testimony from Deputy Chief Powers that no other officer had been terminated for uniform issues. Respondent also purportedly disapproved Complainant’s application for not returning phone calls while on leave but no one in management said anything to him about it. Respondent’s actions are sufficient to warrant punitive damages.
In evaluating and applying punitive damage awards, the Supreme Court has provided guideposts that courts must apply, lest the punished party be denied due process. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417-18 (2003). The three guideposts to consider are: 1) the degree of reprehensibility of the defendant’s misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;\(^\text{10}\) and 3) the difference between the punitive damages awarded . . . and the civil penalties authorized or imposed in comparable cases. Id. at 418 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)). The Supreme Court has specifically noted that “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.” Id. at 425.\(^\text{11}\) Moreover, Congress specifically limited punitive damages under the Act to a maximum penalty of $250,000.00. See 49 U.S.C. § 20109(e)(3).

“Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” Gore, 517 U.S. at 575. I do not find that Respondent acted with a significant degree of reprehensibility when it disapproved Complainant’s application. As stated above, I decline to find that Respondent’s policy of extending injured officers’ probation is per se unlawful under the Act. While Respondent made an essentially unprecedented decision to convene the hiring committee early to withdraw Complainant’s application, I do not find that Respondent acted in such an egregious manner to support the magnitude of punitive damages Complainant requests. See id. at 580 (“[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award”). Complainant was escorted to the hospital shortly after reporting his injury, he received 100% of his IOD benefits while out on leave, his work schedule was altered to accommodate his physical therapy sessions, and Respondent paid for all of his visits to Dr. Wolock, the last of which occurred after he left APD.

The second guidepost is concerned with the harm suffered by Complainant. Not only did Complainant lose his job, but his railroad and state police commissions were also cancelled. Complainant will have to restart the entire commission process and attend another police academy if he wants to work as a railroad police officer again. The degree of harm suffered by Complainant is sufficient to warrant punitive damages in this matter.

Finally, I must compare the circumstances of this matter to similar cases. This is a somewhat difficult task; few cases under the Act have analogous fact patterns to this case. However, looking at a spectrum of cases provides some insight to the pattern of punitive damages awarded in FRSA matters. I provide brief summaries of some example cases below:

- **Laidler v. Grand Trunk W. R.R. Co.**, No. 2021-0013, ALJ No. 2014-FRS-00099, slip op. at 6-7 (ARB Aug. 31, 2021): the ARB affirmed $100,000 in punitive damages where

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\(^{10}\) This value is often represented as the ratio of punitive damages to other damages. See State Farm, 548 U.S. at 424-25.

\(^{11}\) Some circuits have rejected strict applications of the *State Farm* proportionality guidepost in Title VII contexts. See, e.g., *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (“[t]he ratio analysis has little applicability in the Title VII context . . . .”). The extent to which this relaxed interpretation applies to whistleblower laws is unclear, as a stricter application of the guideposts was suggested by the 10th Circuit recently. See *BNSF Ry. Co. v. U.S. Dep’t of Labor*, 816 F.3d 628, 644 (10th Cir. 2016).
complainant was terminated for not reporting a hazardous condition. Complainant was singled out for disciplinary action; respondent’s general manager ignored objective evidence and relied upon unverifiable personal assumptions; and the general manager relied upon witnesses and information that were not presented during the formal investigation or revealed to complainant. Respondent “creat[ed] a work environment in which employees put themselves in danger out of fear of losing their livelihoods, creating an issue of safety and striking at the heart of the FRSA’s protections.”

- D’Hooge v. BNSF Ry. Co., Nos. 15-042, 15-066, ALJ No. 2014-FRS-00002, slip op. at 10-12 (ARB Apr. 25, 2017): the ARB approved a punitive damages award of $25,000.00 despite only $906.00 in other damages. Complainant was retaliated against for reporting a safety hazard, which resulted in respondent terminating the job he was working on (though he had the option to re-bid onto another job). The ARB noted that the value was required to deter respondent from repeating the misconduct.

- Vernace v. Port Auth. Trans-Hudson Corp., 2010-FRS-00018, slip op. at 2-3 (ALJ Sept. 23, 2011), aff’d No. 12-003 (ARB Dec. 21, 2012): the ARB affirmed a $1,000.00 award of punitive damages where respondent threatened discipline against complainant after she filed an injury report, and it failed to “investigate known ambiguities or discrepancies in Complainant’s injury report before filing charges against her.”

- Rudolph, Nos. 14-053, 14-056, slip op. at 15-16: the ARB affirmed a $5,000 award of punitive damages where complainant was threatened with disciplinary action after he reported that he was forced to violate his hours of service limit.

These example cases do not mesh well with the circumstances of this case. However, they provide a scale of ratios, and they establish that punitive damages in most FRSA cases are highly fact dependent. Further, they also show a strong policy of deterring employers from penalizing injury reporting.

Given the information above, and being mindful of the Supreme Court’s guidance, I find that Complainant is entitled to $5,000.00 in punitive damages (or approximately 3.2% of the award in additional punitive damages). While Complainant suffered more than the threatened discipline to which the complainants in Vernace and Rudolph were subjected, Respondent did not act in a manner sufficient to justify an award at the higher end of the spectrum. I find that this amount is sufficient to deter Respondent’s future misconduct.

Considering the guideposts, I find that this matter warrants $5,000.00 in punitive damages.

E. Total Damages

Taken as a whole, Complainant is entitled to $167,961.62 in damages: $157,961.62 in lost wages and interest, $5,000.00 in emotional distress damages, and $5,000.00 in punitive damages.
VI. Attorney’s Fees

Complainant is entitled to reasonable costs, expenses, and attorney fees incurred with the prosecution of his complaint. See 49 U.S.C. § 20109(e)(2)(c). Counsel for Complainant has not submitted a fee petition in this matter. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses (stating the work performed, the time spent on such work, and the reasonable basis for counsel’s rate). Complainant’s counsel is granted 30 days from the issuance of this order to provide a fee application, and Respondent is granted 30 days thereafter to file an objection.

CONCLUSION

Considering the foregoing and on review of the entire record, I find as follows. By a preponderance of the evidence, I find that Complainant engaged in protected activity when he reported a workplace injury on July 3, 2017, and when he followed his doctor’s treatment plan to remain out of work from October 2017 to September 2018. By a preponderance of the evidence, I find that Complainant suffered an adverse personnel action when his application for employment was disapproved on October 30, 2018. By a preponderance of the evidence, I find that Complainant’s protected activity was a contributing factor to the adverse action. Moreover, I find that the record does not establish by clear and convincing evidence that Respondent would have taken the same adverse personnel action against Complainant in the absence of his protected activity.

ORDER

Based on the foregoing:

1. Respondent shall reinstate Complainant as a probationary police officer with nine months remaining in his probationary period;

2. Respondent shall pay Complainant $157,961.62 in back pay and interest;

3. Respondent shall pay Complainant $5,000.00 in emotional distress damages;

4. Respondent shall pay Complainant $5,000.00 in punitive damages;

5. Complainant is granted 30 days from the date of issuance of this order to submit an application for attorney’s fees; and

6. Respondent is granted 30 days thereafter to file an objection to the fee application.
SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by
counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. During this transition period, you are still responsible for serving the notice of appeal on the other parties to the case.

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.
**Service by the Board**

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.