



Issue Date: 16 December 2020

CASE NO.: 2017-PSI-00003

In the Matter of:

RUSSELL BONAR,
Complainant,

v.

ALYESKA PIPELINE SERVICE CO.,
Respondent.

DECISION AND ORDER DENYING COMPLAINT

This matter arises under Section 6 of the Pipeline Safety Improvement Act of 2002 (“PSIA”), 49 U.S.C. § 60129, and the implementing regulations set forth at 29 C.F.R. Part 1981. A hearing was held on August 14 to 17, 2018, in Fairbanks, Alaska. Attorneys Stephani Ayers and Thad M. Guyer represented Complainant, and Attorney Renea Saade represented Respondent.

At the hearing, I admitted into evidence Complainant’s Exhibits 1 to 19, 21, 22, 24, 25, 28 to 33, 36 to 58, 60, 61, 63 to 66, 68 to 77, 79 to 103, 106, and 107. HT 24-44. CX 104 and 105 were offered by Complainant, but not admitted into evidence.¹ Respondent’s Exhibits 1 to 54, 59, 61, and 62 were also admitted into evidence. Respondents offered 55, 56, 57, and 58 into evidence, but those exhibits were not admitted.

The parties stipulated to certain facts that were accepted as conclusively proved for all purposes, marked as Administrative Law Judge Exhibit 1 (ALJX-1), and admitted into evidence. The parties submitted written closing briefs and reply briefs in lieu of oral closing arguments.²

ISSUES

1. Did Complainant engage in protected activity within the meaning of the PSIA:
 - i. On or about and between August 2014 and March 2015 when Complainant wrote a letter to the Joint Pipeline Office about the remote gate valve (RGV) 40;

¹ Complainant withdrew 104 after it was excluded.

² Citations to Complainant’s Closing Brief and Employer’s Closing Brief are referenced as CCB at “page number” and ECB at “page number,” respectively.

- ii. In February-March 2015, when Complainant objected to the decision by Rod Hanson to not allow him to witness or test critical valves in Italy and the subsequent refusal to approve a testing report in April 2015;
 - iii. In March 2015 when Complainant objected to establishing methanol injection sites on the pipeline;
 - iv. On October 13, 2015, March 29, 2017, and August 1, 2017, when Complainant filed whistleblower complaints under the PSIA at OSHA?
2. Did Complainant suffer an adverse action:
 - i. On April 27, 2015, when Respondent terminated him?
 - ii. When Respondent failed to hire him for the following positions for which he applied³:
 1. On November 11, 2016, Construction Supervisor;
 2. On July 14, 2017, Operations & Maintenance Support Engineer?
 3. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged? 29 C.F.R. § 1981.109(a).
 4. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 1981.109(a).
 5. If Complainant prevails, is he entitled to: 1) Back pay in the amount of \$438,433.80, plus interest; 2) Lost benefits in the amount of \$87,686.76; 3) Emotional distress in the amount of \$750,000; 4) Reinstatement to a reasonably comparable position or one of the positions for which he applied and was not selected, or alternatively, front pay; 5) Attorney fees and costs to date of \$125,000 (\$110,000 fees, \$15,000 costs).
 6. Respondent alleges that the suit is frivolous and brought in bad faith and seeks attorney fees and costs. 29 C.F.R. §§ 1981.105(b), 106(a); 1981.109(b) (attorney fees and costs not to exceed \$1,000).

STIPULATED FACTS (ALJX – 1)⁴

1. Complainant Russell Bonar was an employee of Respondent Alyeska Pipeline Service Company from June 2007 until his termination April 23, 2015.
2. Respondent Alyeska Pipeline Service Company (Alyeska) operates the Trans-Alaska Pipeline System (TAPS), including the pipeline, its accompanying pump stations, and the

³ Complainant withdrew/dissolved with prejudice as adverse actions the failure to hire him on January 10, 2017, for Pipeline Hydraulic Engineer, and February 3, 2017, for Pipeline and Civil Maintenance Coordinator. Complainant also withdrew an adverse action claim for failure to hire him as a Mechanical Engineer on January 23, 2017. The parties agree to cover their own costs for the January 23, 2017 claim.

⁴ ALJX-1 was modified at the hearing, striking Stipulated Fact No. 8 and 15. HT 62; HT 149-150. At the hearing, the parties stipulated to ALJX-1 facts 1 through 7 and 9 through 14, and 16.

Valdez Marine Terminal.

3. On June 4, 2007, Respondent Alyeska hired Complainant as a Mechanical Program Support Engineer in Fairbanks, AK, with a base annual salary of \$120,000.
4. In April 2015, Complainant's first line supervisor was Right of Way Integrity Manager Chuck Southerland. Complainant's second level supervisor was Director Tom Webb. Webb's supervisor was Rod Hanson.
5. Complainant's job description included acting as Alyeska's subject matter expert and "go to" person for issues and questions related to maintaining the operational integrity of major valves on TAPS. Complainant was widely recognized within Operations and Projects as Alyeska's expert for valve systems.
6. On February 27, 2014, Right of Way Integrity Manager Chuck Southerland nominated Complainant for an Atigun Award for an innovative approach to valve testing Complainant developed. Manager Southerland specifically praised Complainant's extensive knowledge and deployment of said knowledge to make safety enhancements, noting "Russ applied his knowledge of the TAPS valve systems that he had learned over many years with TAPS and sought to improve the existing valve testing process. Working as a team with Dana, they both developed an innovative replacement test method that reduced field work time which resulted in reduced costs and reduced safety and environmental risks."
7. One of Complainant's key responsibilities included oversight of remote gate valves (RGVs). RGVs are placed at regular intervals along the pipeline to isolate flow and limit the release of oil to the environment in the event of a pipeline leak.
8. Withdrawn
9. Replacing a RGV is a rare occurrence and requires significant time and resources. Such a valve replacement usually involves many months of engineering and designing, as well as months of planning and staging, moving thousands of pounds of material (including the 61,000 pound valves), dozens of workers from various trades, a tight shutdown work schedule, and a worksite in a remote setting.
10. On April 27, 2015, Respondent Alyeska's Kathy LaForest sent Complainant Bonar notice that his employment was being terminated. Alyeska's stated reason for the termination was that Complainant "failed to uphold Alyeska's Corporate Policies and Code of Conduct which requires that you keep unauthorized firearms, weapons, ammunition, explosives and all other prohibited items out of Alyeska facilities, parking lots, and vehicles."
11. In October 2015, Complainant filed a complaint of discrimination with OSHA.
12. In March 2017, Complainant filed a supplemental complaint of discrimination with OSHA.

13. Throughout 2015-2017, Complainant participated in the OSHA investigation into his PSIA concerns.
14. On November 11, 2016, Complainant applied for an APSC Construction Supervisor/Construction Manager position. Complainant learned December 20, 2016, that he was not hired or selected for interview.
15. Withdrawn
16. On July 14, 2017, Complainant learned that APSC had not selected him for the position “Operations and Maintenance Support Engineer”.

FACTUAL FINDINGS

Code of Conduct

Alyeska’s Code of Conduct prohibited having unauthorized firearms, weapons, ammunition, explosives, or other items in Alyeska facilities, parking lots, and vehicles. CX 3 at 13. Alyeska’s Rules and Regulations notified Alyeska employees they and their vehicle could be searched before entering or leaving Alyeska premises. CX 4 at 7. Additionally, a notice from Alyeska Corporate Security reminded employees that “unauthorized weapons, such as bows, arrows, slingshots, and knives not being used for work purposes” were prohibited on Alyeska property. EX 8 at 1. Alyeska Security asked employees to sign and date receipt of the notice, but Employer did not submit Complainant’s signed notice into evidence. *Id.*

Complying with Alyeska’s Code of Conduct was a condition of employment with Alyeska. HT 181-82. Employer distributed its Code of Conduct to new hires and required annual certification that employees had reviewed the most recent Code of Conduct. HT 181. Employer also required employees to fill out a conflicts of interest form annually that also required employees to confirm they had read and understood the Code of Conduct. HT 181; CX 3. On July 2, 2007, Complainant signed a Statement of Employee Obligations confirming he read and would follow the Alyeska Code of Conduct. EX 9 at 1.

Alyeska’s Human Resources Operating Procedures⁵ stated that “possession of unauthorized firearms, weapons, (including but not limited to slingshots, and knives ...), ammunition, explosives, fireworks, projectile flares, and pepper spray” could result in immediate termination. CX 6 at 7. Any employee who violated Alyeska policies, the Code of Conduct standards, or applicable laws or procedures “[would] be subject to management action.” CX 3 at 10. The employee could be disciplined, including termination. *Id.*

How to Report Concerns at Alyeska

Employer’s policy directed employees to bring questions or concerns to their direct supervisor. However, if employees were not comfortable or had already tried to report to their direct supervisor, they could report an issue to any manager up the chain of command and even in

⁵ None of the training materials, HR policies and procedures, or Code of Conduct materials in evidence implied that disassembled weapons were acceptable.

other departments. RX 5 at 6. Fliers explaining Employer’s policy also provided email addresses and phone numbers to the Alyeska Employee Concerns Program (ECP) where employees could make anonymous complaints. RX 6. Employer’s policy directed employees to:

“Assess: what is the risk of speaking up or not speaking up? Analyze: how can I best communicate to foster a safe open dialog? Act: speak respectfully-listen openly—judge fairly—act accordingly.” RX 6.

Alyeska had an open work environment where employees were encouraged to innovate, speak up, and take responsibility for security and safety issues. HT 185 at 24-25; 189 at 1-3; 190-98. Management relied on staff to share their knowledge to inform decision making. Mr. Hanson and Mr. Webb expected Complainant to express his opinion. HT 231-232; HT 783 11-25. The company had a process for resolving “differing professional opinions or (DPOs)” HT 195 at 17-19. When employees did not see an issue the same way, there was a process designed to ensure that both perspectives were fully evaluated, and if there was no resolution, the issue would be evaluated by a supervisor or management. HT 195 at 20-25. While there was not a formal process for management level decision-making, managers relied on subject matter experts to inform them of potential risks including environmental, compliance-related, or financial risks. HT 196 at 5-12. To try to make the “right business decision,” Mr. Hanson would encourage employees to argue alternative positions. HT 196-197.

Complainant History

At the time of the hearing, Complainant was divorced and had three children—Michael (20 years old), Christopher (18 years old), and Jonathan (14 years old). HT 96 at 12-18. In 2015, Complainant had custody of his children every other weekend and lived in a remote area approximately six miles past Ester, Alaska—a town of 1,000 inhabitants. HT 97 at 20; HT 98 at 1-12.

In 1994, Complainant began working as a field project engineer for Alyeska’s “fab shop” and did pump station work for the contractor. HT 92 at 7. Pump station work involved replacing major valves in buildings at the pump station, replacing actuators, and rerouting piping. HT 92 at 7-24. During the last three to four years of his employment with Alyeska contractors, Claimant developed an expertise in RGVs. HT 94 at 22-25. In July of 2007, Alyeska directly employed Claimant as a “lead valve engineer.” HT 95 at 15-17. One of his duties as a lead valve engineer was to ensure that Employer’s valves were in compliance with federal rules and regulations. HT 96 at 5-7. In 2015, Complainant worked out of the Doyon Industrial Facility (DIF). HT 98 at 23.

Mr. Bonar was a subject matter expert in Employer’s valve program and valve testing program. HT 192 at 19-20. He was known as the “valve guy” and was responsible for over 1,000 different kinds of valves from Pump Station 1 to Valdez. HT 102 6-14.

In 2008, Alyeska recognized Complainant’s exceptional contribution as a valve program engineer. CX 1 at 1. Complainant’s response to leaks on an operationally critical valve garnered a letter of praise for his willingness to set aside his own schedule and evaluate and mitigate the issue. *Id.*

In 2013, Complainant and Dana DeGraffenried, a fellow valve engineer, designed a new process that allowed Employer to test a large number of valves in a short time frame while reducing spill risk. CX 2 at 4. The innovation increased efficiency, improved safety, and would reportedly save Employer millions over 15 years. HT 103-04; CX 2 at 1, 4. Chuck Southerland nominated Complainant and Dana DeGraffenried for an Atigun award—a company-wide award given in the areas of: Environment, Health and Safety, Innovation, Integrity, and Teamwork. CX 2 at 1, 5. The Atigun Awards are Alyeska’s “premier recognition” done on an annual basis in addition to less formal recognition given on an ongoing basis. HT 193 at 4-7. In 2014, Complainant and Dana DeGraffenried received an honorable mention Atigun Award for their innovation. CX 2 at 1; HT 103-04.

In 2015, Complainant was a Senior Operations and Management Support Engineer and Dana DeGraffenried was a Valve Engineer. CX 5 at 7. In April 2015, Complainant’s first line supervisor was Right of Way Integrity Manager Chuck Southerland. Complainant’s second level supervisor was Director Tom Webb. Webb’s supervisor was Rod Hanson. ALJX 1. In 2015, Rod Hanson was Vice President of Systems Integrity, Engineering, and Projects (based in Anchorage), Tom Webb was Director of Systems Integrity Management (based in Anchorage), and Chuck Southerland was Right of Way Integrity Manager (based in Fairbanks). CX 5 at 1-6. Mr. Southerland supervised Complainant—a Senior Operations and Management Support Engineer—and Dana DeGraffenried—a Valve Engineer. CX 5 at 7. For approximately three or four years, Mr. Southerland was Complainant’s supervisor. HT 105-06; CX 5.

Valve: RGV 40 Replacement

One of Complainant’s key responsibilities included oversight of RGVs. RGVs are placed at regular intervals along the pipeline to isolate flow and limit the release of oil to the environment in the event of a pipeline leak. ALJX 1 n. 7. In 2015 Alyeska was testing its valves, which it did on a seven and fifteen year cycle according to a memorandum of agreement (MOA) between Alyeska, the BLM, Department of Natural Resources, and Pipeline and Hazardous Materials Safety Administration (PHMSA). HT 107 at 4; HT 108-09.

Complainant conducted leak-through retesting of RGV 40 on June 1, 2014, and August 1, 2014. CX 9 at 1. On August 6, 2014 he sent an email to Mr. Southerland and Mr. Webb with the subject line “ACTION! Government letter for RGV 37 & 40 DRAFT,” specifying that the leak-through rate at RGV 40 exceeded acceptable values. CX 9 at 1. In both the body of the email and the letter, Complainant stated that Alyeska would retest RGV 40 on August 29-30, 2014. CX 9 1-3. The retest of RGV 40 revealed its leak-through rate exceeded the allowable rate published in Alyeska Master Specification P-504. CX 13 at 1. RGV 40 was located in a high consequence area (HCA) where an oil spill could affect a river and nearby village. HT 118 at 16-25; HT 119 at 1-3.

On September 2, 2014, Complainant sent a draft letter that would inform regulators of the leak at RGV 40 to Mr. Southerland, Mr. DeGraffenried, Blake Burley (an engineering intern at Alyeska), and Mr. Webb. CX 12 at 1. The original government letter stated “At this time Alyeska Pipeline Service Company will move forward with plans to replace RGV-40 in 2015.” CX 11 at 4. Mr. Southerland responded that the letter looked good; he was the first to note that RGV 40 is in an HCA because of Wiseman village and an endangered plant habitat on Koyukuk River downstream. CX 16 at 1. Mr. Webb replied to all parties and asked whether Alyeska’s procedures stipulated a time to replace a valve with an unacceptable leak-through rate. *Id.* On the same email thread on

September 3, 2014, Complainant stated in his opinion, if they delayed, Alyeska would be at risk for a notice of possible violation (NOPV) or a notice of violation (NOV). CX 16 at 1; HT 133 at 2-23.

On September 3, 2014, Complainant, Carol Adamczak (Construction Manager), Mr. Webb, Mr. Southerland, Mr. DeGraffenried, and Kim Korten Hof (Pipeline Compliance Coordinator) discussed RGV 40 replacement via email. CX 15 at 1. On this particular email thread, Ms. Adamczak noted a busy construction season and limited engineering resources and asked whether Alyeska had to commit to replacing the valve in 2015. CX 15. Complainant responded that Alyeska could amend the spill plan to accommodate a delayed replacement, but in his opinion that would not be viewed favorably. *Id.*

Later in the afternoon on September 3, 2014, Complainant emailed Mr. Webb and Mr. Southerland with draft comments to management regarding the results of RGV 40's retests and replacement. CX 14. Complainant also attached a revised government letter. *Id.* The revised letter read, "At this time Alyeska Pipeline Service Company is evaluating options for this valve. We will inform you of our plans as soon as we finalize them." CX 17 at 3. In Complainant's email to Mr. Southerland and Mr. Webb, Complainant noted that the leak-through rate at RGV 40 exceeded allowable amounts and would result in an increased spill volume, but the increased volume was within the maximum volume assumed in the oil spill plan. CX 14. As a result, the faulty valve would not require contingency equipment or personnel under the oil spill plan. *Id.* Complainant stated that P-504 Section 2.6.1 committed Alyeska to "repairing or replacing any valve that is identified as having an internal leak through rate that could increase the spill volume of a 1-inch diameter mainline leak." *Id.* Complainant also noted that 49 C.F.R. § 195.401(b) required Alyeska to correct any condition that could adversely affect the safe operation of the pipeline within a "reasonable time." *Id.* He noted in the past, when Alyeska discovered leaks in mainline valves, it replaced the valves the following summer. *Id.*

Subsequently on September 3, 2014, Mr. Webb sent most of the text of Complainant's email to his superiors: Mr. Hanson, Michael Joyner (Vice President of Projects and Engineering), and Mr. Baldrige (Senior Director of Pipeline Operations). CX 13 at 1. Mr. Webb made several edits to Complainant's language and the content of his email. For example, in Complainant's email Complainant specified that the valve replacement would be requested for "2015 or 2016 depending on management direction," whereas Mr. Webb's email stated that Systems Integrity would submit a PWR⁶ for the replacement of RGV 40 but "the time of replacement will be dependent on management direction." *Compare* CX 14 at 2 to CX 13 at 2. Mr. Webb also deleted several paragraphs from Complainant's email detailing the frequency of valve testing and the purpose of and justification for MOA #1. *See* CX 14 at 2. Complainant had copied these paragraphs from Alyeska REF P-504A. *Id.* Finally, Mr. Webb noted "the time of the replacement will be dependent on management." CX 13 at 2.

In response to Mr. Webb's email, Mr. Baldrige recommended replacing RGV 40 in 2015 based on past practices. CX 19 at 2. He noted the valve was in an HCA and doubted Alyeska could successfully argue for a 2016 replacement timeline. *Id.* Mr. Joyner concurred and stated Alyeska needed to order a valve because they only had one spare. *Id.* Mr. Hanson, however, wanted to discuss the risks associated with replacing it in 2015 versus 2016. *Id.* at 1. He stated they should consider procurement of a replacement valve right away and the time needed for adequate planning,

⁶ Based on the context, a PWR is an internal, formal request for funds.

resourcing, and execution of the replacement project. *Id.* He wanted to consider interim risk mitigation Alyeska could implement if they replaced the valve in 2016. *Id.*

On September 8, 2014, Mr. Webb informed Mr. Hanson, Mr. Joyner, and Mr. Baldrige that the government letter would go out that day and it would be silent on the timing of the valve replacement. CX 19 at 1. Mr. Baldrige emailed Complainant: “the language in the letter needs to follow what is provided by Tom Webb below. *Id.* Complainant responded “please copy me on the signed version.” *Id.* In response Complainant also warned Kim Kortenhof—Pipeline Compliance Coordinator—“Better get ready to answer agency questions....” CX 21 at 1. Joint Pipeline Office (JPO) representative Lori Hall-Ingalls spoke with Complainant and asked what the lack of commitment to a replacement timeline meant. HT 137 at 2-9. She did not give him any action items or indicate that the JPO would issue a NOPV or NOV. *See* HT 138 at 21.

On September 24, 2014, Complainant asked Mr. Webb via email if he could submit a PWR for the replacement of RGV 40. CX 25. He expressed concern about getting a NOPV or NOV for inaction. *Id.* A PWR was initiated on October 1, 2014. *See* CX 28 at 2. That day, Mr. Webb emailed Complainant about the PWR asking if there were any stipulations (regulatory or otherwise) that would require Alyeska to replace the valve in 2015. CX 28 at 2. Complainant replied that,

49 CFR 195 420 states that all valves required for safe operation of a pipeline system must be kept in good working order at all times. APSC GVT Letter 99-15191 was in response to JPO Letter No. 97-098-LB which established the maximum allowable leak through rate for each valve on TAPS (P-504). JPO Letter No. 00-018-JH (attached here as well as to the PWR) clarified the requirement that deferral of repair/replacement of any valve with leak through must be approved by the Authorized Officer, the State Pipeline Coordinator and the US DOT/OPS Technical Officer.

CX 28 at 1. Finally, Complainant stated “unless a waiver is pursued through the mentioned offices I think we are obligated to 2015.” *Id.*

On October 6, 2014, Complainant, Mr. Webb, Mr. Southerland, and Mr. DeGraffenried emailed regarding replacement costs. EX 36 at 2. Complainant signed off an email, “Good luck on obtaining agency approval to delay implementation to 2016. It would be outside of any previous precedent but may be worth a try.” *Id.* On October 7, 2014, Mr. Webb contacted Complainant to confirm Alyeska had a replacement valve in stock, and from which manufacturer Alyeska would order a replacement valve. EX 35. Complainant confirmed. *Id.*

At some point in the fall of 2014, Complainant’s supervisor and Mr. Baldrige told Complainant it would get done, to stop worrying about it, and leave it alone. HT 139 at 10-20; HT 351 at 19-25.

On December 3, 2014, Mr. Southerland, Mr. Webb, Mr. Baldrige, Mr. Hansen, Mr. Joyner, and Complainant had a meeting regarding RGV 40 replacement. *See* CX 98;⁷ *see also* CX 37.⁸

⁷ CX 98 is an outlook meeting invite for December 3, 2014, regarding RGV 40 to teleconference in Mr. Joyner.

⁸ In a December 3, 2014 email to Mr. Southerland and Mr. Webb (with Mr. Baldrige copied), Complainant references “our meeting with Joyner, Hansen, Baldrige, and others today....” CX 37.

Following the meeting, the replacement date for RGV 40 remained unclear. *See* CX 37. Complainant requested permission to procure a replacement valve given the long lead time. CX 37. He also proposed changing the required inventory from one to two valves to “make this happen quickly.” *Id.*

On December 18, 2014, Complainant was included on an email exchange discussing removing the replacement valve that Alyeska had from stock, so it could be used to replace RGV 40. EX 37. Complainant emailed Mr. Webb, Tom Stokes (the Compliance Director), and Mr. Southerland asking whether Alyeska should notify “the agencies of the decision to move forward replacing the RGV 40 in 2015.” EX 37 at 1. Mr. Stokes responded that Alyeska never communicated the possibility that it was considering postponing the replacement to 2016. *Id.* He continued, if we wanted to defer work, we are required to gain their specific approval. That option was never pursued.” *Id.* Mr. Webb clarified that Complainant was referring to moving forward on the replacement in 2015, not postponing the replacement to 2016. *Id.* Complainant misunderstood the comment to mean delaying the replacement was never discussed even within Alyeska; and he was annoyed. HT 355 at 12-15.

By April 7, 2015, Alyeska communicated to the JPO it would replace RGV 40 in August of 2015. *See* CX 45 at 1.

Methanol Injections

At a staff teleconference meeting in March 2015, Mr. Hanson gave an executive overview of projects that Alyeska was working on and announced the company was exploring using methanol in the pipeline. HT 358 at 4-8; 359 at 3-16. Mr. Hanson had been discussing the studies that Alyeska was doing and the challenges with many teams. He expected employees, including Complainant and the other valve engineer, Mr. DeGraffenried, to share their knowledge on the subject. HT 231-232. During the meeting Complainant interrupted Mr. Hanson to warn the company that “valves are very susceptible to degradation” if Alyeska were to inject methanol. HT 360 4-7. Following the interruption there was a silence on the phone, and Mr. Hanson then continued the overview of other projects. HT 366 at 17-22. During that silence, Mr. Hanson became flushed. HT 366 at 6-16. Mr. Hanson rarely interacted with Complainant and did not remember the incident when asked whether he had any disagreements with Complainant. *See* HT 201; *see also* HT 228 at 20.

Complainant suspected prior use of methanol had degraded valves that Alyeska was in the process of replacing. HT 360 at 8-25. On March 12, 2015, Complainant followed up and emailed Matthew Korshin and Rod Hanson to again advise against injecting methanol into the pipeline to suppress the freeze point. EX 42 at 2. He stated in the past they used methanol to “clean the lines” and the seals in the valves were “toast” as a result. *Id.* Complainant attached a 1976 letter from a valve manufacturer, Grove Valve and Regulator Company, explaining that its seals were not compatible with methanol. *Id.* at 3. Other valve manufacturers produced valves that were compatible with methanol. *Id.* However, 99 percent of the valves on the pipeline were still original 1976 equipment, and Grove manufactured most of Alyeska’s mainline valves. HT 362 at 22-25; HT 233 at 20-22. If the seals were damaged, it could reduce the effectiveness of the valves and oil could be released into the environment. HT 363 at 6-8 and 20-21.

Flight to Italy and Valvitalia Testing Review

On February 23, 2015, Mr. Hanson granted Complainant's request to travel to Italy to inspect some valves, but on March 5, 2015, denied the request to travel in business or first class because it increased the fare from \$1,700 or \$1,800 to approximately \$10,000 round trip. CX 40 at 1; CX 42 at 1; HT 201 at 4-25. While Employer typically required employees to travel in coach, its policy permitted approval of business or first class travel for flights over six hours. CX 42 at 2. In his email denying Complainant's request, Mr. Hanson cited low oil prices and a commitment to being as cost effective as possible. CX 42 at 1. Complainant declined to travel roughly 16 hours to Italy after his request to travel in business or first class was denied. CX 42 at 1; HT 202 at 24-25. In response to Mr. Hanson's apologetic email citing low oil prices and cost effectiveness, Complainant told Mr. Hanson, "if the company feels that deviating [sic] from policy due to oil prices is acceptable I'll decline on witness testing the projects valves." EX 43 at 1. Steven Schudel suggested Complainant witness the fitting of the actuators and the valves in Bellingham, Washington—an event that would happen around mid-May—as a cost effective alternative. *Id.* Complainant agreed if particular tests were performed and documented prior to installation. *Id.*

Alyeska asked another employee, Erv Cutright, to travel to inspect the valves and planned to have Complainant inspect the valves in Bellingham. The flight to Italy cost approximately \$2,250. CX 44 at 15; HT 212 at 23. Before his trip Mr. Cutright, a construction manager, informed Complainant that he would need his real-time assistance approving the test results that he witnessed. CX 44 at 1.

Prior to testing, Alyeska asked Complainant to comment on Valvitalia's test procedures. CX 87 at 1. Complainant clarified that every valve should be tested. *Id.* The C.F.R. required that valves test to a minimum leak rate standard. HT 384 3-5. The American Petroleum Institute (API) has leak rate requirement standards. HT 381 at 11-13. And Alyeska had more stringent leak-through rate requirements that it agreed to with vendors. HT 383 at 21-25. The JPO would "hold" Alyeska to whatever level they set. HT 384 at 7-8. When Valvitalia completed testing, Alyeska asked Complainant to review the test results from Italy. On March 31, 2015, Complainant received an email with the Valvitalia hydrostatic and pneumatic test results. EX 59 at 1. Alyeska requested Complainant "review the results and ensure they are adequate for our standards." *Id.* On April 7, 2015, Complainant confirmed that three of the valves tested "excellently" but one of the valves appeared to have some leakage, and Complainant asked for clarification on the cc/minute leak rate observed. CX 59 at 7. In response, engineers outside of Alyeska but involved with the valve testing asked Complainant to clarify Alyeska's requirements which seemed to exceed API requirements. EX 59 at 2. Alyeska fired Complainant before he received more clarification on the observed leak rate. HT 386 at 7.

In response to a separate inquiry from an employee of Fluor Corporation regarding whether there would be a need for testing the valves under pressure in Bellingham, Complainant responded, "it is none of Valvitalia's business what we do as far as testing goes. They have certified their tests' case closed." EX 59 at 10. He continued, "what Lex described below meets my expectations for this project." *Id.* A pre-commissioned leak test was required prior to turnover into crude service for

⁹ There was no evidence that Alyeska wanted Complainant to sign off on equipment regardless of whether or not it complied with the CFR standards. *But see* CCB 13.

operation. EX 59 at 8. Ultimately there were issues with the valves in the way they were welded which made it more difficult to make changes and led to additional costs. HT 917 at 3.

Personnel Issues

Complainant was a valuable valve engineer and the valve program in March 2015 was thinly staffed. *See* CX 44. Despite his recognized expertise in valves, there was a documented history of issues with Complainant's communication skills, professionalism, and attendance.

In his Performance Expectation/Evaluation Review (PER) for 2014, Complainant's supervisor noted Complainant was a "very capable nuts and bolts valve engineer" who was a "valuable resource for Design Engineering, Operations Maintenance, and Purchasing. CX 39 at 3. He also noted "improvements in verbal and written communications (i.e. email) have been made/observed" and some improvements have been made in office decorum since Russ recently moved to an enclosed office, but there is still room for improvement, especially on the top-of-desk environment that gives the appearance of chaos." *Id.* Additionally Complainant continued to "have issues with tardiness and late-in-the-morning notification of tardiness or a sick day." *Id.* His supervisor acknowledged improvement, but stated there was still need for further improvement. *Id.* In response, Complainant stated he is not an hourly employee, he could do better arriving at a consistent hour, but "the company gets more than their money's worth out of [him] compared to others." CX 39 at 4.

Complainant needed to improve his communication skills. Complainant would get frustrated when others would not "catch on as quick to his way forward" and as a result his communications "were not at the level of professionalism" that Alyeska would have liked. HT 1004 at 3-14. In an email exchange editing a draft letter to the Bureau of Land Management, Complainant informed Mr. Webb—his direct supervisor's supervisor, "I can only work with the information I have. As it stands, we have both effectively wasted several productive hours commenting on something that was not relevant." EX 39 at 15. In another instance in April 2015, the JPO agreed to give Alyeska 30 days to submit its final reports on valve tests, as long as Alyeska submitted preliminary results within seven days. EX 40. Mr. Webb asked Mr. DeGraffenried if it was possible to complete preliminary reporting in seven days, and in a refusal to accommodate the regulator's request, without further explanation, Complainant responded to Mr. Webb, "we are not going to make any pass/no pass decisions until we have properly vetted the results and determined if any follow-up testing is required." *Id.*

Complainant acknowledged he needed to improve how he communicated. On February 5, 2014, Complainant stated he had made progress improving his written and verbal communication skills and would "continue to seek guidance from [his] peers and supervisor to present [himself] in a professional manner." RX 2 at 1. In his interview for an operations and maintenance support engineer position, Complainant stated he continued to work on his communication skills; for example, he would curtail firing off an email without a phone call first. CX 83 at 301.

Crossbow on Alyeska Property

On Saturday, April 11, 2015, Complainant and his sons ordered an Arrow Precision cross bow and a 48 pack of aluminum 20-inch hunting crossbow bolts with steel points from Amazon. EX 14. Complainant's son asked for Complainant's permission to purchase a crossbow and he and

his son reached consensus on a \$150 crossbow on Amazon. HT 155 at 12; HT 156 at 2-16. His son shipped the crossbow to his Alyeska workplace with his knowledge. EX 14; *see* EX 16 at 3). Complainant opened an Amazon email sent April 13, 2015, regarding an update to his crossbow order. EX 14 at 5. Before April 16, 2015, Complainant received a package of arrows—part of the Amazon crossbow order—at the Alyeska warehouse. HT 435 at 12-19; HT 436 at 1-10. He did not report the arrows to Security nor did he attempt to stop Amazon from delivering the crossbow to Alyeska facilities. *Id.*

Arrow Precision specified that the Crossbow Inferno is not a toy, could injure people from a distance of 220 yards, and that misuse could cause injury or death. EX 13 at 1. The crossbow required assembly on receipt. *See* CX 13. The Inferno Crossbow arrived at the Alyeska facilities in Fairbanks on April 16, 2015, and shipping and receiving emailed Complainant that a package arrived for him. CX 15 at 1.

Badge Hold Appeal

Katherine LaForest—a Human Resources Generalist—coordinated Complainant’s badge hold appeal and Disciplinary Review Board (DRB). Ms. LaForest has worked for Alyeska for 27 years. HT 967-68. As an HR Generalist, she supports approximately 330 employees, shares in supporting the Discipline Review Board, and specializes in the badge access program. HT 968-69; HT 974 at 1. For the badge access program, when a Badge Access Appeal is filed, Ms. LaForest coordinates the process with the team doing the review and communicates with the employee. HT 969 at 10-15. She puts together the badge packet, including the employee’s appeal, statement, and a security report if applicable. HT 969 at 20-25. She has similar duties with the Discipline Review Board. HT 970 at 6. During a badge hold appeal meeting, security, legal, and HR convene to review the initial violation and the submitted appeal. They then make a determination about whether the badge hold will stand. HT 978-79.

On April 17, 2015, at 6:30 am Alyeska security guard, Jeffrey Auton, noticed a box addressed to Russ Bonar containing a 175 pound fiberglass crossbow in the Alyeska Central Warehouse Will Call Area. EX 16 at 7. Mr. Auton secured the box and delivered it to Sgt. McAlister and notified Sgt. Warren McAlister and Cpt. Larry Graham of Alyeska Doyon Security. *Id.* Sgt. McAlister delivered the crossbow to Dave Brown—the Alyeska Pipeline Security Manager—at 7:00 am on April 17, 2015. *Id.* The box contained a fiberglass limb, crossbow body, two strings, a stringer cable, foot stirrup, hardware package, quick detach quiver, quiver hardware, four bolts with practice points, shoulder sling, rail lube, eye protection, open sight, a dot sight, and a rope cocking device. *Id.* On April 17, 2015, Security notified Ms. LaForest of Complainant’s Code of Conduct weapons violation, and she coordinated Complainant’s badge appeal. HT 970 at 20; HT 975 at 12-14. The mailroom or warehouse employees who received the crossbow package did not notify security and were not investigated. HT 718 at 3.

That day around noon Ms. LaForest notified Complainant by phone of the weapons violation and that he had been placed on administrative badge hold. EX 16 at 17. Complainant was professional during the call. EX 16 at 16, 17. Ms. LaForest informed Complainant not to come on Alyeska property or conduct business on behalf of Alyeska. *Id.* She described his right to file a statement and walked him through the process, including the time-line. HT 976 at 4-10. Complainant had until April 22 at noon to submit materials. Ms. LaForest also notified Mr. Hanson that Complainant was placed on “badge hold” for a weapons violation. HT 210 at 5-9.

Ms. LaForest told Complainant his Discipline Review Board (DRB) would meet on April 23, 2015. EX 16 at 17. Complainant indicated he would submit a detailed statement by the following Thursday at noon. *Id.* at 16. During their conversation Complainant told Ms. LaForest he shipped the crossbow to work because UPS required a signature and he needed to send it somewhere it could be received. EX 16 at 17. He stated “Alyeska has over interpretations of things. This sure is one. This is not a regulation.” EX 16 at 17.

On April 17, 2015, after Ms. LaForest notified Complainant, Mr. Brown spoke with Complainant. EX 16 at 16. Complainant disagreed with the process as he would not be able to work despite having scheduled valve testing and an important upcoming meeting. *Id.* Mr. Brown noted that Complainant stated because the shipper needed a signature and Complainant was not home during the day, his “boys” had the package sent to Complainant’s work address. *Id.* Complainant also told Mr. Brown the warehouse should have called him and he would have picked it up and everything would be ok. *Id.*

On April 18, 2015, Complainant picked up a badge hold appeal packet and asked when he could retrieve the crossbow. EX 16 at 8. On April 20, 2015, Complainant returned his badge to Mr. Brown and picked up the crossbow. *Id.*

On April 22, 2015, at approximately 4:00 pm, Ms. LaForest sent Steven Browning (Security Director), David Brown (Security Manager), Christopher Masters, Stacia Motz, Eric McGhee, and Susan Murto (Legal Representative) materials for Complainant’s badge hold appeal. EX 16 at 1. The materials included Complainant’s badge hold appeal form stating that he appealed his badge hold, his statement entitled “Draft apology, feedback requested,” an image of the crossbow, the security incident report, an image of the crossbow packaging, the shipping information, an email from David Brown to Ms. LaForest summarizing the conversation he had with Complainant following the incident, an email from Ms. LaForest to Mr. Southerland, Mr. Webb, Mr. Hanson, and Mr. Brown summarizing Ms. LaForest’s conversation with Complainant following his badge hold, and an email Ms. LaForest sent to herself summarizing notes taken during her phone call with Complainant. EX 16. The badge hold appeal team did not receive the summary of Complainant’s work performance that Mr. Southerland and Mr. Webb prepared. HT 638 at 2-7.

In his email statement on April 21, 2015, Complainant apologized for “causing this situation to occur.” EX 16 at 3. He stated he and his son ordered the crossbow, but it was never his intent “to use or even un-package” it on Alyeska property. *Id.* The order required an adult’s signature and it could not be shipped to a P.O. Box. *Id.* Complainant had it shipped to Alyeska because he “realized that [he] would not be home to sign for it during working hours.” *Id.* He continued that he did not even consider that someone would interpret his package as “bringing a weapon” onto company property. *Id.* Complainant characterized his action as a “logistical oversight” and maintained that he did not put the company or anyone at risk with this miss directed [sic] order.” *Id.* Complainant apologized if the “situation was interpreted to mean anything other than what it was, which [was] simply a misdirected piece of legal merchandise.” *Id.* Finally he asked “that this misdirected piece of merchandise not be intemperate [sic] as me knowing [sic] trying to bring prohibited items on to [sic] company property.” *Id.*

Alyeska’s disciplinary policy and procedures mandated at least a 60-day badge hold for a first weapons offense, even if Alyeska determined the violation was unintentional. CX 66 at 3. A second offense would result in termination and a one-year badge hold. *Id.* If Alyeska determined the

violation was intentional, the company would terminate the violator's employment and issue a minimum one-year badge hold. *Id.*

On April 23, 2015, Ms. LaForest, Mr. Browning, Mr. Brown, Mr. Masters, Ms. Motz, Ms. McGee, and Ms. Murto met to review Complainant's Badge Hold Appeal. CX 63 at 1. No one on the Badge Access Team was in Complainant's reporting line and none of them knew of his alleged protected activity. During the badge hold appeal, the participants noted Complainant's story had changed over time, and based on the security report, they concluded that Complainant had deliberately shipped the crossbow and arrows to Alyeska facilities. HT 992 at 14-22; CX 66 at 2. They did not believe Complainant had made an "honest mistake." HT 642 at 12-13. Complainant had the crossbow sent to Alyeska because he needed to ship it to an address where someone would sign for it; it was not misdirected. HT 645 at 15-25. The fact that Complainant never possessed the crossbow was irrelevant; Complainant deliberately had it brought into Alyeska facilities. HT 992 at 23-24. The group concluded Complainant knew of the policy, and did not take responsibility for the incident, instead he stated the rule was being misapplied, over interpreted, and the package was misdirected. CX 66 at 2. The panel upheld his one-year badge hold.

Disciplinary Review Board

Ms. La Forest also coordinated Complainant's DRB, and prior to the DRB, she confirmed that Complainant had not submitted any concerns or complaints to ECP within the last five years. EX 21 at 1. The DRB Checklist noted that Complainant had not ever raised a concern or otherwise engaged in protected activity. CX 64 at 5. Typically, Ms. LaForest would check with HR to see if HR had any concerns, and at the DRB, the legal representative, Ms. Murto, would ask if any of the Complainant's supervisors knew of any "concerns the individual had raised?" HT 1043. Ms. LaForest followed the process, but did not remember if Ms. Murto specifically asked the question. HT 1046 at 6-11.

On Friday, April 17, 2015, Ms. LaForest notified Complainant his DRB would be on April 23, 2015, and his DRB panel would consist of Mr. Southerland, Mr. Webb, Mr. Hanson, Frank Millen (HR Manager), Susan Murto (Legal Representative), and Ms. LaForest. CX 48 at 1. She reiterated that Complainant could submit a written statement for consideration that she would provide to the DRB participants as soon as she received it. CX 48 at 1. Complainant requested feedback on his statement, but Ms. LaForest did not offer to edit or provide feedback on Complainant's written statement. *See* CX 48 at 1; CX 60 at 1. Instead Ms. LaForest told Complainant she could not advise him on the content of his statement. CX 60 at 1. Complainant expressed a hope that Ms. LaForest would be his advocate in the DRB and emphasized that he never possessed the crossbow. *Id.*

On April 22, 2015, Ms. LaForest sent documents for Complainant's DRB to Mr. Southerland, Mr. Webb, Mr. Hanson, Frank Millen, Susan Murto, David Heimke (Engineering Manager), Steven Browning, David Brown, and Elizabeth Haines (Senior Director of Engineering).¹⁰ EX 19. The packet included: a DRB submittal for proposed actions, Complainant's statement, the security incident report, a summary of the statements Complainant made to security and HR, a performance overview from Complainant's supervisors, HR operating procedures for disciplinary

¹⁰ Mr. Heimke and Ms. Haines were invited to participate in the DRB because Complainant had been transferred and was to begin reporting to them.

actions, and the corporate policies and code of conduct. CX 64 at 2. Although HR retrieved Complainant's 2013 and 2014 performance reviews, they were not included with the review materials. *See* CX 5; CX 64.

Complainant had no other disciplinary actions, but a summary of his performance noted issues with his communication skills, professionalism, and attendance/punctuality. CX 64 at 3; EX 20 at 1. According to his Mr. Southerland and Mr. Webb, Complainant had detailed knowledge of valves, he was instrumental in the selection and installation of valves, and he was valuable to Alyeska as an "individual technical contributor." *Id.* They noted he received an Atigun Award Honorable Mention for his innovation and due to his technical strengths, other teams consulted him on a daily basis. *Id.* In their assessment, he was competent in fulfilling his duties.¹¹ *Id.*

Complainant's professionalism, mannerisms, and writing and verbal skills, however, needed work. *See* EX 20 at 1. Although friendly and sociable with department staff, his mannerisms, demeanor, and actions were "generally not reflective of a normal office environment professional." *Id.* Although his communication skills were adequate, he sometimes made abrasive verbal and written statements which were not professional. *Id.* Similarly his "comments and actions conveyed a mindset that he is one of the few people left in Alyeska with his knowledge and experience base on valve systems (which may be true)," but due to Complainant's "self-elevated value" he focused on what he believed was important rather than current management priorities or directives. *Id.* Complainant's attendance and punctuality issues—for which he had been reprimanded by email in January 2014—were improving. *Id.* The performance overview also noted Complainant had refused to travel coach to Italy to observe valve testing. *Id.*

Mr. Hanson avoided driving the conversation in DRBs. HT 217 at 9-14. Other participants confirmed that during the DRB, Mr. Hanson waited to speak until other had voiced their opinions. HT 661 at 12-17, HT 1104-05; 1012-13. Complainant's supervisor, Mr. Southerland felt the discipline was excessive, but he believed it was consistent with Alyeska's practices and he did not object to the conclusion the DRB reached. HT 825 at 5-17. During the DRB, the panel also noted "the impact of having this EE [employee] gone and how his work will be managed – significant business impact." CX 64 at 5. The decision was difficult because the company would lose an employee whom they relied on heavily for the valve program. HT 221 at 19-25. Terminating Complainant's employment would create a hardship on Mr. Webb's department and they would have to seek contract help to fill Complainant's role. HT 770 at 6-18.

The DRB participants reviewed three other cases where an employee violated the weapons policy.¹² CX 64 at 4. In all of the cases examined, the DRB found the violation was unintentional, but still represented a safety risk. *Id.* Each case resulted in a 60-day suspension without pay, and the initial one-year badge hold was reduced to a 60-day badge hold. *Id.*

According to the DRB participants, Complainant's case was unique due to his intent to ship the crossbow onto Alyeska property. CX 64 at 4. Much of the discussion at the DRB focused on whether Complainant had full knowledge of the policy and still decided to have the weapon sent to the Alyeska warehouse. HT 221 at 1-3. The participants noted terminating Complainant's

¹¹ In the original draft, Mr. Southerland stated Complainant was "dependable" in performing his duties; Mr. Webb edited this to say Complainant was "competent" in performing his duties. CX 51 at 2; CX 52 at 1.

¹² Employees "SG", "RH", and "CR" discussed below.

employment was in “alignment with the badge procedure.” *Id.* at 5. They decided to terminate Complainant’s employment “based on one-year minimum badge hold for policy violation,” but he was considered “suitable” for rehire after his badge hold expired. *Id.*

Beginning approximately ten years before the hearing, Alyeska President Tom Barrett set a higher bar, particularly around safety and “any type of risk that pertains to people or the facility.” HT 1010 at 9-20. Most of the documented weapons violations occurred when employees or contractors brought personal guns onto Alyeska property in their vehicles. Alyeska consistently reduced the badge hold to 60 days for first-time offenders who unintentionally violated the policy. For example, in 2005 employee “SG” brought a handgun to work in a laptop case. CX 80 at 1. He seemed genuinely surprised the gun was in the case, and explained in a written statement that he left it there a month ago and forgot it was in the case. The badge hold appeal review found the violation was unintentional and reduced his badge hold to 60 days. *Id.* Similarly in 2013 employee “RH” left a gun in his car. CX 80 at 2. He was surprised when the search turned up the gun and stated he forgot to return it to his safe. *Id.* Finding no intent to violate the policy, his one-year badge hold was reduced to 60 days. *Id.* In 2015 contractor “TM” was subjected to a vehicle search that revealed a loaded holstered gun under the passenger seat. TM claimed his wife accidentally left it there after a walk and he apologized and stated he understood the policy and its purpose, and was willing to accept the consequences of his violation. CX 80 at 5. The review reduced his one year badge hold to 60 days. *Id.* In 2016 employee “CR” was subjected to a vehicle search which turned up a handgun in the driver door pocket. CX 80 at 7. She was visibly upset and stated she forgot it was there. *Id.* She apologized stating she takes the code seriously and would never intentionally break it. *Id.* She continued that her lapse made her question how she would transport her gun so that she was never unable to account for it again. *Id.* at 8. Her one-year badge hold was reduced to 60 days. *Id.*

Alyeska consistently upheld a one-year badge hold for offenders who intentionally violated the policy.¹³ In 2013 a contractor disassembled his gun and kept it in his car. CX 80 at 3-4. The contractor claimed he thought it was ok if the gun was broken down, because it would not work. *Id.* at 4. His one-year badge hold was upheld because the review concluded he intentionally violated the policy. In 2015 a contractor brought a gun to work in his vehicle. A random vehicle search revealed a revolver in a holster in a duffel bag on the passenger seat visible to the contractor. CX 80 at 3. He claimed he forgot the pistol was there, even though it was visible to him. *Id.* Security also found ammunition. *Id.* He was placed on a one-year badge hold. *Id.* In 2016 a contractor was subjected to a vehicle search that turned up a revolver under the passenger seat. CX 80 at 6. He stated he needed it for protection and claimed he was not fully briefed on the policy. He received a one-year badge hold. *Id.*

Termination

On April 27, 2015, Ms. LaForest emailed Complainant a notice of termination for cause, specifically stating that Complainant violated Alyeska’s Code of Conduct prohibiting weapons on

¹³ In 1994 and 2001 there were several inconsistent instances involving a hand spear. All of the incidents involved the same employee bringing hand spears onto the premises. CX 81 at 1. In the first incident involving Badge No. FC-5968 the hand spear was confiscated. *Id.* The employee claimed the spear was a hunting implement, not a weapon. HT 695-696. On seven occasions in 2001, Badge No. FC-5968 voluntarily surrendered the spears and they were secured and returned to him when he left Alyeska property that day. CX 81 at 1-2.

company property. EX 23 at 2; CX 71. The notice informed Complainant he would be on a one-year badge hold beginning April 17, 2015, which prevented him from working at any TAPS facility or conducting any TAPS work. *Id.* Complainant was suitable for rehire after his badge hold expired. EX 24 at 1.

Following his termination, Complainant forwarded his notice of termination to Alyeska President Thomas Barrett and wrote just the words, “pretty cold...” in the body of the message. EX 27 at 2. Mr. Barrett forwarded the message to Mr. Millen and Ms. LaForest. He expressed concern that the termination letter read more like a suspension. CX 95 at 1. He asked HR Director Mr. Millen “why would we ever rehire someone we fire for a code of conduct violation? Is this a person who reflects our values and fits in our organization? We need to discuss this whole process, I am so discouraged with company attitude on accountability...what you describe is more like a suspension than what I understand termination to be.” *Id.*

On May 22, 2015, Complainant submitted a request for executive review. HT 1134 at 5-6. Susan Parkes, the vice president of legal, reviewed and denied his appeal. HT 1133 at 18-23.

Other Prohibited Items

On May 1, 2015, Alyeska Security, Facilities Lead McMahan, and Complainant’s direct supervisor, Mr. Southerland, inventoried and packed up Complainant’s office belongings. EX 22 at 1. Security found an Amazon envelope which contained six broad-head blade arrow tips for a crossbow. EX 22 at 1; HT 666 at 15-16.

Rehire

On April 13, 2016, Ms. LaForest emailed Complainant and informed him he would be eligible for rehire on April 17, 2016 when his badge hold is lifted. EX 15 at 4. She confirmed that the HR database reflected the correct rehire eligibility. *Id.*

Construction Supervisor/ Construction Manager

On November 11, 2016 Complainant applied to an open position for a construction supervisor/manager with Alyeska. EX 46 at 6.¹⁴ 68 applicants applied and ten were interviewed. *Id.* at 4. Kalu, the project portfolio manager who led the hiring for the position, knew Complainant well because they were coworkers at Alyeska and worked in the same building. EX 49 at 1, 3. As coworkers, they had exchanged greetings and engaged in small talk, but Kalu was unfamiliar with Complainant’s work. EX 49 at 4. Patricia Miller, the direct supervisor for the position, also knew Complainant in passing. EX 50 at 3. Kalu and Ms. Miller did not offer Complainant an interview for the position because they were looking for candidates with heavy civil and environmental engineering backgrounds. EX 49 at 1; EX 46 at 8; EX 50 at 4. Complainant is a mechanical engineer. EX 46 at 25-30. No one involved in hiring or on the interview panel was aware Complainant raised safety concerns nor did they know the circumstances of Complainant’s termination. EX 49 at 1; EX 50 at 4; EX 51 at 4; EX 52. Additionally, neither Mr. Webb nor Mr. Hanson influenced the decision not to interview Complainant. EX 49 at 1; EX 50 at 4. Mr. Webb and Mr. Hanson were in a “completely different group” and had no input on recruiting or hiring for

¹⁴ Pages 9-11 of EX 46 were illegible and thus not considered.

the position. EX 51 at 4. Additionally, Mr. Webb had retired before Alyeska recruited and hired the construction supervisor/manager. EX 49 at 4. Complainant learned on December 20, 2016, that he was not hired or selected for interview. ALJX 1.

O&M Support Engineer

In the spring of 2017 Alyeska was hiring a manager for an O&M support engineer position and Joseph Imlach, the operations and maintenance engineering manager, led the hiring process. HT 919 at 1-7. Mr. Hanson and Mr. Webb were not involved in the hiring process. HT 923 at 8-10. Complainant applied for the facility engineer position. HT 924 at 21.

Alyeska preferred a mechanical engineering candidate with varied experience in piping, tankage, heating, ventilation, and air conditioning to support the pump stations for the position. HT 927; HT 940 at 6-12. After HR screened the candidates, Mr. Imlach and two other Alyeska employees, Daniel Ottenbreit and Bob Stech, selected a pool of candidates to interview. HT 929 at 4-19. Complainant was initially not selected for an interview, but HR informed Mr. Imlach that Complainant had a pending legal case and it would be in Alyeska best interest to interview him. HT 933 at 8-25. Mr. Imlach did not discuss the pending case with others on the interview panel, and during the interview he gave Complainant a higher score than the other interviewers did. CX 83 at 291-307. Complainant's experience was specialized in valves and project engineering, whereas the position required someone with varied mechanical engineering and facilities experience. HT 941 at 14-20. The interview panel reached consensus on their preferred candidate, and although the preferred candidate had fewer years of experience than Complainant, he had the varied mechanical engineering experience that the team needed. HT 943 at 19-24; HT 969 at 6-10.

On July 14, 2017, Complainant learned that APSC had not selected him for the position "Operations and Maintenance Support Engineer". ALJX 1.

LEGAL FRAMEWORK

The purpose of the PSIA is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation. 49 U.S.C. § 60102(a)(1). To prevail on a whistleblower complaint under the PSIA, the complainant must demonstrate by a preponderance of the evidence that (1) he or she engaged in protected activity, (2) suffered an unfavorable personnel action, and (3) that his or her protected activity was a contributing factor in the unfavorable personnel action.¹⁵ 29 C.F.R. § 1981.109(a); *Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-001, -002, -003, -004, slip op. at 9 (ARB June 25, 2009). A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the

¹⁵ Knowledge by the respondent that the complainant engaged in the protected activity is an element during the investigation by OSHA. 29 C.F.R. § 1981.104(b)(1). However, once the matter has been referred for hearing, the complainant is not required to show employer knowledge of the protected activity, although a knowledge requirement may be implicit in the causation requirement. See 29 C.F.R. § 1981.109(a); *Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2, n.3 (Feb. 18, 2016) (discussing identical elements of a whistleblower claim under the Sarbanes-Oxley Act).

respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of any protected activity. 29 C.F.R. § 1981.109(a).

Protected Activity

The PSIA's employee protection provision prohibits discrimination against an employee who engages in certain types of protected activity, including: (1) providing to an employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under Federal law relating to pipeline safety; (2) refusing to engage in any practice made unlawful by Federal law relating to pipeline safety if the employee has identified the alleged illegality to the employer; (3) providing testimony before Congress or at any Federal or State proceeding regarding any Federal law relating to pipeline safety; or (4) commencing, assisting or participating in a proceeding under any Federal law relating to pipeline safety, or in any other action to carry out the purposes of any Federal law relating to pipeline safety. 49 U.S.C. § 60129(a)(1); 29 C.F.R. § 1981.102(b).

An employee need not complain about an actual violation relating to pipeline safety, as long as the employee has an objectively and subjectively reasonable belief of a present or potential violation. *Williams v. Mason & Hanger Corp.*, ARB No. 98 030, ALJ No. 1997-ERA-14, slip op. at 18-19 (Nov. 13, 2002), *aff'd Williams v. Admin. Review Bd.*, 376 F.3d 471 (5th Cir. July 15, 2004). It is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards. *Williams*, 1997-ERA-14, at 18. Internal complaints concerning safety and quality control have been held to be protected activity. *Donahue v. Exelton*, 2008-PSI-001, at 30, citing *Bassett v. Niagara Mohawk Power Corp.*, Case No. 1985-ERA-034 (Sept. 28, 1993).

The PSIA also protects employees who refuse to engage in any activity made unlawful under that statute or any other Federal law relating to pipeline safety so long as the employee identifies the alleged illegality to his or her employer. 49 U.S.C. § 60129(a)(1)(B). An employee need only prove that the refusal to work “was properly communicated to the employer and was based on a reasonable and good faith belief that engaging in that work was a practice made unlawful by a Federal law relating to pipeline safety.” *Rocha*, ARB No. 07-112, slip op. at 11. The employee is not required to establish that the allegedly illegal practice at issue actually violated a Federal law relating to pipeline safety. The work refusal, however, loses its protected status after the perceived hazard has been investigated and, if found safe, is adequately explained to the employee. *Rocha*, ARB No. 07-112.

Protected activity, however, does not lose its protected status merely because the employer recognizes and addresses the complainant's concerns. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9, slip op. at 8 (ARB Feb. 13, 2015) (employer cannot “cure” protected activity by admitting to wrongdoing, by apologizing, or by agreeing with the employee about a safety concern); *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 5-6 (ARB Nov. 5, 2013) (“...that management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity....”).

The Administrative Review Board (“ARB”) has held that similar whistleblower regulations do not “indicate that an employee does not engage in protected activity when he informs his employer about violations of which the employer is already aware.” *Inman v. Fannie Mae*, ARB No.

08-060, ALJ No. 2007-SOX- 047, slip op. at 7 (ARB June 28, 2011). Additionally, an employee can engage in protected activity when performing his normal job duties. *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-001, slip op. at 12 (ARB Apr. 25, 2014).

Adverse Action

An employer engages in adverse action when it discharges or otherwise discriminates against an “employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity.” 49 U.S.C. § 60129(a)(1). The implementing regulations provide that prohibited discrimination includes efforts to “intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” for engaging in protected activity. 29 C.F.R. § 1981.102(b). Under a nearly identical whistleblower statute, the ARB has interpreted adverse actions to encompass “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12-15 (ARB Dec. 29, 2010).

To prove a “refusal to hire” case, a complainant must show that (1) he applied and was qualified for an available job; (2) he was rejected despite his qualifications; and (3) after his rejection, the position remained open and/or the employer continued to seek applicants of similar qualifications. *Saporito v. Exelon Generation Co., LLC*, ARB No. 12-034, ALJ No. 2010-ERA-12 (ARB Aug. 22, 2013). The Tenth Circuit Court of Appeals has held that a complainant can establish the third prong by showing that the employer filled the position, or left the position open, and continued to seek applicants with complainant’s qualifications. *Hasan v. U.S. Dep’t of Labor*, 298 F.2d 914, 917 n.3 (10th Cir. 2002).

So long as a rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary. *Thorstenson v. BNSF Ry. Co.*, ARB No. 2018-0059, 2018-0069, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019). “Courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions.” *Thorstenson, quoting Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

Contributing Factor

Complainant must prove by a preponderance of the evidence, that their protected conduct was a contributing factor to the adverse employment action—i.e., that it tended to affect the decision in some way. *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019)(internal quotation marks omitted). A “contributing factor” is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action. *Frost*, 914 F.3d at 1195; *Rocha*, ARB No. 07-112, slip op. at 9 (citation omitted). Complainant need not conclusively prove retaliatory motive or animus; “the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a “contributing factor” in the resulting adverse employment action.” *See Frost*, 914 F.3d at 1195. “Contributing factors may be quite modest—they include any factor which tends to affect in any way the outcome of the decision.” *Frost*, 914 F.3d at 1197 (internal quotation marks omitted); *see Palmer v. Canadian Nat’l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017).

An employee may prove that protected activity was a contributing factor through “indirect or circumstantial evidence, which requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No.12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence that shows protected activity was a contributing factor may include evidence such as “motive, bias, work pressures, past and current relationship of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices.” *Citationshares*, ARB No. 12-029, slip op. at 12.

Where the complainant presents his case by circumstantial evidence, the ALJ must consider all relevant evidence as a whole to determine if the protected activity contributed. *Bobreski*, ARB No. 09-057 at 17. A complainant does not need to prove that an employer’s lawful reasons were pretext. *Id.* An ALJ can infer causal connection from the decision maker’s knowledge of the protected activity and reasonable temporal proximity. *Palmer*, ARB No. 16-035, slip op. at 52. The ARB, however, has specifically rejected “any notion of a per se knowledge/timing rule.” *Id.*

Furthermore, “if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.” *Clark v. Pace Air-lines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 12-13 (ARB Nov. 30, 2006). Considering an intervening event is essential to upholding the intended purpose of the Act. Whistleblower provisions “are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment.” *Passaic Valley Sewerage Comm’rs v. Department of Labor*, 992 F.2d 474, 478 (3d Cir.1993). But “[t]hey are not, however, intended to be used by employees to shield themselves from the consequences of their own misconduct or failures.” *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999). A complainant cannot use his whistleblower status to evade termination for non-discriminatory reasons. *Trimmer*, 174 F.3d 1098 at 1104. Thus, the occurrence of an intervening event, especially one undertaken by the employee himself, may undermine a causal inference between the protected activity and the alleged adverse action.

For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action. *Palmer v. Canadian Nat’l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016).

Affirmative Defense

Respondent may avoid liability if it shows by clear and convincing evidence that it would have taken the adverse actions absent any protected activity. 29 C.F.R. § 1981.109(a). “Clear” evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. “Convincing” evidence has been defined as evidence demonstrating that a proposed fact is “highly probable.” *Speegle v. Stone & Webster Construction, Inc. [Speegle II]*, ARB No. 13-074, ALJ No. 2005-ERA-6, slip op. at 11 (ARB Apr. 25, 2014). It is not enough to show that the employer *could have* taken the same adverse action absent the protected activity; the employer must

show that it *would have* taken the same adverse action absent the protected activity through either direct or circumstantial evidence. *Id.*

DISCUSSION

Credibility Determinations

Complainant

Generally, I did not find Complainant credible because he was not consistently forthcoming, he gave vague or unclear responses, and some of his testimony was unsupported by the record. In several instances Complainant gave responses that were misleading because he disagreed with the use of a particular word or phrase. *See* HT 475. Additionally, although he would sometimes recount full conversations, he did not seem thoughtful about details. Several times in the hearing he finished a sentence saying, “and blah, blah, blah.” For example, regarding Alyeska’s weapon policy he said the following were prohibited, “unauthorized weapons, bows, arrows, slings, knives, gunshots, blah, blah, blah, blah, blah.” HT 507 at 1-3. There were instances, such as Complainant’s recollection of his conversations with Ms. LaForest, in which Complainant’s version of events were not supported by the record or simply did not make sense in light of documented exchanges.¹⁶ *See* EX 16 at 16-17. In another example, despite his 2014 performance evaluation directly contradicting his responses, Complainant gave less than truthful responses during his testimony regarding issues with his attendance, punctuality, and lack of professionalism. *See* HT 606. He ultimately admitted that Mr. Southerland had expressed concerns that Complainant’s alcohol consumption was interfering with his work. HT 607 at 7-8. Despite notes in his 2014 PER regarding issues with his attendance and punctuality, Complainant argued he was there during core hours, which was the requirement. HT 606.

The record documented Complainant’s lack of communication skills and there were several instances in which Complainant misread interactions or circumstances. For example, Complainant testified that it was apparent to him, but perhaps not to others, that the Compliance Director was misrepresenting the situation regarding the internal RGV 40 communications. HT 355. Complainant misunderstood an email, became annoyed, and concluded that a manager was misrepresenting the facts. *See* EX 37 at 1. The record however, simply does not support Complainant’s accusation. *See id.* In another instance, Complainant testified that it was “unusual or rude” that management would make a decision without keeping him apprised of the status. HT 348 at 18-19. While Complainant’s expertise in the valve program was clearly valued, he was not in management, or even a supervisor. His position that he should have been included in management’s deliberations after his opinion had been solicited and given, supports the assessment that he had “self-elevated value” and could perceive slights where there were none. *See* EX 20 at 1. For all of these reasons, I found Complainant’s credibility suspect and gave his testimony less weight except in those areas where there was support in the record for his positions.

¹⁶ Complainant claimed he was not sure why he wrote in his DRB statement that he had ordered it. He claimed he thought Ms. LaForest would edit it. “I would have expected her to come back and say, “I thought you said the boys ordered it. Maybe we need to clean that up...” HT 427-428. I do not find the explanation credible.

Crossbow

In particular, I did not find Complainant's testimony regarding the shipment of the crossbow credible. Complainant claimed he only stated that he had it shipped to Alyeska in his appeal statement in order to "take some level of ownership..." because he knew they were going to hold him responsible one way or another. HT 426 at 25; HT 427 at 1-17. Claimant admitted his son consulted him regarding the selection of the crossbow. Complainant went on to state he believed it was "more Christopher" than he who realized that Complainant would not be home to sign for it. *Id.* This was a strange way to phrase something. If his son had shipped it to Alyeska without his knowledge, he likely would have given a less equivocal response. Additionally, in his written appeal he stated he had it shipped. On the phone with Mr. Brown he stated "the boys" had it sent to work. Complainant's inconsistent statements about who directed the crossbow to Alyeska undermined his credibility.

There were other indications that Complainant knew the crossbow had been shipped to Alyeska. The day before the crossbow arrived, for example, he received practice arrows—which were part of the crossbow order—at work. HT 435 at 12-19. Additionally, His own testimony suggested that he knew the crossbow was shipped to the Alyeska warehouse. When Complainant testified regarding his phone conversation with Ms. LaForest, he indicated that he was unsurprised that the weapon was shipped to Alyeska. *See* HT 404. He testified that he said, "Oh yeah, the boys were out last weekend – they ordered that. Do I need to come in and get it now?" *Id.*

Finally, in initial conversations with HR and Security, Complainant knew that Amazon required a signature and he stated they had it shipped to work because he would not be home during work hours. The record indicates Complainant volunteered this information to Ms. LaForest and Mr. Brown before he and his son reported conversing again. *See* EX 16 at 16-17; *See also* HT 160 at 17. Thus, Complainant was able to relay to Ms. LaForest and Mr. Brown that a signature was required without consulting his son. It seems likely Complainant was aware *why* the crossbow was shipped to Alyeska instead of the P.O. Box.

Complainant's Son

Similarly, I did not credit the testimony of Complainant's son that his father did not know that the crossbow would be shipped to his workplace. *See* HT 166 at 4. First, the crossbow would not fit in Complainant's P.O. Box, which was limited to receiving mail. HT 158 at 8. Second, Complainant would not have assumed his son had it sent to his mother's house because that address was not listed on the Amazon account and his mother would likely disapprove of purchasing a crossbow. *See* HT 166 at 13-15; *see also* HT 162 at 8-18.

I conclude Complainant knew and assented to having the weapon sent to Alyeska. The child consulted him regarding the price and his testimony that it was "more Christopher" than himself who realized no one would be home to sign for it, indicates that he was at least consulted and aware in advance that the weapon was being shipped to Alyeska.

In general due to Complainant's lack of candor and his vague or unsupported responses, I conclude his testimony is entitled to little weight.

Other Witnesses

Other than Complainant's testimony, which I gave little weight for the reasons described above, there was no reason to question or discount the testimony of Rod Hanson, Dana DeGraffenried, Donald Kinney, Erv Cutright, Joseph Imlach, Katherine LaForest, Fred Millen, and Charles Southerland. They were credible witnesses and their testimony was supported by other evidence in the record. Thus, I gave significant weight to their testimony. I did not reach the issues of back pay or damages, and the testimony of Mary Bonar—Complainant's mother—and Dennis Rogers—certified physician's assistant—was not relevant to the issues considered.

1. *Protected Activities*

RGV 40 Replacement

Complainant engaged in protective activity related to the RGV 40 replacement. Complainant subjectively believed Alyeska risked violating a federal regulation or standard by delaying the replacement of RGV 40. Valve retesting on August 29-30, 2014 revealed that RGV 40's leak-through rate exceeded the allowable rate published in Alyeska Master Specification P-504 and Complainant informed his supervisors and management. CX 13 at 1; CX 14 at 2. Although no changes to the oil spill plan were needed despite the faulty valve, RGV 40 was in a high consequence area, and if the pipeline were compromised the increased spill would affect a populated area and riparian life. Multiple emails demonstrate that Complainant believed the regulation and standards required Alyeska to replace the valve in 2015. Complainant stated the regulation required Alyeska to correct any condition that could adversely affect the safe operation of the pipeline within a "reasonable time." CX14. In the past, Alyeska had replaced leaky valves in the summer of the following year. CX 11 at 4; CX 14. When Alyeska management declined to commit to a replacement date in a letter to regulators reporting the leak-through rate, Complainant warned an Alyeska employee in compliance to "get ready for agency questions." CX 21 at 1. Complainant's concern in December 2014 that Alyeska's "reputation with the agencies was deteriorating because of a lack of commitment" to replace RGV 40 was not protected. *See* HT 142 at 11-13. However, Complainant also expressed concerns that Alyeska risked an NOPV or NOV by not replacing the valve in 2015. CX 16 at 1; HT 144 at 21-25. The record demonstrates Complainant believed a delay could violate a Federal regulation or standard.

It was objectively reasonable for Complainant to believe that Alyeska risked violating a federal regulation or standard. First, Complainant's supervisors on multiple occasions consulted him asking whether Alyeska was under any statutory, regulatory, or other obligation to replace the valve in 2015 or 2016. CX 15, CX 16. Complainant was the valve expert with extensive and respected knowledge on the subject matter. Second, two higher level managers initially agreed with Complainant's assessment that Alyeska was obligated by "past practice and precedence" to replace the valve in 2015 and would likely be unsuccessful in arguing for a 2016 replacement. CX 19 at 2. Finally, Alyeska ultimately agreed that delay would require a waiver or "specific approval." EX 37 at 1. Given these facts, it was objectively reasonable for Complainant to believe Alyeska had to replace the valve in 2015 or risk a NOPV or NOV.

Thus in the fall and winter of 2014, Complainant had an objectively and subjectively reasonable belief that delay would violate a regulation, standard, or order relating to pipeline safety and his internal discussions regarding the replacement of RGV 40 were protected activities.

Methanol Injections

Similarly, Complainant's comments regarding methanol injections to the pipeline was also protected activity. In March 2015 Complainant raised concerns internally regarding Alyeska's plan to use methanol in the pipeline because it could damage valves and diminish their capacity to prevent oil from spilling onto the environment. Complainant need not allege specific statutory or regulatory violation related to pipeline safety. *See Williams*, 1997-ERA-14, at 18. Complainant had an objectively and subjectively reasonable belief that injecting methanol could diminish the integrity of valve seals which could in turn diminish the safety of pipeline, potentially leading to unsafe conditions or a violation, thus the information he provided internally was protected.

Complainant had an objectively and subjectively reasonable belief of a potential violation. In March 2015, Complainant interrupted a staff meeting and subsequently emailed Matthew Korshin and Rod Hanson to advise against injecting methanol into the pipeline to suppress the freeze point. HT 358 at 4-8; 359 at 3-16. EX 42 at 2. He stated in the past they used methanol to "clean the lines" and the seals in the valves were "toast" as a result. *Id.* Complainant attached a 1976 letter from a valve manufacturer, Grove Valve and Regulator Company, explaining that its seals were not compatible with methanol. *Id.* at 3. While other valve manufacturers produced valves that were compatible with methanol, Grove manufactured most of Alyeska's mainline valves. HT 233 at 20-22; EX 42 at 2. Complainant believed that introducing methanol would damage the seals on valves, which would in turn reduce Alyeska's ability to prevent oil from spilling into the environment if the pipeline were compromised. Given the letter from the manufacturer and the number of Grove manufactured valves still in use, it was objectively reasonable to believe injecting methanol would diminish Alyeska's ability to "[protect] against risks to life and property" while operating the pipeline. *See* 49 U.S.C. § 60102(a)(1). Thus Complainant's internal objections to using methanol in the pipeline were protected activities.

Flight to Italy and Testing Approval

Complainant's refusal to fly to Italy to witness Valvitalia test purchased valves was not a protected activity. On February 23, 2015, Mr. Hanson granted Complainant's request to travel to Italy to inspect some valves, but on March 5, 2015, denied the request to travel in business or first class because it increased the fare from \$1,700 or \$1,800 to approximately \$10,000 round trip. CX 40 at 1; CX 42 at 1; HT 201 at 4-25. Complainant chose not to go because he felt the company deviated from its travel policy by not granting his request for a business or first class fare. EX 43 at 1. Complainant's email to Mr. Hanson alleged a violation of company policy. *Id.* His refusal was not based on a belief that the action would be illegal or in some way violate Federal law related to the pipeline. Thus, the activity was not protected.

Complainant's refusal to sign off on the valve testing results was a protected activity. The American Petroleum Institute (API) sets leak rate requirement standards, and the C.F.R. requires that valves test to a particular minimum leak rate standard. HT 381 at 11-13; HT 384 3-5. Alyeska had more stringent leak through rate requirements that it agreed to with the vendor. HT 383 at 21-25. The JPO would "hold" Alyeska to whatever level they set. HT 384 at 7-8. In 2015, Complainant stated that three valves tested "excellently" but he requested clarification on the observed leak-through rate for the fourth valve. CX 59 at 7. Before Complainant received clarification on the leak-through rate, Alyeska terminated his employment. At the hearing,

Complainant stated that his reserved request for “clarification” was his attempt to be “politically correct.” HT 382 at 16-18. He stated at the hearing the failing valve “exceeded the API requirement by quite a bit.” HT 382 16-19. It was unclear from the record whether the leaking valve violated Alyeska or API standards. If the valve did not comply with Alyeska standards, it is unlikely the refusal to sign off on the testing would have been protected without more specific evidence that the JPO held Alyeska to those standards. While Complainant was not known for subtle communications, I conclude that he was being truthful when he testified that he believed the valves appeared to exceed the APT requirements by quite a bit.

Complainant had a subjectively and objectively reasonable belief that the test results did not meet API requirements. And thus his expressed opinion withholding approval of the fourth valve was protected. Complainant indicated he had reservations about the fourth valve, and could not approve it without more information. The other engineers on the email thread were unable to quickly confirm that the leak through rate was acceptable. *See* EX 59. This strongly suggests that further clarification was needed to respond to Complainant’s inquiry and that the valve was not clearly acceptable. While ultimately the valves passed the inspections, given Complainant’s expertise in valves, I conclude he had a subjectively and objectively reasonable basis to withhold his approval until he saw more test results. Before he could confirm whether or not the valve was acceptable, he was fired. Because Complainant had a subjectively and objectively reasonable belief that the valve did not meet regulatory requirements, his opinion stating that he need more clarification about the testing was protected.

OSHA Complaints

In October 2015, Complainant filed a complaint of discrimination with OSHA. ALJX 1 n. 11. In March 2017, Complainant filed a supplemental complaint of discrimination with OSHA. ALJX 1 n. 12. Throughout 2015-2017, Complainant participated in the OSHA investigation into his PSIA concerns. ALJX 1 n. 13. Complainant’s commencement and participation in OSHA proceedings related to his alleged whistleblowing activities related to pipeline safety are protected activities. *See* 49 U.S.C. § 60129(a)(1); *see also* 29 C.F.R. § 1981.102(b).

Complainant engaged in protected activity by internally expressing concerns regarding a potential violation of standards for replacing faulty valves, methanol injections, and the purchase of a potentially faulty valve that might not meet regulatory requirements. His commencement and participation in OSHA investigations were protected activities, but his refusal to fly to Italy was not protected.

2. Adverse Actions

Complainant suffered unfavorable, non-trivial personnel actions when Alyeska put him on a one-year badge hold, terminated his employment, and refused to rehire him. On April 17, 2015, Complainant suffered an adverse action when Alyeska placed him on administrative badge hold and on April 23, 2015, when a team denied his one-year badge hold appeal. Without a badge, Complainant was unable to access Alyeska facilities, which effectively barred him from performing his job. On April 27, 2015, Complainant suffered an adverse action when Alyeska terminated his employment. EX 23 at 2. Complainant suffered further adverse action when Alyeska refused to hire him after his badge hold was lifted. Following the expiration of his badge hold, Complainant applied for two jobs with Alyeska: Construction Supervisor/ Construction Manager and an O&M

Support Engineer. Complainant met the minimum qualifications for both jobs, was rejected for both jobs, and Alyeska hired other applicants. *See Saporito*, 2010-ERA-12 (Aug. 22, 2013); *see also Hasan*, 298 F.2d 914, 917 n.3 (2002). Thus Complainant showed a refusal to hire. *See id.*

3. *Contributing Factor*

Complainant failed to show by a preponderance of the evidence that any of the protected activities were contributing factors in the adverse actions Alyeska took against him. 29 C.F.R. § 1981.109(a).

RGV 40 Replacement

I conclude that Complainant failed to show that his discussions regarding the timing of the replacement of RGV 40 contributed even slightly to his badge hold, termination, or failure to rehire. Complainant argues Alyeska fired him because he alone stridently argued for a large financial outlay to replace RGV 40 at a time when the company was financially stressed. CCB 5. Yet, contrary to Complainant's contentions, he was not a lone voice pushing for replacement in 2015. Complainant drafted an email briefing management on the circumstances, and Mr. Webb edited it to indicate that management would decide on the timing of replacement. Two upper managers agreed that RGV 40 should be replaced in 2015—Mr. Baldrige (Senior Director of Pipeline Operations) and Mr. Joyner (Vice President of Projects and Engineering Employees) and were also pushing to replace the valve sooner. CX 19 at 2. Mr. Hanson wanted to further explore delaying the replacement. Although Mr. Baldrige told Complainant on September 8, 2014, that the letter needed to be silent as to when the valve would be replaced, this does not prove that he changed his mind regarding the timing of the valve replacement, instead the issue remained unresolved and the letter indicated as much. *See* CX 19 at 1.

Regarding the replacement of RGV 40, Complainant testified that Mr. Webb took the position that “[he] didn’t want to commit to doing it at all” and he “definitely didn’t want to commit to doing it in ’15.” HT 127 at 9-13. Testimony that Mr. Webb did not want to commit to doing it all is misleading and simply not credible given the record. Mr. Webb and Alyeska management inquired about their obligations regarding the timing of the replacement, and there was a paper trail demonstrating that Alyeska intended to replace the valve in 2015 or 2016, including a PWR initiated on October 1, 2014. CX 28 at 2.

Complainant testified that John Baldrige came to his office and stated “don’t worry about what they’re saying in Anchorage. I’ve already put it in the budget for 2015. We’re going to replace it.” HT 128 at 8-11. He testified that Mr. Southerland told him not to worry about the replacement, that it was not Complainant’s responsibility, and that it was management’s responsibility at that point. HT 138 at 16-18. He testified that Southerland and Baldrige eventually told him “just let it lie. We’re – it’s going to get done. Quit worrying about it,” which initially assuaged his concerns. HT 139 at 14-16; HT 139 at 13-25. It was credible that Complainant’s supervisors and management told him the replacement timing was being considered by management and was out of Complainant’s hands. There was not testimony or evidence that would support a conclusion that Complainant’s objections were being ignored, dismissed, or that management was attempting to stifle him.

Complainant claimed his supervisor and a manager telling him not to worry and to leave the issue alone indicated he had annoyed management with his stance on the RGV 40 replacement. I conclude, the conversations were instead to convey to Complainant that his opinion had been heard and management was deliberating. As stated above, based on documentary evidence, the issue was unresolved in the fall of 2014, but the discussions were ongoing. Alyeska solicited Complainant's opinion on Alyeska's regulatory obligations before deciding when to replace the valve. CX 28 at 2. The evidence shows Alyeska wanted to explicitly understand its legal obligations before committing to an expensive valve replacement in 2015. Mr. Hanson and Webb credibly testified that Complainant's opinion was expected and valued. HT 231-232; *See* HT 783 11-25. Mr. Hanson also testified that it took a few months to land on the decision to replace the valve in 2015 rather than 2016, and that he "asked questions for more information on what would be the risk of a replacement in '16 versus '15 so [Alyeska] could take more time to fit it into [its] project plan and budget and cycle. HT 241 at 5-10. Management proceeded to make a decision based on cost, feasibility, and its regulatory obligations. There was no evidence that Alyeska intended or sought to evade their regulatory responsibilities, instead management was attempting to determine if they had the flexibility to replace the valve in 2016.

Complainant's vague allegations that Hanson and Webb influenced the DRB are unconvincing. When asked why he believed Webb influenced the DRB, Complainant responded because I know his personality. HT 545 at 14. Complainant could not point to any specific or general conversations to support his allegations. *See* HT 545-46. Complainant admitted that after the RGV 40 project, Mr. Webb, "probably moved onto another project or something." HT 544 at 16-17.

Additionally, testimony and the emails in evidence do not show animus towards Complainant or his opinion to replace the valve in 2015. In fact, Complainant testified that when he shared his opinion with Mr. Joyner in December of 2014 and recounted his interaction with a regulator, Mr. Joyner thanked him and agreed that the project should move forward. HT 147 at 21-22. Complainant testified that *he* was annoyed following an email exchange with management where management told him that Alyeska never informed the JPO that it might delay the replacement and thus a follow-up letter was unnecessary, but there was no evidence of animus towards Complainant from management.

Although contributing factors may be quite modest, Complainant must still prove by a preponderance of the evidence that the factor tended to affect the adverse action. *See Frost*, 914 F.3d at 1197. Here, Complainant did not prove by preponderance of the evidence that his opinion on the RGV 40 replacement influenced in any way Alyeska's adverse personnel actions against him. Complainant did not present convincing evidence that management was annoyed or upset with him for providing his opinion. Instead the record shows the company went through a deliberative decision-making process in late 2014, and Complainant's expertise in the valve program, among other factors, helped the company reach a decision to replace the valve in 2015.

Valvitalia Valves

Complainant's argument that his refusal to sign off on valves from Italy contributed to the disciplinary proceedings and decision to terminate his employment also fails. This is the least developed of all of Complainant's allegations. There was no evidence that Alyeska asked Complainant to sign off on the valves even if they were not compliant. Instead, it appears Alyeska

asked him to take a second look to assist Mr. Cutright so Alyeska could confirm the valves were acceptable. EX 59 at 1. An ALJ can infer a causal connection based on temporal proximity, but in the absence of any other evidence I am not convinced that Complainant's ongoing discussions regarding the Valvitalia valves contributed in any way to the adverse actions. *See Palmer*, ARB No. 16-035, slip op. at 52. Quite the opposite, the evidence instead suggests that Complainant's ongoing projects, such as the valve testing, actually made the DRB hesitate in enforcing Alyeska's policies because Complainant's termination would lead to a "significant business impact." CX 64 at 5.

Methanol Injections

I find that Complainant's staff meeting comments and email regarding the use of methanol injections in the pipeline did not contribute to Alyeska's disciplinary actions against Complainant. Complainant testified his junior colleague—Mr. DeGraffenried—relayed to him that Mr. Hanson turned purple following Complainant's interruption regarding the compatibility of methanol with valve seals during the Alyeska staff meeting. HT 366. This testimony and an email regarding methanol and valves were the only evidence Complainant put forward to suggest it was a contributing factor. According to Complainant's testimony his coworker told him that Mr. Hanson flushed purple when Complainant interrupted him during the staff meeting to warn that "valves are very susceptible to degradation" if Alyeska were to inject methanol. HT 360 4-7. Following the interruption there was a silence on the phone, and Mr. Hanson then continued the overview of other projects. HT 366 at 17-22. Complainant testified he asked Mr. DeGraffenried, 'Well things sure got quiet after I brought that up, didn't they?' And he said, 'you sure pulled Rod's chain' and 'yeah you should have seen Rod he – turned purple.'" HT 366 at 10-14. While I credit Complainant's testimony that Mr. Hanson flushed following his interruption at the meeting, I do not infer or attribute a specific emotion to Mr. Hanson's reaction. *See* HT 366 at 6-16. Although Mr. DeGraffenried testified, counsel did not solicit corroborating testimony on this subject. Furthermore, even though it was a company-wide meeting, Complainant did not allege that anyone else spoke to him about it in person, on the phone, or via email, including his supervisors. While Complainant need not conclusively prove animus, he must prove by a preponderance of the evidence that his protected activity contributed to the adverse actions. *See Frost*, 914 F.3d at 1195. A manager turning purple during a meeting falls short, especially when there is credible evidence that the manager valued Complainant's input on the subject.

Even if Mr. Hanson had been briefly upset by the interruption, it was likely due to how Complainant expressed himself not the content of his opinion. Regarding the methanol issue generally, Mr. Hanson stated that Alyeska had an issue with freezing temperatures and was looking for solutions. HT 231-232. He was working with groups along the pipeline to explore options. *Id.* Mr. Hanson credibly testified that he remembered the subsequent email and was pleased that Complainant raised the issue and copied Matthew Korshin—an employee working to address the issue—so Alyeska could make a more informed decision. HT 229 at 1-12. Given the cost of replacing valves, it is not credible that Mr. Hanson would have preferred Complainant to not raise the issues that methanol might cause for valve seals. Temporally, this interaction was approximately a month before Complainant was terminated, but as discussed below his weapons violation was an intervening factor that broke any causal chain I could infer from the timing.

Weapons Violation

The majority of Complainant's argument centered on contentions that the weapons policy was unevenly and unfairly enforced. Complainant made several arguments to show that Alyeska's policy was not consistently followed. Complainant attempted to characterize the crossbow as a hobby item rather than a weapon. CCB 5. He argued he never actually possessed the weapon and the weapon was unassembled. HT 424 at 4-12. He also alleged that he never told Ms. La Forest or Mr. Browning that he had the item delivered to Alyeska. HT 424 at 4-12; HT 422 at 10-14.

He further alleged Alyeska's disciplinary policies were conspicuously not followed. CCB 6. Complainant alleged managers withheld information during the DRB regarding Complainant's protected activity. CCB 6. He also asserted a negative performance write-up was submitted to the DRB instead of his actual performance write-up. *Id.* Finally, Complainant alleged that Mr. Barrett's emails showed animus at the highest levels. CCB 7.

Employer countered that Complainant was fired solely for his weapons violations and its application of company policy was consistent with past disciplinary actions for other employee's weapons violations. Employer contended that multiple decision makers most of whom had no knowledge of Complainant's protected activities independently concluded he should receive a one-year badge hold and Alyeska should terminate his employment. RCB 17.

First, it is not an ALJ's function to serve as a super-personnel department. *See Thorstenson*, ARB No. 2018-0059 (ARB Nov. 25, 2019). Complainant's arguments parsing the language of the policy regarding assembled or disassembled weapons and physical possession are insufficient to show that Alyeska selectively or unevenly enforced its policy. As stated above, I did not find Complainant's testimony regarding his involvement in shipping the item to Alyeska credible. Instead I find that Complainant never gave Alyeska a straight story nor did he accept accountability for having the weapon shipped to his workplace, both of which influenced the badge hold appeal team and the DRB.

Second, the badge hold appeal team followed its policies and came to a conclusion that was overall consistent with approximately 20 years of enforcement. Alyeska had a clear weapons policy prohibiting weapons on the premises, Complainant had a weapon shipped to Alyeska. Based on physical evidence and Complainant's statements, the badge hold appeal team determined that Complainant had the weapon sent to Alyeska, and thus intentionally violated the policy. Complainant did not acknowledge a violation of the policy and instead argued his discipline was an over interpretation of the policy. As Mr. Browning testified, accountability "helps [Alyeska] understand the likelihood of it occurring again." HT 646 at 12-14. Instead of being accountable, Complainant argued he had not violated the policy, the crossbow was not a weapon, it had been "misdirected," Alyeska was overreacting, and there was no reason to worry about him having a crossbow at work. EX 16 at 3, 16-17; HT 647 at 15-20. The badge hold appeal team concluded the violation was not an honest mistake and enforced a one-year badge hold consistent with company policy. HT 642 at 12-13. They did not consider Complainant's PER or the Employee Performance Statement that his supervisors drafted for the DRB. HT 637-38.

Complainant contends that Employer's arguments relying on the composition of the badge hold appeal team are irrelevant because (1) the adverse action was Alyeska's termination of Complainant's employment, and (2) DRB and Executive Review had the ability to reverse the badge

hold appeal team's decision. These arguments are unpersuasive. The one-year badge hold precluded Complainant from entering Alyeska property for a year, thus making it impossible to perform his job. Thus the badge hold was an adverse action. Additionally, while the DRB could reverse the badge hold, the circumstances under which the DRB convened are relevant. Complainant shipped a weapon to work, security seized the package, security and HR initiated an administrative badge hold for a weapons violation, the badge hold appeal team then reviewed the evidence and upheld the badge hold. The DRB would not have met if it were not for Complainant's violation and the badge hold. The badge hold appeal team—compromised of Alyeska employees who did not know of Complainant's activities—upheld a one year badge hold before the DRB took any action. Even though Alyeska employees on the DRB panel knew of Complainant's protected activities and had the opportunity to influence the DRB decision, the prior disciplinary proceeding also led to a one-year badge hold. The badge hold appeal team comprised of employees in HR, security, and legal—who did not know of Complainant's protected activities—determined that he intentionally violated the policy and did not acknowledge or take responsibility for the violation. It is significant that before DRB took any action, the badge hold appeal team upheld a one-year badge hold.

Third, Complainant's contentions that the DRB unevenly enforced the policy fail. The DRB's subsequent findings were consistent with the unbiased findings of the badge hold appeal team. The managers did not discuss Complainant's protected activities, but Ms. LaForest did check to see if Complainant had filed any complaints with ECP. He had not. Complainant alleges this was an attempt to circumvent a more rigorous process, but more likely Complainant's managers did not consider the conversations they had with Complainant protected. Mr. Hanson testified that Complainant's position on the RGV 40 replacement was "not something that [he] considered rose to a protected-activity level." HT 277 at 17. Complainant had never communicated to Mr. Hanson's knowledge that he believed it was a real safety concern. Instead Complainant's position, like Mr. Baldrige's, had been that the regulators would not agree to a later replacement. HT 277 at 18-25. Mr. Hanson further testified that the type of protected activity discussed at DRB's is usually "a type of concern that would go to ECP." HT 279 at 16-18. The PSIA forbids discrimination against employees because they engaged in protected activities. 49 U.S.C. § 60129. Although such consideration may be advisable, the Act does not mandate particular discussion of protected activities during internal personnel decisions. I conclude that the DRB's failure to consider Complainant's activities protected did not reveal animus or motive to discriminate, rather it was based on Alyeska's more narrow understanding of protected activity.

DRB considered a work performance summary that accurately summarized Complainant's performance. Complainant's work performance summary included accomplishments and criticisms that were also in his 2014 PER. *See* CX 39 at 3-4; *see also* EX 20 at 1. Namely Complainant had a record of issues with his communication skills, his professionalism, and his attendance and punctuality. *Id.* The DRB considered the performance summary which included a bullet about him refusing to fly to Italy unless he could go in business or first class, but as stated above this was not protected activity. *See* EX 20 at 1. Furthermore, as the DRB took place four months into the year, it was reasonable for HR to seek out a more recent summary of Complainant's work performance than his 2014 PER.

Complainant's arguments that Alyeska unevenly enforced its policy of reducing unintentional violations from a one year badge hold to a 60 days also fails. The documentary evidence shows that Alyeska consistently reduced one year badge holds to 60 days for first-time offenders when the

weapons violation was deemed unintentional. *See* CX 80 at 1-2, 5, 7-8. Generally, in these cases employees stated that they forgot they had their weapon in their vehicles. *See* CX 80. Most of the records also show that the employees indicated that they understood their action was forbidden under the policy. *Id.* In contrast, when Alyeska found the violation was intentional, it enforced a one-year badge hold. *See* CX 80 at 3-4, 6. In one outlying case in 1994 and again in 2001, an employee brought his hand spear to Alyeska in his car and surrendered it to security. CX 81 at 1-2. This remote exception, however, does not negate Alyeska's consistent enforcement of the policy more recently. The hand spear case was over 20 years ago, the evidence suggests the involved employee disclosed the weapon regularly, and more recent cases demonstrate consistent enforcement.

Fourth, testimony and the DRB notes suggested that Alyeska was concerned about losing an employee integral to the valve program. Mr. Browning's testimony and the DRB notes indicate that during the DRB, Mr. Webb and Mr. Southerland discussed the negative impact that Complainant's termination would have on the company. HT 664 at 12; CX 64 at 5. Generally, Complainant's supervisors relied on him for anything related to valves. On occasion they asked him to further explain his position, so they would be able to advise management. HT 774 at 7-25. Mr. Webb credibly testified that he valued Complainant's opinion, but sometimes had an issue with the lack of professionalism in Complainant's communications. HT 773 at 14-25. Without Complainant's expertise, the company would likely have to hire contractors to fill the void. HT 770 at 6-18. Alyeska upheld its disciplinary policy despite the fact that it would negatively impact the company to lose Complainant's expertise.

Finally, there was no evidence that Complainant's protected activities contributed to the outcome of Complaint's executive review. Mr. Barrett's expressed concern about rehiring an employee who had been terminated for violating the code of conduct, but his concerns were directed more broadly towards the policy than at the specifics of Complainant's case. The head of the legal department—Ms. Parkes, not Mr. Barrett, reviewed Complainant's case and denied his Executive review. Complainant failed to show that Mr. Barrett's email influenced Ms. Parkes' review.

To show contribution, Complainant need not have shown that Alyeska's purported rationale for his termination was pretextual. *See Bobreski*, ARB No. 09-057 at 17. But Complainant failed to prove by a preponderance of the evidence that his protected activities regarding RGV 40, valve testing results, or methanol injections contributed, even modestly, to Alyeska's personnel decision. *See Frost*, 914 F.3d at 1197; *see also Palmer*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53. Likewise, Complainant failed to show that Alyeska's explanations shifted, that there were material changes in its practices, or uneven enforcement of Alyeska's weapons policy. *See Citationshares*, ARB No. 12-029, slip op. at 12. Complainant failed to show that management was annoyed or upset with him for providing his opinion about the RGV 40, the valve testing, or the methanol injections. Instead testimony and exhibits showed that the company sought out and relied on his expertise and hesitated to fire someone so integral to its valve program. CX 28 at 2; CX 87 at 1; CX 59 at 1; and CX 64 at 5. While the bar for establishing a contributing factor is low, and even a modest contribution suffices, Complainant failed to meet his burden. *See Frost*, 914 F.3d at 1197; *see also Palmer*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53.

Furthermore, whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly

asserting company violations of statutes....” *Passaic Valley Sewerage Comm'rs*, 992 F.2d at 478. They are not, however, intended to shield employees from the consequences of their own misconduct or failures.” *Trimmer*, 174 F.3d at 1104. Here, Complainant’s violation of the weapons policy undermined any causal inference between the protected activity and the adverse action.

Not Rehired

Construction Supervisor/Manager (2016)

Complainant’s protected activities were not a contributing factor in the decision not to select him for the Construction Supervisor/Manager position in 2016. First, the hiring committee for Construction Supervisor / Manager did not know of Complainant’s protected activities or specifically the OSHA complaint. EX 49 at 1; EX 50 at 4; EX 51 at 4; EX 52. Kalu Kalu gave credible reports to OSHA that they did not know why Complainant was fired or that he had engaged in protected activity. *Id.* Second, the hiring committee articulated credible reasons for hiring another candidate whose qualifications better fit the demands of the position. EX 49 at 1; EX 46 at 8; EX 50 at 4. Specifically, Kalu Kalu and Ms. Miller did not offer Complainant an interview for the position because they were looking for candidates with heavy civil and environmental engineering backgrounds. EX 49 at 1; EX 46 at 8; EX 50 at 4. Complainant is a mechanical engineer. EX 46 at 25-30. Third, although Mr. Barrett strongly disagreed with the content of Complainant’s termination letter, which did not foreclose the possibility of rehire, there was no evidence Mr. Barrett was involved in the hiring for the Construction Supervisor / Manager or O&M Support Engineer position. Mr. Barrett signed off on final hiring decisions and Complainant failed to show that the hiring committee was somehow steered away from selecting a candidate to whom Mr. Barrett might object. Additionally, neither Mr. Webb nor Mr. Hanson influenced the decision not to interview Complainant. EX 49 at 1; EX 50 at 4. Mr. Webb and Mr. Hanson were in a “completely different group” and had no input on recruiting or hiring for the position. EX 51 at 4.

Thus, not only did the hiring committee not know of Complainant’s protected activities, but they had a legitimate business reason for not selecting him for the position. I conclude that Complainant’s protected activities did not contribute to the hiring selection.

Operations and Maintenance Mechanical Engineer (2017)

Likewise, Complainant’s protected activities were not a contributing factor in the decision not to select him for the Operations and Maintenance Mechanical Engineer in 2017. First, on the hiring committee only Mr. Imlach knew of Complainant’s protected activities, and he gave Complainant higher scores than any other member of the hiring committee. HT 935, 951. That is, he had a more positive perception of Complainant’s interview than the other people on the hiring panel. Second, the hiring committee articulated credible reasons for hiring another candidate whose qualifications better fit the demands of the position. Specifically, Complainant’s experience was specialized in valves and project engineering, whereas the position required someone with varied mechanical engineering and facilities experience. HT 941 at 14-20. The interview panel reached consensus on their preferred candidate, and although the preferred candidate had fewer years of experience than Complainant, he had the varied mechanical engineering experience that the team needed. HT 943 at 19-24; HT 969 at 6-10. Third, again as described above, there was no evidence Mr. Barrett was involved in the hiring for the O&M Support Engineer position. Mr. Hanson and

Mr. Webb were also not involved in the hiring process. HT 923 at 8-10. Only Mr. Imlach was aware that Complainant had filed a complaint with OSHA.

Alyeska Would Have Taken the Same Adverse Action

Complainant failed to establish by a preponderance of the evidence that his protected activities contributed to the adverse actions, thus I did not reach the question whether Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity.¹⁷ 29 C.F.R. § 1981.109(a). However, even if Complainant had shown a contributing factor, based on the record Employer would have taken the same action.

First, Alyeska established that it valued safety and accountability. Mr. Hanson credibly testified that Alyeska's core values were safety, innovation, and teamwork. HT 183 at 7-8; HT 185 at 9-12. Ms. LaForest credibly testified that under the leadership of company president Mr. Barrett, Alyeska was particularly focused on safety and "any type of risk that pertains to people or the facility." HT 1010 at 9-20. Alyeska's Code of Conduct prohibited having unauthorized firearms, weapons, ammunition, explosives, or other items in Alyeska facilities, parking lots, and vehicles and complying with Alyeska's Code of Conduct was a condition of employment with Alyeska. CX 3 at 13; HT 181-82. Furthermore, any employee who violated Alyeska policies, the Code of Conduct standards, or applicable laws or procedures "[would] be subject to management action." CX 3 at 10. The employee could be disciplined, including termination. *Id.*

Second, the record demonstrated that Complainant violated the weapons policy by intentionally having a crossbow sent to the Alyeska warehouse. As described above Complainant's arguments that the weapon was unassembled and never in his possession are unpersuasive. Furthermore, like the badge hold appeal team and the DRB, I did not find Complainant's contentions that he did not know his son shipped the weapon to Alyeska credible. Instead holding himself accountable, Complainant argued he had not violated the policy, the crossbow was not a weapon, it had been "misdirected," Alyeska was overreacting, and there was no reason to worry about him having a crossbow at work. EX 16 at 3, 16-17; HT 647 at 15-20. Although he began his statement with the phrase "I would like to apologize..." he continued by blaming others and calling the violation a misinterpretation. EX 16 at 3. Complainant did not apologize or accept responsibility in any way that would lead Alyeska to believe that it was an honest mistake or that it would not happen again.

Finally, the record demonstrated that Alyeska consistently applied the policy based on whether an employee or contractor intentionally violated the policy. Complainant intentionally shipped a weapon to work and was disciplined accordingly. Alyeska's disciplinary policy and procedures mandated at least a 60-day badge hold for a first weapons offense, even if Alyeska determined the violation was unintentional. CX 66 at 3. A second offense would result in termination and a one-year badge hold. *Id.* If Alyeska determined the violation was intentional, the company would terminate the violator's employment and issue a minimum one-year badge hold. *Id.* The DRB participants reviewed three other cases where an employee violated the weapons policy. CX 64 at 4. In all of the cases examined, the DRB found the violation was unintentional, but still

¹⁷ Similarly I do not reach the question of back wages, emotional distress, lost benefits, reinstatement, or attorney fees and costs.

represented a safety risk. *Id.* Each case resulted in a 60-day suspension without pay, and the initial one-year badge hold was reduced to a 60-day badge hold. *Id.* Complainant's case was unique in that he intentionally had the weapon brought onto Alyeska facilities. A review of disciplinary actions involving employees and contractors reveals that overall Alyeska has consistently implemented a 60-day badge hold for unintentional violations and a one-year badge hold for intentional violations. *See* CX 80. Because Complainant could not enter Alyeska facilities while on badge hold, Alyeska terminated his employment.

The record indicates that Alyeska reluctantly terminated Complainant's employment because he was an asset to the company. Had Complainant proved his case, I would have concluded that Alyeska showed by clear and convincing evidence that because of its safety policy, it would have made the same decision even if Complainant had not engaged in protected activity.

Frivolous Suit

Respondent alleged that the suit was frivolous and brought in bad faith and sought attorney fees and costs. 29 C.F.R. §§ 1981.105(b), 106(a); 1981.109(b) (attorney fees and costs not to exceed \$1,000). Respondent provided no evidence or argument that the suit was frivolous or brought in bad faith. Respondent's request is denied.

ORDER

1. Complainant did not establish by a preponderance of the evidence that his protected activity contributed in any manner to any adverse action. Therefore, Complainant's complaint under the PSIA is denied. All requests for relief under the PSIA are denied.
2. Even if Complainant had established contribution under the PSIA, then Respondent has shown by clear and convincing that it would have taken the same adverse action in the absence of the protected activity.
3. Respondent's request for attorney fees and costs under the PSIA is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date 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. § 1981.110(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. § 1981.110(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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1981.110(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. § 1981.110. 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. §§ 1981.109(c) and 1981.110(a) and (b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at <https://efile.dol.gov/>. If you use the Board's prior website link, dol-appeals.entellitrak.com ("EFSR"), you will be directed to the new system. 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/>.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system 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. You are still responsible for serving the notice of appeal on the other parties to the case.

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210-0001

Access to EFS for Non-Appealing 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 creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are 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 users of EFS 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. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.