



Issue Date: 23 August 2018

Case No.: 2016-SOX-00005

In the Matter of:

SIU-CHUN K. WONG
Complainant

v.

SUMITOMO MITSUI BANKING CORP.
Respondent

Appearances:

For the Complainant: Pro Se

For the Respondent: John F. Fullerton III, Esq.

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This matter arises under the employee protection provision of Section 806 of the Corporate and Criminal Fraud, Accountability Act of 2002, Title VII of the Sarbanes Oxley Act of 2002 (hereinafter, "SOX" or "the Act"), 18 U.S.C. § 1514A, as amended by § 922(c) of the Dodd-Frank Act of 2010, Public Law 111-203 (July 21, 2010). Applicable regulations are set forth at 29 C.F.R. Part 1980. The governing procedural regulation is at 29 C.F.R. Part 18. Siu-Chun K. Wong ("Complainant") alleges that Sumitomo Mitsui Banking Corporation ("Respondent") imposed disciplinary measures and eventually fired him as a result of reporting financial irregularities. Complainant is not represented by counsel. A hearing in this matter took place on June 20 and 21, 2016.

I. PROCEDURAL HISTORY

On October 8, 2014, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that Respondent terminated him for his refusal to make suspicious accounting entries related to bank fraud.¹

¹ As the alleged SOX violation occurred in the state of New York, the law of the U.S. Court of Appeals for the Second Circuit applies. See 18 U.S.C. § 1514A(b)(1).

On October 19, 2015, OSHA found that although the evidence showed Complainant initially raised complaints protected under SOX, Respondent provided sufficient information to demonstrate that his concerns were not valid. At that point, according to OSHA, Complainant no longer had a reasonable belief that Respondent had engaged in any fraud enumerated in the statute or had violated an SEC rule or regulation. Therefore, Complainant failed to make out his *prima facie* case.

Complainant objected to OSHA's findings and requested a hearing before an administrative law judge ("ALJ") on October 29, 2015. Upon receiving this case, the undersigned issued an Initial Prehearing Order and Notice of Hearing on November 13, 2015, which set a hearing date for June 20, 2016 and continuing on June 21, 2016 as necessary.

The hearing took place over these two days as scheduled. The undersigned admitted JX² 1-20 (Tr. at 12-13.); WX 1-5 and 7-14 (Tr. at 29, 55, 68, 74, 80, 87, and 340) and RX 1, 3, 10, and 12. (Tr. at 176, 178, 198, and 270) into evidence. At the conclusion of the hearing, the undersigned set a post-hearing brief deadline of September 30, 2016.

After multiple requests to adjourn the deadline for post-hearing briefs, the undersigned adjusted the due date for December 21, 2016 by Order dated October 18, 2016. The parties timely submitted their briefs.

II. ISSUES

The following issues require adjudication under Section 806 of SOX:

1. Did Complainant engage in protected activity?
2. Did Respondent know that Complainant engaged in protected activity?
3. Did Complainant suffer an adverse employment action?
4. Did any demonstrated protected activity contribute to Respondent's adverse employment actions towards Complainant?
5. Assuming Complainant can meet his burden of demonstrating the above elements, would Respondent have disciplined Complainant in the absence of any protected activity?
6. Is Complainant entitled to any relief?

See Henrich v. Ecolab, Inc., ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 9-10 (ARB June 29, 2006.)

² This Decision and Order uses the following abbreviations: "JX" refers to Joint Exhibits; "WX" refers to Complainant's (Wong's) Exhibits; "RX" refers to Respondent's exhibits; and "Tr." refers to the transcript of the June 20-21, 2016 hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Evidence

The parties jointly submitted the following exhibits:

- JX 1: Complainant's Job Description Questionnaire
- JX 2: Email exchange between Complainant, Ms. Lew, and Mr. Cheung dated April 9, 2013
- JX 3: Email exchange between Complainant and Ms. Garcia dated April 4, 2013
- JX 4: Interdepartmental posting memo dated July 16, 2013, entry vouchers dated July 16, 2013, and check copies
- JX 5: Complainant's email to Ms. Situ, Mr. Cheung, and others advising of posted checks dated July 16-17, 2013
- JX 6: Professional enhancement plan ("PEP") issued August 9, 2013
- JX 7: Complainant's email to Ms. Lew regarding access to Cognos Report dated November 19, 2013
- JX 8: Complainant's email to Mr. Situ regarding LIQ vs. GL break dated November 27, 2013
- JX 9: Email exchange between Complainant, Ms. Lew, and Ms. Garcia regarding LIQ-GL break dated November 27-28, 2013
- JX 10: Email exchange between Complainant, Mr. Alcantara, Ms. Garcia, and Mr. Palmieri regarding LIQ-GL break dated November 27, 2013
- JX 11: Email exchange between Complainant and Mr. Alcantara, Ms. Garcia, and Mr. Cheung regarding LIQ-GL break dated November 27, 2013
- JX 12: Complainant's email to Mr. Palmieri regarding LIQ-GL break dated November 27, 2013
- JX 13: Ms. Lew's memorandum dated November 29, 2013
- JX 14: Email exchange between Ms. Garcia and Ms. Lew following up on LIQ-GL break dated November 29, 2013
- JX 15: Complainant's first PEP progress report issued December 3, 2013
- JX 16: Ms. Lew's memorandum to Complainant advising of final warning dated December 3, 2013
- JX 17: Mr. Judge's December 4, 2013 narrative of his meeting with Complainant
- JX 18: Complainant's compensation history
- JX 19: Complainant's annual review dated June 14, 2013

In support of his case, Complainant submitted:

- WX 1: Complainant's July 2013 performance evaluation
- WX 2: Complainant's July 2012 performance evaluation
- WX 3: Complainant's July 2011 performance evaluation
- WX 4: Complainant's July 2010 performance evaluation
- WX 5: Complainant's July 2008 performance evaluation

- WX 7: Excerpt of BCDAD loan and credit services manual regarding portfolio transfers
- WX 8: Excerpt of BCDAD loan and credit services manual regarding past due payments
- WX 9: Summary of portfolio transfer dated May 30, 2012
- WX 10: Summary of portfolio transfer dated July 11, 2012
- WX 11: Summary of portfolio transfer dated July 1, 2013
- WX 12: Screenshot of ledger discrepancies dated August 14, 2013
- WX 13: Email exchange between Complainant and Ms. Marie Florence Almazar dated April 2, 2013
- WX 14: Screenshots detailing accounting events on April 1-2, 2013

In support of its case, Respondent submitted:

- RX 1: Email invitation requiring Complainant's attendance for a meeting set for July 23, 2013
- RX 3: Ms. Lew's memorandum for August 2, 2013 in preparation for meeting with human resources
- RX 10: OSHA's acknowledgement of Complainant's complaint dated January 8, 2014
- RX 12: OSHA's findings dated October 19, 2015

B. Stipulated Facts

1. Respondent hired Complainant in its New Jersey office on February 20, 2007 as a "Support Staff B" employee in the Financial Accounting Department ("FAD")—Controllers Group.
2. Complainant's primary responsibilities included identifying and reconciling any differences in account balances between the general ledger and various sub-ledgers, recording daily account balances of these ledgers, preparing reports or statements related to the reconciliation of these ledgers, and scanning supporting documents and managing related data files.
3. The Job Description Questionnaire for Support Staff B estimates that eighty percent of the employee's time is spent reconciling, identifying, and investigating any difference between sub-ledgers and general ledgers to "ensure the account information in the Balance Sheet and Income Statement [is] accurate" and "the account balance of Sub Ledgers and general ledgers correspond to each other;" and that twenty percent of the employee's time is spent preparing reports, statements, and month-end closing statement to "give out requested information and financial statements for decision-making."
4. Respondent's direct supervisor at Respondent was Wai Mei "Sandy" Lew, the Senior Vice President, Senior Management Reporting Specialist in the FAD—Controllers group.

5. Ms. Lew reports to Tak Yu Cheung, Joint General Manager, Department Head, FAD–Controllers.
6. On April 8, 2013, Complainant prepared a manual adjustment for a possible overstatement of PL in the 880101 booking branch for the year ending March 29, 2013 and brought the adjustment to Ms. Lew’s attention.³
7. Ms. Lew told Complainant that the 880101 book had already been closed; since the proposed adjustment was to the US Book and not the JPN Book, she needed more time to review it; and that if the adjustment was applicable, she would need Complainant to make the adjustment to the 880111 book.
8. Complainant told Ms. Lew that he would not make an adjustment to the 880111 book.
9. Mr. Cheung and Ms. Lew then met with Complainant and, during this meeting, they told Complainant that once the 880101 book was closed, it could not be reopened, and that applicable adjustments would have to be made under the 880111 book.
10. Complainant disagreed with Mr. Cheung and Ms. Lew that the 880101 book could not be reopened and that the adjustment he prepared should be made under the 880111 book.
11. On April 9, Complainant emailed Ms. Lew and asked, “Would you open the US Book for March 2013 so that I may upload and post the entries in 880101, the US GAAP Book?”
12. Ms. Lew responded, “As we (Tak, yourself, and me) discussed last night, the US Set of Books has already been closed for Fiscal Year ending Mar-13. Once the US Set of Books is closed, all the subsequent identified US GAAP adjustments will be made to US Set of Books via booking branch 880111, unless the applicable adjustment has accounting impact on JP Set of Books. In this case, we already agreed there is no impact on the JP Set of Books. Please prepare and upload the entries with booking branch 880111 instead of booking branch 880101.”
13. Later that day, in an email to Complainant, Mr. Cheung wrote “Sandy, your dept. head, has explained to you and provide[d] the booking guidance to you on this matter. Please follow her guidance.”
14. Complainant did not prepare and upload the entries with booking branch 880111 as requested by his supervisor.

³ Unless otherwise indicated, all dates mentioned in the subsequent paragraphs refer to 2013.

15. On April 12, Ms. Lew informed Complainant that the PL in the 880101 book for March 2013 had not been overstated but instead had been understated.
16. On July 17, Complainant did not prepare a manual adjustment that Ms. Lew asked him to prepare.
17. On July 18, Complainant told Ms. Lew not to step into his cubicle unless she had some work-related issues to show him.
18. On July 18, Complainant told Ms. Lew how to assign work to him.
19. On July 23, Complainant told Hui Bing Situ, Assistant Vice President, Senior Financial Reporting Specialist for FAD–Controllers Group and the group’s Cognos coordinator, to make sure that the next time the Cognos consultant sent a meeting invitation listing Complainant as a required attendee, the meeting had to do with Complainant.
20. In an August 2 email to Complainant, Ms. Lew wrote, “I noticed that you have been late to work quite often. You arrived at the office at 9:25 am on Wednesday and 9:27 am today. I...have spoken to you several times to call in if you will be late. So, going forward, please call in if you will be late. If applicable, action will be taken.”
21. On August 9, Respondent issued Complainant a Professional Enhancement Plan (“PEP”).
22. The PEP listed the following categories of “Performance to be improved”: “Professionalism/Teamwork;” “Corporate Values/Conduct;” and “Attendance and Punctuality.” The PEP stated, “If your performance does not improve and you do not reach the goals set forth in the PEP, you may be subject to disciplinary action up to and including termination.”
23. In a November 19 email to Ms. Lew, Complainant filed a complaint about Ms. Situ for moving a report from one system folder to a different system folder and wrote “[p]lease make sure that she would not do this again.”
24. In a November 26 email, Complainant complained to Ms. Lew about Ms. Situ when he wrote, “It should be another complaint. If the report can be updated just for a few minutes, why would it take more than a month to complete?”
25. In a November 27 email at 10:09 am, a former Business Control Analyst in Respondent’s Business Control Department, Americas Division (“BCDAD”) named Michael Alcantara sent an email to Complainant with the subject “LIQ-GL Break 11/27/13” about a Loan IQ-General Ledger

break in connection with an expense code entry into the sub-ledger in the BCDAD. A “break” of this sort meant that the General Ledger and the relevant sub-ledger did not match.

26. In an email response to his co-worker, Mr. Alcantara, Complainant wrote that “the Portfolio Transfer mentioned in the previous email was not processed as shown below....Please take a look and send an email to inform PDAD–FAD Controllers–Bank Accounting when the Portfolio Transfer is completed.
27. Mr. Alcantara replied, “Good Afternoon [Complainant]. This wasn’t a portfolio transfer, the expense code was just amended to the correct expense code on the deal level.”
28. On November 27 at 3:41 pm, Complainant responded to Mr. Alcantara, copying, *inter alia*, Ms. Lew, Ms. Situ, Mr. Alcantara’s supervisor, Gina Garcia (Senior Vice President, Group Head in BCDAD), and Steven Palmieri (Deputy General Manager, Manager Strategy and Planning in BCDAD) and accused Mr. Alcantara of trying to trick Complainant writing, “Based on your behavior of sending email to trick PDAD–FAD Controllers–Bank Accounting to make any Manual Adjustment, it would be better that BCDAD–Application and Reporting, should send an interoffice document with all the relevant documents supporting for any transactions related to or similar to Portfolio Transfer in the future.”
29. On November 27, at or around 4:30 pm, Ms. Lew met with Complainant and told him that it was inappropriate to communicate with a colleague in this manner, and that he should have consulted with her first before making such remarks. Ms. Lew also told Complainant not to follow up any further on this issue and that she would investigate the situation.
30. At 4:37 pm that day, Ms. Garcia responded to Complainant’s earlier accusation by email and wrote, “We would never send an email to ‘trick’ Controllers to make any type of adjustment” and “[t]o get a GM stamp on this type of discrepancy would not be necessary.”
31. Ms. Garcia then emailed Ms. Lew at 5:00 pm, copying, *inter alia*, Complainant and Mr. Cheung, and wrote, “The insinuation that we are tricking the Controller’s dept. to pass such adjustment is inappropriate. Additionally I don’t believe that GM approval should be required for these type[s] of adjustments since this is a known issue with LIQ and this process has been in place for several years now.”
32. Ms. Lew responded to Ms. Garcia, copying, *inter alia*, Complainant, and wrote, “I understand. My sincere apology for the inappropriateness of the language.”

33. On November 27 at 5:21 pm, Complainant sent an email to Ms. Garcia with the subject "Re: LIQ-GL Break 11/27/13."
34. On November 27 at 6:53 pm, Complainant sent an email to Ms. Garcia, among others, with the subject "Fw: LIQ-GL Break 11/27/13."
35. On the evening of November 27, Ms. Lew and Mr. Cheung met with Complainant.
36. At this November 27 meeting they told Complainant that he should have consulted with his supervisors before drawing his own conclusions regarding the LIQ-GL break. They also told him that the language and tone of his email to Mr. Alcantara was inappropriate.
37. Ms. Lew and Mr. Cheung instructed Complainant to not send any more emails concerning the LIQ-GL break.
38. On November 29, Complainant sent an email to Mr. Palmieri with the subject "Re: Fw: LIQ-GL Break 11/27/13."
39. In a November 29 email, Complainant filed another complaint with Ms. Lew about Ms. Situ, writing, "I need to file another complaint. Bing did not read the file carefully or did not consult me before reject[ing] my RCC when the relevant information is attached in the file."
40. On December 3, Ms. Lew and Matthew Judge, Vice President, Human Resources Business Partner at Respondent's Americas Division, met with Complainant and discussed his performance with him.
41. During this meeting, Complainant was issued a written PEP, 1st Progress Report ("PEP Progress Report"), and a Final Warning, the contents of which were discussed with Complainant at the meeting.
42. The PEP Progress Report stated that, among other things, that it "encompasses 3 months of your performances, and management has found that you are falling behind in all aspects of the PEP specifically with failing to follow managers' direction which may be viewed as insubordination. For this reason, you are being placed on a Final Warning." It also stated that Complainant's "next Progress Reports will be given on or about December 30, 2013."
43. The Final Warning expressly referenced the events of November 19 and November 27.

44. The Final Warning stated, among other things, that Complainant was “being placed on Final Warning for failure to follow management direction and poor performance for the next 90 days” and that “if we do not see substantial and sustained improvement in your performance...additional disciplinary action will be taken, up to and including termination.”
45. Complainant refused to sign or take copies of the PEP Progress Report or Final Warning.
46. Respondent terminated Complainant’s employment on December 6, 2013.

(See JX 20; Tr. at 14-23.)

C. Hearing Testimony

The following witnesses appeared at the hearing and testified as follows.

Complainant Siu Chung K. Wong (Tr. at 27-169)

Complainant worked for Respondent for seven years as a member of Support Staff B. His tasks included performing account reconciliations related to the sub-ledger and general ledger, identifying discrepancies among assets and liabilities on the balance sheet and income statement, reporting on loans and payouts in the treasury sub-system, and performing month-end accrual and adjustment reports. Complainant also reported on the amortization schedule of secondary purchase bills. On his 2012 evaluation, Complainant earned a “3” on a scale from 1-5 in attendance as he was occasionally absent or late from work. (Tr. at 27-33; WX 1.) Complainant acknowledged his tardiness and that his superiors wanted him to notify them if he would be coming in late. (Tr. at 142.)

As part of his job description, when Complainant would come across a discrepancy, he would communicate it to his direct supervisor or other departments. Complainant cited emails that he sent to his superiors dated August 14, 2013 and April 2, 2013 (WX 12 and 13) as examples where his superiors did not offer any resistance to his claim that a discrepancy existed. Complainant did not detect fraud in these instances. The email at WX 13 concerned a discrepancy in the balance sheet of Account No. 294521, an ELC confirmed customer contingent liability account. Complainant reported the discrepancy to Business Control Department, Americas Division (“BCDAD”) trade services and he described BCDAD’s response as very smooth. In general, Complainant’s supervisor, Ms. Lew, gave him authority to make manual adjustments and to upload them to the general ledger upon her approval. For example, Complainant created Excel spreadsheets at WX 9 on May 31, 2012 and WX 10 on July 11, 2012 to reflect portfolio transfers and reconciliations. (Tr. at 52-68.)

Complainant indicated that a turning point came in March 2013 when he made a manual adjustment related to a past-due fee with Ms. Lew’s approval, which she posted in the general ledger. In March 2013, Ms. Lew asked Complainant to reverse entries he had previously entered. On April 2, Complainant identified a discrepancy and reported the overbooking to Ms. Lew regarding Account Nos. 415002 and 512007. Complainant explained that Loan IQ, the

computer system used to track the loans of Respondent's clients, will automatically generate an entry when a deal has expired. Here, Loan IQ generated the transaction in account number 415002 as a premium such that the account showed a positive sign in the liability column when it should have displayed a negative sign. The loan was supposed to fully amortize by the date of maturation, rendering it fully matured at zero and no longer a liability. In this instance, when the loan administrator changed the expiration date from March 29 to April 2, the remaining portion of the loan commitment was recalculated due to the gap in time between the two dates. The result, reflected in WX 14, shows an extra transaction after the deal matured to zero. Complainant notified Ms. Lew of the problem. (Tr. at 80-86, 101.)

Complainant did not report Ms. Lew's directive as unlawful to anyone in his department, but he did send an email to a department called "PDAD, NY Pending," charged with overseeing the controllers. The email advised that Ms. Lew asked Complainant to do something wrong, but not unlawful, based on the procedure manual reflected in WX 8. Complainant did not know whether the person who received his email played a role in terminating his employment. He could not offer this email into the record because he did not have access to his company email address. Hui Bing Situ, an assistant vice president at the time, made the adjustment that Complainant refused to execute. (Tr. at 158-163.)

The summary of the manual adjustment shown in JX 2 had an impact on the financial statement for the fiscal year end 2013, according to Complainant. Normally, the manual adjustment prepared by Complainant is simply the absolute value in the credit column of its positive or negative counterpart in the debit column. Ms. Lew asked Complainant to manually book this particular transaction in Book 880111, a book that relates to regulatory reporting. Complainant surmised that booking the transaction in Book 880111 would confuse the external auditor or government agency because the transaction did not relate to regulation reporting. Moreover, Loan IQ can only generate entries into Book 880101. Because this transaction did not concern the regulatory report, Complainant objected to booking the transaction in Book 880111. Complainant insisted that the transaction belongs in Book 880101. In an April 9 email detailing his refusal at JX 2, Complainant listed the types of instances that call for an adjustment at week's or month's end. The adjustment Ms. Lew instructed Complainant to make did not fall under any of these instances, according to Complainant. (Tr. at 87-92.)

Page nine of JX 2 shows a debit value of \$19,597.46 and a credit value of \$3,751.96 under Account No. 51207 on March 29, 2013. According to Complainant, if these values remained as shown, the fiscal year-end income statement would show about \$22,000 more than it should. Complainant objected to Ms. Lew's instruction to enter the transaction in Book 880111, which would have adjusted the discrepancy in the next reporting period, because the loan had already expired on March 29. The \$19,597.46 would appear as extra income due to the system's automatic generation, income that it did not truly have. Ms. Lew maintained that the account was under-booked by \$4,000 and directed Complainant to book even more income. The \$4,000 figure came from a recalculation reflected in an email from Complainant to several individuals including Ms. Lew on April 12 on page two of JX 3. Complainant explained that a commitment decrease caused this \$4,000 overstated disparity. He communicated his concern that this would have an impact on the debt shown in the income statement to Ms. Garcia. (Tr. at 94-100.)

Ms. Lew rescinded the manual adjustment he made even though he gave her the information she needed to make her decision. Instead, she directed him to reflect the adjustment in Book 880111 because Book 880101 had closed. Complainant cited this as a problem because Book 880111 is not related to Loan IQ. (Tr. at 101-103). When asked why this posed a problem, Complainant responded:

Because...there [are] some entries that Loan IQ can book directly to the general ledger, to the financial statement. This is one of them, especially, for example...amortized interest income, and some amortizations, because if it's done by manual adjustment it's very, it's (indiscernible) because there is [an] unlawful loan in there, in the system, so...the Loan IQ system that (indiscernible) can automatically generate the amortization strictly into the general ledger, into the financial statement.

(Tr. at 102-103.)

Based on a conversation with an attorney after his discharge, Complainant justified his refusal to make an adjustment based on his belief that the overstatement would somehow impact the stock price as reflected in the fiscal year-end report. He also noted that Respondent compensates its employees by salary and bonus based on the income of the loan. From Complainant's understanding, based on overhearing Ms. Lew and Ms. Situ discuss calculation of bonuses, the more income booked, the greater the percentage of the sale that the employee would retain. Complainant believed this related to bank fraud because some employees would receive larger bonuses than they deserved. (Tr. at 107-110.) Despite expressing his belief to Ms. Lew that this overbooking would affect Respondent's income statement by showing inaccurate and inflated income, he did not convey to Ms. Lew or Mr. Cheung that it constituted unlawful or fraudulent conduct at the time. He formed this belief upon speaking to an attorney after the termination of his employment. Neither did he think about whether the overbooking would impact Respondent's stock price as of April 2013. (Tr. at 154-157.)

Next Complainant discussed an episode related to employee travel checks. In an email from July 18, 2013, Complainant sought to confirm whether the correct posting date for a particular transaction was July 16, 2013 or July 17, 2013, as reflected at JX 5. (Tr. at 111.) Complainant also referenced checks made out to Respondent from June and July 2013 which he deemed problematic because he believed that Respondent could reopen the book to correct transactions to show that they actually took place in June rather than July. He previously heard that Ms. Lew reopened the book during the month of June six or seven days after the quarter closed. Even though Respondent received these checks in July, Complainant believed that it still must book them in the month of June because the quarter ended at the conclusion of that month. These records form part of a report given to the government and shareholders; thus Complainant found it important to keep accurate records of the company's cash accounts as it impacts the liquidity of the company and potentially its stock price. (Tr. at 114-116.) However, Complainant did not tell Ms. Lew or Mr. Cheung that he believed the entry of these dated checks represented bank or securities fraud against Respondent's shareholders. After his termination, Complainant consulted with an attorney and upon reviewing documents provided by Respondent, he believed he had engaged in protected activity in July 2013. (Tr. at 153-54.) He

also conceded that he did not include this incident in his OSHA report and did not remember the details of it. (Tr. at 150-153.)

After the problems from a few months prior, Complainant paid more attention to which transactions he should authorize. In November 2013, Complainant encountered another issue related to the execution and proving dates of a portfolio transfer. He declined to make a manual adjustment as directed by Ms. Lew because the approval date differed from the execution date. Citing to JX 12, Complainant asserted a relationship between the bank fraud and the loan administrator. Complainant believed that the loan administrator held the expense code longer than necessary in order to make income on the transaction. Although Complainant could not identify who he believed perpetrated this fraud, he maintains that someone from BCDAD tricked the FAD-Controllers group ("Controllers Group") by breaking one transaction event into two expense codes. This resulted in the payment of two bonuses for a single transaction, which violated company policy as reflected in WX 7, according to Complainant. In Complainant's mind, Ms. Lew did not thoroughly investigate this irregularity. He refused to enter the transaction because he felt as if he would be covering up a trail if he did. Complainant also did not have the opportunity to verify which expense code the bonus actually belonged to. (Tr. at 117-127.)

In an email to Mr. Alcantara, Complainant alerted him to missing information as to a portfolio transfer. Mr. Alcantara explained that this was an amendment to an expense code, a correction at the deal level, and not a portfolio transfer. Complainant told Ms. Lew that the BCDAD group had engaged in conduct counter to Respondent's internal policy as set out in the policy and procedure manual. The manual referenced some regulation or laws, but Complainant did not specify which laws or regulations he was referencing. Based on Ms. Lew's and Mr. Cheung's background as CPAs, as well as that of a reviewing auditor, Complainant believed they should understand the connection between BCDAD loan services operations and PDAD Controller's accounting practice and why the Loan IQ system had to be checked manually, but Complainant did not make any accusations related to unlawful or fraudulent activity. He also could not say that Mr. Alcantara refused to disclose information. Again, he described the conduct as wrong, but not unlawful. He only perceived the conduct as fraudulent after the fact. While Complainant did not know who would receive the duplicate bonus after a change to the expense code on the deal level, he maintained that the company paid twice for the same transaction. (Tr. at 164-168.)

As part of his job duties, Complainant reviewed a daily ethics error report to reconcile the general ledger and the foreign exchange ("FX") rate for the sub-ledger system and to create a report to send to other employees. On one particular day, Ms. Situ moved the report without notifying Complainant. Subsequently, he could not find the report. After confirming its removal with a systems administrator, Complainant filed a complaint with Ms. Lew, telling her that Ms. Situ had harassed him and prevented him from doing his job. In two other complaints, Complainant averred that Ms. Situ assigned him to meetings that did not concern him and that an administrator named Irina Tishelman delayed giving him an unfinished, out-of-sequence report,

which prevented him from completing his work on time. (Tr. at 129-136.) He did not report any of these incidents as protected activity to the OSHA investigator. (Tr. at 150.)

Although his relationships with Ms. Lew and Ms. Situ had deteriorated, Complainant actively worked with them to complete tasks before the end of the quarter. After declining to make the manual adjustment, however, Ms. Lew spoke with Mr. Cheung and they terminated his employment. (Tr. at 137-138.)

Sandy Lew (Tr. at 186-248)

Sandy Lew, a senior vice president in Respondent's Financial Accounting Department—("FDAD") Controllers Group, has worked for Respondent for seventeen years and currently reports to Mr. Cheung. Her group's two major functions consist of retaining the general ledger of Respondent's New York and Cayman Island branches and maintaining the accounting policy for these branches. In 2013, four individuals, including Ms. Situ and Complainant, reported to Ms. Lew. (Tr. at 187.)

On April 8, 2013, Complainant approached Ms. Lew with a manual adjustment for an apparent profit/loss ("P/L") overstatement of about \$22,000 and asked her to reopen Book 880101 under the U.S. Seller Book so he could make the entry. Ms. Lew discussed the matter with Complainant, told him Book 880101 had closed, and that she would review his entry to see if it was applicable, in which case Book 880111 would reflect the adjustment. Complainant disagreed and told her she had to reopen Book 880101. Ms. Lew then consulted Mr. Cheung and the two spoke to Complainant, reiterating what Ms. Lew had explained to him. Ms. Lew thoroughly researched Complainant's concern and emailed her findings to him; her findings revealed a P/L understatement of around \$4,000, not an overstatement of \$22,000. Even had Complainant correctly found an overstatement, the amount would not have materially affected Respondent's stock price. Ms. Lew described the issue as merely a routine adjustment made to Book 880111 per company policy. (Tr. at 188-191.)

Although Complainant is responsible for reconciling the sub-ledger and general ledger by manual adjustment, he does not have authority to post the entry into the general ledger. He only uploads the entry into the system, which Ms. Lew then reviews. Only after her review does the entry post to the general ledger. (Tr. at 193-194.)

On cross examination, Ms. Lew could not recall any internal auditors having issues with the general ledger numbers. The accounting software that supports the system cannot reopen Book 880101, unless the entry 1) impacts the Japanese GAAP book and 2) occurs before the third business day of the succeeding month. Otherwise, adjustments are to be made to Book 880111, the Controllers Group's official book for regulatory reporting, which remains open until submission of the monthly regulatory report. By April 8, 2013, both the U.S. and Japanese seller books had been closed for more than three business days and could not be reopened as per internal policy. (Tr. at 207-213.) Ms. Lew further contested Complainant's assertion in an April 9, 2013 email that her decision not to reopen Book 880101 would violate U.S. law. After Complainant brought this possibility to her attention, she testified that she conducted a thorough investigation and made the appropriate adjustment upon reviewing the related entries in Loan IQ

and Oracle. Her investigation, which she notified Complainant and others about on April 12, 2013, revealed an understatement of about \$4,000, not an overstatement. (Tr. at 238-239.)

On re-cross examination, Ms. Lew explained the research she performed into her understatement determination. The transaction at issue terminated as of March 29, 2013. The Controllers Group received fees, which amortized over the life of the facility until its termination. At termination, the record showed a discounted unamortized fee of \$26,947.51. She input the entries posted by Loan IQ and reviewed the debits and credits, as shown at JX 3, which showed a net credit of \$22,772.94 to Account No. 512007. The unamortized fee of \$26,947.51, along with the net credit of \$22,772.94, left Ms. Lew with an understatement of \$4,174.57 remaining to be amortized for the fiscal year ending in April. Ms. Lew made an adjustment reflecting this understatement. (Tr. at 246-248.)

On July 17, 2013, Ms. Lew requested that Complainant post a manual entry for a memo he received from the General Affairs Department. He refused to do so because he insisted the accounting date was incorrectly reflected as July 16, and not July 15. (Tr. at 191-192.) The memo concerned checks dated June 2013. Ms. Lew acknowledged that she did not book these checks until July 17, 2013 and explained why she did so on redirect examination. (Tr. at 218). Certain employees make purchases on the American Express company card. American Express sends a statement to Respondent and Respondent will pay the balance. If the employee makes a purchase that is not covered by the company card, the employee will write a reimbursement check for that expense and send it to the General Affairs. General Affairs will send certain documents, including a copy of the check, to the Controllers Group to make the applicable adjustment. Here, Ms. Lew received copies of the June checks on July 17, 2013. Because it takes time to process the check, the bank may not receive the check in the time frame in which it can be reported before the end of the month. (Tr. at 243-244.)

Ms. Lew asked Complainant to make this adjustment and he refused. The next day, Ms. Lew approached Complainant in his cubicle and expressed her desire that he show more teamwork. Complainant responded by telling her not to step in his cubicle again and that she should set a meeting with him ahead of time for future assignments. Feeling offended, she discussed the incident with Mr. Cheung. Upon meeting with Mr. Cheung, Ms. Lew created a memo detailing her interactions with Complainant. (RX 3.) She and Vice President of Human Resources Matthew Judge used this memo as a basis to place Complainant on a performance enhancement plan ("PEP"). (JX 6). Complainant refused to sign the PEP. (Tr. at 192-196, 200.)

Complainant sent a November 26, 2013 email accusing Michael Alcantara of BCDAD of misleading the Controllers Group (JX 10). Ms. Lew learned of this accusation when she received an email about it the next day from Ms. Garcia. (Tr. at 242.) Despite Ms. Lew admonishing Complainant about the inappropriate nature of the email, he continued to send subsequent emails in the same vein to BCDAD. Ms. Lew apologized to BCDAD for Complainant's conduct. After another warning from Ms. Lew and Mr. Cheung, Complainant continued to press the issue in an email dated November 29, 2013. (JX 12). Thereafter, Mr. Judge requested that Ms. Lew prepare a memo regarding this latest incident. (JX 13). On December 3, 2013, Mr. Judge conducted a meeting with Ms. Lew and Complainant to review Complainant's unsatisfactory progress and to deliver a final warning. (JX 15, 16). Again,

Complainant refused to sign the paperwork at the end of the meeting. Days after, Mr. Cheung informed Ms. Lew that the company planned to terminate Complainant's employment. (Tr. at 201-204.)

Ms. Lew cited other instances of Complainant making negative remarks toward others, such as Complainant's reaction to the removal of the Cognos report at JX 7. This incident itself did not contribute to Complainant's termination, according to Ms. Lew; it was his attitude and the way he dealt with the complaint that impacted the decision to discharge him. Ms. Lew recalled that Complainant had to obtain a specific report as one of his tasks, which he could not find. He then spoke to a consultant and when the consultant told him that the report had been moved, he approached Ms. Situ in a hostile and rude manner and criticized her for not telling him that she moved the report. (Tr. at 228-234.)

Gina Garcia (Tr. at 249-262)

Gina Garcia worked as a vice president in the BCDAD application support management information system (MIS) reporting group. Her group supports the Loan IQ system from a user perspective and provides MIS reporting from the Loan IQ system. Mr. Alcantara reported to Ms. Garcia, who in turn reported to Senior Vice President Steve Palmieri. She explained that Complainant reported a break, or a discrepancy imbalance, between the sub-ledger and general ledger to Mr. Alcantara on November 27, 2013. Mr. Alcantara responded that upon a review of the events page in Loan IQ, he did not see an event indicating that a portfolio transfer had occurred. Once Complainant replied by accusing Mr. Alcantara of tricking the Controllers Group, Ms. Garcia intervened by contacting Ms. Lew and sharing her displeasure with the accusatory language of the email. (Tr. at 249-252.)

Ms. Garcia testified that one can enter an expense code into Loan IQ in two ways: at the deal level and at the portfolio allocation level. The change Complainant raised occurred at the deal level, which created the break between the general ledger and sub-ledger. Ms. Garcia relayed this explanation to Complainant. Complainant continued to question the break issue, but Ms. Garcia did not understand his concerns. After performing some research, Ms. Garcia emailed Ms. Lew and explained what caused the break. Ms. Lew, in turn, apologized to Ms. Garcia on Complainant's behalf for the tone of his email. After giving Complainant the information as to what caused the break, Complainant emailed Ms. Garcia and questioned the policy and procedure as to handling the issue. Ms. Garcia added that changing an expense code at the deal level would not result in two employees receiving a bonus for the same transaction. Complainant had prior interactions with the BCDAD group, but none of them had risen to the level of this episode. His response took the group aback because BCDAD previously had a good relationship with him and the Controllers Group and his insinuation of deceit angered her as well. (Tr. at 253-257.)

On cross examination, Ms. Garcia indicated that the earliest booking of the transaction into two expense codes on the Loan IQ sub-system occurred in August 2013. She did not notice the double booking before November 2013. She did not find this portfolio transfer suspicious, but described it as unique in that expense code on the deal level did not match the portfolio expense code. Usually the expense code on closing of the deal level is identical to the portfolio

expense code. Despite this incompatibility, the transaction could be processed because it was booked prior to this particular break, which Ms. Garcia only learned about on November 27, 2013. She still would have investigated the break even without Complainant's prompting because Mr. Alcantara had recently joined the group as a junior employee and he may not have understood the different scenarios that could have caused the break. (Tr. at 258- 261.)

Hui Bing Situ (Tr. at 262-289)

Hui Bing Situ, now an assistant vice president of FAD, controller bank accounting, first began working with Complainant as an assistant treasurer in 2006. As an assistant treasurer, Ms. Situ performed general ledger maintenance and manual adjustments under the Japanese GAAP book. She trained Complainant in daily processing, which involved sending out reports to third parties, and they worked together on a daily basis as teammates. Ms. Situ noticed a change in Complainant's conduct about one year before he left the company. His attitude had changed. He no longer showed willingness to commit as a teammate, insisted that his point of view was correct, and showed up late. As a result of Complainant's tardiness, Ms. Situ would have to complete Complainant's work. (Tr. at 263-268.)

In 2013, Ms. Situ served as the Cognos coordinator. She described Cognos as a reporting application that generates reports from Respondent's financial data. Her responsibilities in this role included coordinating the IT group and the end user to allow migration from the one application to the new application and developing the report on the new application. Based on RX 1, Respondent's IT consultant scheduled a meeting for July 23, 2013 to gain input from the end users on the new report. Ms. Situ decided to invite Complainant and listed him as a required attendee because he uses Cognos often as a main user. (Tr. at 268-272.)

Both Ms. Situ and Complainant attended the meeting as scheduled. After the meeting, Complainant told Ms. Situ, in a hostile and unprofessional tone, to mark him as an optional, and not required, attendee for future meetings that do not concern him. Ms. Situ responded by telling Complainant that he need not attend meetings if he is busy. The exchange made Ms. Situ feel upset because she simply wanted to complete her assignments and have the project go live, which first required user input. Ms. Situ spoke to Ms. Cheung about this episode that evening. (Tr. at 273-275.)

On November 19, 2013, Complainant contacted Ms. Situ regarding a daily exchange rate report. (JX 7.) Ms. Situ explained that the report is moved from one folder to another on a daily basis. The report shows and validates all of the inputs from the FX department, according to Ms. Situ. She instructed Respondent's IT consultant, Ms. Tishelman, to remove the report, but she did not do so to harass Complainant. The head of FX requested that all reports move from the old system to the new system as part of the migration. Based on the request, Ms. Situ decided to move the report from one folder to another to allow FX to have access to that particular folder. Unlike FX, other users from the Controllers Group have access to all folders. So had Ms. Situ not moved the report, FX would not have had access to it. Complainant still could retrieve the report in the new folder location. (Tr. at 275-278.)

Ms. Situ first learned of Complainant's problem with the move on the morning of November 19, 2013 when Ms. Tishelman told her that Complainant had sent her an instant message inquiring as to the location of the report at JX 7. Ms. Situ directed Ms. Tishelman to make a copy of the report and save it to the original folder. Right after, Complainant approached Ms. Situ at her desk and described moving the report as ridiculous in a rude and hostile tone. This interaction upset Ms. Situ because Complainant simply could have approached her or Ms. Tishelman to inquire as to the whereabouts of the report. Ms. Situ emailed Ms. Lew about the incident and explained why she had to move the report and conveyed the tone in which Complainant spoke to her. Ms. Lew responded by telling Ms. Situ that she would confer with Mr. Cheung. This incident impacted Ms. Situ's subsequent interactions with Complainant in that she had to prepare herself each time she spoke to Complainant and had to speak in hushed tones when directing him to complete his work. (Tr. at 278-283.)

On cross examination, Ms. Situ acknowledged that Complainant needed access to the report. Ms. Situ indicated that she directed the removal of the report to another folder when she received the request from FX. Ms. Situ did not know how to make a copy of the report and paste it another location, as she believed that task fell under IT. (Tr. at 283-285.)

Matthew Judge (Tr. at 291-317)

Matthew Judge, Respondent's Vice President of Human Resources, spoke to Ms. Lew about Complainant's performance, interaction with his peers, and attendance issues. Mr. Judge advised Ms. Lew that he could place Complainant on a Performance Enhancement Plan ("PEP") or give him a written warning. Because Ms. Lew believed that Complainant could overcome these issues, the two decided to place Complainant on the PEP. Mr. Judge and Ms. Lew formulated the PEP, setting goals for Complainant and establishing ways to measure his progress. (JX 6.) During this process, Ms. Lew did not relay to Mr. Judge that Complainant informed her that Respondent had engaged in unlawful or fraudulent activity. On presenting the plan to Complainant, Mr. Judge described Complainant's reaction as disengaged. Complainant refused to sign the PEP even though Mr. Judge told Complainant that his signature did not mean that he agreed to the PEP. (Tr. at 291-294.)

In late November, Ms. Lew presented Mr. Judge with a document reflecting issues related to Complainant's professionalism as shown at JX 13. Upon evaluating the document, they decided to give Complainant an unsatisfactory progress report and a written warning due to his unacceptable behavior. (JX 15, 16.) He did not sign either document. In a very contentious meeting with Complainant to review the progress report, Mr. Judge indicated that Complainant tried to own the meeting and interjected himself while others spoke. These problems escalated and his conduct at the meeting put a spotlight on Complainant's lack of professionalism. Mr. Judge then gave Complainant a final warning. Complainant refused to take the final written warning, saying it had no validity, so Mr. Judge read the final warning to him and sent it to Complainant via email with a return receipt. (Tr. at 295-300.)

This meeting left Mr. Judge frustrated. Ms. Lew initially thought that Complainant would make the appropriate adjustments and move on from there, but he showed no desire to

change his behavior. For example, Complainant's insistence that senior officials would try to trick BCDAD did not seem logical. Realizing that the PEP had not moved in a positive direction, Mr. Judge emailed his bosses, Senior Vice President of Employee Relations, Sandy Lamparello and Howard Teigel, Chief Human Resources Officer, to inform them about the lack of improvement in Complainant's behavior. (JX 17.) Mr. Judge and Ms. Lew recommended Complainant's termination to Mr. Cheung, who met with Complainant to inform him of his termination with Mr. Judge present. (Tr. at 300-302.)

On cross examination, Mr. Judge did not find it suspicious that the date on a memo would differ from the actual entry date of the accounting voucher. He did consult with PDAD and BCDAD on the issue, but also conceded that he did not understand the minute details of such a transaction. Mr. Judge also read the portion of the email at JX 10 in which Complainant made the accusation of BCDAD tricking the Controllers Group, but did not review the entire email chain. In his conversations with Ms. Lew, Mr. Judge discussed Complainant's professionalism, conduct with others, and punctuality issues. They did not discuss Complainant's inability to perform his job responsibilities. Mr. Judge acknowledged that Complainant did not have issues with other departments aside from PDAD and BCDAD. Ms. Lew first brought these issues to Mr. Judge's attention in August 2013. She presented Mr. Judge with supporting documentation related to the BCDAD email, but not the incident related to the checks from General Affairs. (Tr. at 303-314.)

On redirect examination, Mr. Judge confirmed that he reviewed Ms. Lew's materials at EX 3 before issuing the PEP. (Tr. at 315.)

On re-cross examination, Mr. Judge denied speaking to third parties, such as the internal and external departments, about the bookings. He did not discuss the bookings with Ms. Lew and Complainant present because the PEP concerned Complainant's professionalism, conduct, and punctuality. (Tr. 315-316.)

Upon the undersigned's questioning, Mr. Judge clarified that the human resources department recommended the termination of Complainant's employment to Mr. Cheung. Complainant's combative disposition at the meeting with Mr. Judge and Ms. Lew disturbed them to the point of concern over Complainant's effect on the entire group. He advised Ms. Lamparello and Mr. Teigel, but the ultimate decision to terminate Complainant belonged to Mr. Cheung as the general manager. (Tr. at 316-317.)

Tak Yu Cheung (Tr. at 318-335)

Tak Yu Cheung, Joint General Manager of the FAD-Controllers group, has worked for Respondent since 1999. He seldom had direct interaction with Complainant. Ms. Situ first complained to Mr. Cheung about Complainant's attitude toward her during the first half of 2013. Ms. Lew also alerted him to issues regarding Complainant's failure to follow her directions, his hostile actions, and his limiting communication between them to email rather than face-to-face in his cubicle. Mr. Cheung found this behavior unacceptable and sensed that the issue had become serious, so he advised Ms. Lew to contact human resources. (Tr. at 318-321.)

In November 2013, Mr. Cheung received an email from Mr. Palmieri regarding Complainant's unprofessional interaction with Ms. Garcia. Upon conferring with Ms. Lew to better understand what happened, Mr. Cheung apologized to Mr. Palmieri and assured him that he would address the situation. He emphasized to Ms. Lew the importance of maintaining a working relationship with BCDAD. Ms. Lamparello and Mr. Judge met with Complainant and the meeting did not go well. They advised that termination was the only choice remaining to address the problem. Mr. Cheung agreed with this assessment based on Complainant's unchanged behavior since the first episode with Ms. Situ and his effect on others in the department, even after adoption of the PEP. In justifying Complainant's termination, Mr. Cheung specifically cited the impact of his hostile attitude on department morale and the deteriorating relationship with BCDAD. With the quarter-end closing around the corner and Complainant's lack of progress over six months since the PEP started, these factors presented a big risk and moved Mr. Cheung to terminate him. At no time did Complainant express to Mr. Cheung that he believed Respondent had engaged in fraudulent or unlawful activity. (Tr. at 321-325.)

On cross examination, Mr. Cheung denied that the issue Complainant raised in the email at JX 2 broke U.S. law. Within the Controllers Group, no one other than Ms. Situ and Ms. Lew complained to Mr. Cheung about Complainant's attitude, but Mr. Cheung also received complaints from Mr. Palmieri and Ms. Garcia at BCDAD. Mr. Cheung had not known of any issues with Complainant before 2013. Mr. Cheung had reviewed Complainant's most recent performance appraisal at WX 1, along with those of fifty other employees. Mr. Cheung recollected that Complainant sent an inappropriate email to BCDAD regarding a break between LIQ and the Oracle general ledger, an indication that Complainant's behavior had not changed. This was the lone inappropriate email brought to Mr. Cheung's attention. (Tr. at 325-335.)

D. Analysis

1. Protected Activity

Under Section 806 of SOX, a covered employer cannot discharge, demote, suspend, threaten, harass, or otherwise discriminate against an employee in the terms and conditions of employment because that employee carried out an act:

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344, or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct);

or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348 [18 USCS § 1341, 1343, 1344, or 1348], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a).

Unlike other whistleblower statutes, Section 806 of SOX enumerates the specific types of misconduct an employee must provide information about or report on in order to benefit from the protections of the Act. They include mail fraud [1341]; wire fraud [1343]; bank fraud [1344] and securities fraud [1348]. An employee's protected activity must concern one of these types of fraud. The employee "need not cite a code section he believes was violated in his communication to his employer, but [his] communication must identify the specific conduct that [he] believes to be illegal." Sharkey v. J.P. Morgan Chase & Co., 805 F.Supp. 2d 45, 57 (S.D.N.Y. 2011). Furthermore, the employee's protected activity need not describe an actual violation of the law, as long as it is based on a reasonable, even if mistaken, belief that the employer violated one of these enumerated categories. See Gladitsch v. Neo@ogilvy, Ogilvy, Mather WPP Group USA Inc., 2012 U.S. Dist. LEXIS 41904 at *22-23 (S.D.N.Y. 2011).

In Sylvester v. Parexel Int'l, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14 (ARB May 25, 2011), the Administrative Review Board ("ARB" or "the Board") similarly held that a complainant need only have a reasonable belief of a SOX violation in order for the complaint to be considered protected activity. In order to satisfy this standard, a complainant must have both a subjective and an objective belief that the conduct complained of constitutes a violation of relevant law. Id. at 14-15. That is, a complainant must have actually believed that such conduct constituted a violation and a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee must be deemed to have believed the same. Id. The complainant also need not actually convey a reasonable belief to management or authorities in order to engage in protected activity. Id. at 15.

Subsequent ARB case law clarified the definition of an objectively reasonable belief. In a later case, the Board definitively stated that a complainant may be afforded protection for complaints regarding infractions beyond the scope of those relating to shareholder fraud. See Zinn v. American Commercial Lines, ARB No. 10-029, ALJ No. 2009-SOX-025, slip. op. at 8 (ARB May 28, 2012). Thus, a clear and reasonable belief about a violation of any SEC rule or regulation, even if devoid of any accusation of securities fraud, could constitute an objective belief. Id. Just as in Gladitsch, Zinn held that a complainant need not establish the elements required in a securities fraud statute or describe an actual violation of law to demonstrate a

reasonable belief that an employer committed SOX-related misconduct, even if the complainant is mistaken in either instance. Id. at 9-10.

Complainant asserts that he engaged in five discrete acts of protected activity. This decision will address each act chronologically.

a. March 2013 Refusal to Reverse Adjustments for Letter of Credit

Complainant's first alleged protected activity centers on an incident that occurred in March 2013, in which Complainant refused to reverse a transaction related to the adjustment for a letter of credit. At the hearing, Complainant asserted that he sent an email to a department within Respondent's organization, PDAD, conveying that his superior, Sandy Lew, asked him to reverse a transaction. (Tr. at 158-59.) Complainant informed PDAD that the transaction related to a past-due fee. (Tr. at 161.) At the hearing, Complainant recounted that he told PDAD that Ms. Lew had asked him to do something wrong, rather than unlawful. Complainant based this assertion on Respondent's procedure manual regarding past-due fees. (Tr. at 162.) According to the manual, "Principal and interest are classified as delinquent if payment is not received within three (3) days of the due date." (WX 7.)

Although Complainant testified that he relied on the past-due item policy in the manual when alerting PDAD, he did not cogently explain why Ms. Lew's directive violated Respondent's company policy regarding past-due fees, let alone constituted fraudulent behavior under the Act. Moreover, the record does not contain any emails related to this particular episode. Complainant maintained that the email in which he reported Ms. Lew's instruction exists in his "Y" drive, but he could not produce the email because he did not have access to his work email address. (Tr. at 160-61.) The absence of this documentation makes it difficult for him to prove that he actually believed that Ms. Lew was committing a fraudulent act, leaving him to rely solely on testimony that took place three years after the occurrence of the alleged protected activity.

Aside from Complainant's brief testimony and the submission of an excerpt of Respondent's past-due item policy, he presents little else of substance proving that he reasonably believed that he engaged in SOX-related protected activity in March 2013. Due to the lack of supporting evidence, along with Complainant's reluctance to characterize Ms. Lew's instruction as unlawful, the undersigned finds that Complainant has not proven that he held a subjectively reasonable belief that his report of Ms. Lew's conduct constituted protected activity under the Act. As both a subjective belief and objective belief comprise the necessary components to establishing protected activity under Sylvester and Complainant has failed to prove the former by a preponderance of the evidence, the undersigned finds that he did not engage in protected activity by refusing to reverse an adjustment for a letter of credit in March 2013.

b. April 2013 Request to Reopen Book 880101 and Refusal to Post in Book 880111

Complainant prepared a manual adjustment for a possible profit/loss overstatement in the U.S. GAAP Book under Booking Branch 880101 related to a transaction that took place before

the fiscal year ended in March 2013 and brought it to Ms. Lew's attention on April 8, 2013. See JX 20 ¶ 6.) Specifically, Complainant reported an overstatement of about \$22,000 and requested that Ms. Lew open Book 880101 to upload this entry reflecting the adjustment. Ms. Lew told Complainant that Book 880101 had closed and she would review the adjustment. Complainant disagreed with her response and again requested that Ms. Lew open Book 880101 to upload this entry. Ms. Lew, along with her supervisor Tak Yu Cheung, met with Complainant and reiterated Ms. Lew's explanation that they could not reopen Book 880101 and that, if applicable, the adjustment would be posted to Book 880111. (Tr. at 188.)

The next morning, Complainant emailed Ms. Lew, asserting that this transaction did not belong in Book 880111 and included a list of items. (See JX 2.) Ms. Lew testified that these items referred to very routine and recurring adjustments made in the U.S. book. Per department policy, any adjustments needed for the U.S. book are to be entered into Book 880111, according to Ms. Lew. (Tr. at 191.) In response to Complainant's email, Ms. Lew repeated the same reasoning she and Mr. Cheung provided to Complainant the day prior. Expounding on her point, Ms. Lew told Complainant that unless the adjustment impacted the Japanese Book, the adjustment would be reflected in Book 880111. As such, Ms. Lew directed Complainant to prepare and upload the entry in Book 880111. (See JX 2.)

Later that morning, Complainant again pushed back, writing "The only situation we may anticipate in making adjustment in Facility 880111 is when we or U.S. regulatory find out that there are some mistakes or some missing entries for some regulatory reports. In this situation, opening [the] US Book to correct over-stated interest income, it would be an appropriate action compar[ed] [to] breaking the US law." (JX 2.) This time, Mr. Cheung responded to Complainant's email by instructing him to follow Ms. Lew's guidance as his department head. In his final reply of April 9, Complainant wrote to Mr. Cheung, "You are supposed to be on my side since I am trying my best not to have some adjustments posted into the regulatory reporting related [to] booking facility 880111 & 880112." (JX 2.)

Ms. Lew testified that, over the next few days, she conducted a very thorough investigation into the matter, which culminated in an email she sent to Complainant and Mr. Cheung among others. Her investigation revealed a profit/loss understatement of about \$4,000 instead of the approximate \$22,000 overstatement asserted by Complainant. (See JX 3.) Even if there had been an overstatement in that amount, Ms. Lew testified that she did not believe the overstatement would affect the bank's share price because \$22,000 represents only a fraction of the value of the asset, rendering it "immaterial" in accounting parlance. (Tr. at 190.) Ms. Lew's investigation did not find that the adjustment in Book 880111 violated U.S. law. (Tr. at 238.)

Ms. Lew later elaborated on her findings during her testimony. She explained that for the transaction at issue, the department received fees to be amortized over the lifetime of the loan until its termination on March 29, 2013. The record showed a discount unamortized fee of \$26,947.51 and so Ms. Lew entered all of the entry information into the loan accounting system, Loan IQ. Ms. Lew found a net credit of \$22,772.94 in Account No. 512007. Comparing that amount to the unamortized fee of \$26,947.51 indicated that the entirety of the loan was not fully amortized. This left \$4,174.57 remaining to be amortized to the profit/loss figure for fiscal year ending in 2013. That amortization took place in April 2013. (Tr. at 246-47; see also JX 3.)

In his testimony, Complainant expressed his belief that the overstatement would affect the income statement. However, Complainant conceded that he did not have knowledge about bank fraud or security fraud at the time of his refusal to complete the entry in Book 880111. Just as in the March 2013 incident, Complainant's testimony made clear that he did not describe Ms. Lew's instruction as unlawful, only that he believed her instruction would lead to an overbooking that showed an inaccurate amount of income. Moreover, he did not think about whether the perceived \$22,000 overstatement would affect Respondent's share price. (Tr. at 155-157.)

A Second Circuit case presented similar circumstances where a CPA, in his role of certifying the accuracy of its financial statements as his employer's signer, shared his suspicion that the company's commercial director recognized revenues in violation of the company's revenue policy. See Berman v. Neo@Ogilvy LLC, 2016 U.S. Dist. LEXIS 147902 at *7-8 (S.D.N.Y. 2016). Familiar with GAAP practices, the CPA believed that the improper recognition would have fraudulently manipulated company profits and misled shareholders and also asserted that the company's chief internal auditor acknowledged that this constituted a SOX violation. The CPA alleged that his attempts to persuade the company to take corrective action led to the termination of his employment. Id. In dismissing the company's motion to dismiss, the Court found that the CPA held a reasonable belief of protected activity, citing his obligation as signer and the corroboration of the chief internal auditor. Id. at 27.

Though the employee in Berman may have made an analogous allegation to that levied by Complainant concerning accounting irregularities, several important distinctions exist that establish that Complainant did not hold a reasonable belief that Ms. Lew had engaged in fraudulent conduct. Foremost among them, the CPA unambiguously alleged that his employer misled shareholders. In comparison, Complainant repeatedly declined to call Ms. Lew's actions unlawful or fraudulent at the hearing and, more importantly, did not alert either Ms. Lew or Mr. Cheung as to the perceived illegal nature of her actions. (Tr. at 156-159, 162, 165-166, 324-325.) This ongoing demurrer throughout the hearing eviscerates the notion that Complainant actually believed that posting the adjustment in Book 880111, and not Book 880101, amounted to fraudulent activity at the time he made his complaint. Moreover, Complainant testified that he formed this belief only after his termination upon consulting with an attorney. (Tr. at 152-153.) Complainant suffered his ultimate adverse action prior to becoming aware that he may have engaged in an alleged protected activity, whereas the Berman CPA, as the designated signer, formed a reasonable belief prior to his discharge. This distinction reinforces the notion that Complainant did not subjectively believe that his insistence on using Book 880101 constituted SOX-covered protected activity when he emailed Ms. Lew and Mr. Cheung in April 2013.

Second, the Berman CPA contended that the company's chief internal auditor agreed with his assessment that the commercial director had improperly recognized revenues and the Court determined that this fact added credibility to his claim. Here, Complainant has not introduced one individual who shared his belief that Ms. Lew's directive to post the adjustment in Book 880101 constituted a SOX violation. While certainly this is not a prerequisite to proving protected activity, the lack of support does not strengthen Complainant's claim in the face of his inability to otherwise explain how Ms. Lew's actions violated SOX. The closest Complainant

came to articulating such a reason was when he testified that Ms. Lew's instruction to post in Book 880101 posed a problem "[b]ecause that book is not related to the entry book in Loan IQ." Complainant attempted to explain that Loan IQ automatically processed amortized income into the general ledger, but can be adjusted manually. (Tr. at 101-102.) However, this explanation falls short of illustrating how Ms. Lew's directive constituted fraudulent activity as enumerated under the Act.

In comparison, Ms. Lew did not simply refute Complainant's claim in conclusory manner. She supported her position with thorough research reflected in JX 3 and uncovered that, not only did fraudulent activity not occur, but also a \$4,000 understatement had been made instead of the \$22,000 overstatement as contended by Complainant. Unlike in Berman, where the chief internal auditor corroborated the CPA's findings, Ms. Lew shared well-researched findings that actually disproved Complainant's claims.

Finally, Complainant has not demonstrated that he held an objectively reasonable belief that he had engaged in protected activity. To do so, he must have demonstrated that a reasonable person in the same factual circumstances with the same training and experience would have believed that Respondent had engaged in fraudulent activity. Complainant testified that his job involved identifying discrepancies on the balance sheet, income statement, and expense accounts and reconciling the sub-ledger and general ledgers. (Tr. at 20.) The parties further stipulated that Respondent had employed Complainant since February 2007 as a Support B employee in the Financial Accounting Department—Controllers Group. His responsibilities included identifying and reconciling any differences in account balances between the general ledger and various sub-ledgers, recording daily account balances of ledgers, and preparing reports. His job description also stated that he spent eighty percent of his time reconciling, identifying, and investigating any differences between sub-ledgers, and the general ledger to ensure accuracy in the balance sheet and income statement and that the account balance of the sub-ledgers and general ledger correspond to one another. (See JX 20 at ¶¶ 2, 3.)

Complainant worked for Respondent for almost seven years. Based on past performance evaluation ratings, he consistently earned ratings of three and four on a one-to-five scale, indicating that Complainant possessed an adequate understanding and satisfactory command of the job duties described above. (See WX 1-4.) With that in mind, Complainant made the same accusation five times within two days to either Ms. Lew or Mr. Cheung. The undersigned also notes that when Ms. Lew communicated her findings upon performing research and came to a different conclusion than that reached by Complainant, he refused to accept the validity of her findings. A reasonable person in Complainant's position would have either engaged in a give-and-take regarding his differences with Ms. Lew or would have accepted his supervisor's findings. Instead, Complainant repeated the same accusation, even in the face of contrary evidence indicating otherwise.

For all of these reasons, the undersigned finds that Complainant had neither a subjectively nor an objectively reasonable belief that Ms. Lew's direction that he post in Book 880111 constituted fraud under SOX. Because he could not prove both types of belief by a

preponderance of the evidence, the undersigned finds that Complainant did not engage in protected activity when he questioned Ms. Lew's practices.

c. July 2013 American Express Travel Expense

According to Ms. Lew's memorandum, she asked Complainant to make a routine adjustment in July 2013. The adjustment concerned several checks made out to Respondent, as reflected in JX 4, some dated June 2013 and some dated July 2013. Complainant explained to Ms. Lew that he would not execute the adjustment because the date of the accompanying memo differed from the date on the actual entry of the accounting voucher. Complainant insisted on reissuance of the memo or else he would not make the adjustment. (See JX 13.) At the hearing, Complainant conceded that he did not include this incident as part of his OSHA report. In an answer to a self-interrogatory, he explained that he did not include the travel expense issue in his report because he:

...was really busy [trying] to complete a lot of reports in the morning...that day so that when Wai Mei Lew took those documents back I just forgot that part. I remember[ed] that there was something that happened in the last year tickled me, but I could not get a better picture so I did not include the Amex travel expense in the complaint. I depended on the documents from [Respondent] to refresh my memory.

(Tr. at 151-152.)

Complainant believed that the way Ms. Lew ordered him to enter the checks would compromise the accuracy of the company's cash account and misrepresent the company's liquidity to investors. (Tr. at 116). On the other hand, Complainant acknowledged that he did not know whether Respondent had committed bank fraud or securities fraud against its shareholders based on the processing of these checks at the time. Neither did he share this belief with his superiors in July 2013. Like the Book 880111 issue, he formed his belief that he had engaged in protected activity after the termination of his employment when, in March 2016, he conferred with an attorney and reviewed documents provided to him by Respondent during the course of discovery. (Tr. at 152-154.)

In her testimony, Ms. Lew acknowledged that she intentionally booked some of the checks in JX 4 in July, rather than June. (Tr. at 218.) However, she also explained that the company issues a corporate American Express card to certain employees. Those employees charge expenses to the card and American Express sends a statement reflecting these charges to Respondent, which then pays the balance. If an employee uses the company credit card for an unauthorized purchase, that employee writes a check in the amount of that purchase to reimburse Respondent and sends it to the General Affairs Department. General Affairs then sends a copy of the check to FAD-Controllers, which then makes the applicable adjustment in its records. (Tr. at 243.) Ms. Lew also made clear that General Affairs, not her department, receives the check. (Tr. at 215.)

In some instances, questions surrounding a systems error related to the entry of dates can qualify as protected activity. In Robinson v. Morgan Stanley, a senior auditor discovered that the

company's reliance on the date of notice, as opposed to the date of receipt, caused a delay in the charging of customer bankruptcies. This practice resulted in the inflation of the respondent's financial statements and made it look as if they had more assets than they actually did and the auditor raised her concerns with her direct supervisor. ARB No. 07-070, ALJ. No. 05-SOX-044, slip op. at 2-3 (Jan. 10, 2010.) The ARB determined that the respondent materially misstated its financial condition to its investors and thus its misconduct came under the umbrella of the Act. Id. at 12. The facts here differ from those in Robinson in material ways, however. First, the auditor in Robinson submitted a memorandum to the respondent's CFO, concluding that the discrepancies could have a potential impact of \$8 million. As opposed to this potential multi-million dollar error in Robinson, none of the checks at issue exceed \$1,000 and only two out of seven exceed \$250. More importantly, the auditor in Robinson explained that discharging bankruptcies in the improper period would deceive shareholders. In contrast, Complainant did not convey what he believed to be the fraudulent impact of processing June transactions in July. Standing alone, Respondent's timing of processed checks does not fall under mail, wire, banking, or securities fraud.

Aside from holding an objectively unreasonable belief that fraudulent activity was afoot as compared to the Robinson auditor, Complainant also concedes that, at the time of his refusal to enter the adjustment in July 2013, he did not know whether the dates on these checks from the previous month constituted bank or securities fraud. That admission alone eliminates the possibility that Complainant held a subjective belief, that is, Complainant himself actually believed, that he had engaged in protected activity by refusing Ms. Lew's instruction. In order to successfully maintain an allegation of a violation of SOX, a complainant's belief as to a violation of SOX must be reasonable from the outset. See Twyman v. TaxMasters, Inc., 2010-SOX-055, slip op. at 4 (Feb. 16, 2011).

Beyond a vague "tickling" sense, Complainant at no time articulates why adjusting a June check in the month of July would be considered fraudulent under any of the categories enumerated in Section 806. "Providing information to management about questionable ...corporate expenditures with which the employee disagrees...is not protected under the SOX. To bring himself under the protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations." Harvey v. Home Depot U.S.A., Inc. ARB Case Nos. 04-114, -115, ALJ Case Nos. 04-SOX-20, slip op. at 14-15 (June 2, 2006.) Devoid of an accusation of fraud, it appears that Complainant merely disagreed with Respondent's practice of posting some June transactions in the following month's ledger. This dispute alone does not suffice to raise a question of misconduct under the Act. Moreover, the notable omission of this incident from his original OSHA report also indicates that Complainant did not consider himself to have participated in protected activity during this particular episode.

d. June to November 2013 Portfolio Transfer Transaction and LIQ-GL Break

According to Complainant, BCDAD improperly claimed commissions on a portfolio transfer transaction. (Tr. at 145.) Complainant defined a portfolio transfer as a transfer from one expense code to another expense code. After entering a manual adjustment, Ms. Lew asked Complainant to review the entry because of the time gap between the June approval date and the September or October execution date. Complainant consulted the policy and procedure manual

and declined to make the adjustment, for he viewed this three to four month time lapse as a serious matter. In his testimony, Complainant asserted that the loan administrator purposefully held the transaction in an expense code for a longer time than necessary, which he believed related to bank fraud. Because Complainant did not see any documentation explaining this delay, he surmised that the only reason for the delay was to make income on the deal. (Tr. at 117-120.) The inconsistencies of these dates heightened Complainant's awareness going forward. (Tr. at 126-127.)

In Complainant's mind, these concerns resurfaced as reflected in an email exchange with Michael Alcantara of BCDAD dated November 27, 2013, when he informed Mr. Alcantara that a portfolio transfer from the day before had not been properly transferred. This email triggered an exchange between Complainant and Mr. Alcantara. Mr. Alcantara attempted to clarify that the issue did not concern a portfolio transfer, but instead was a corrective amendment to an expense code on the deal level. Complainant responded by accusing Mr. Alcantara of deceit:

Based on your behavior of sending E-mail to trick PDAD - FAD Controllers - Bank Accounting to make any Manual Adjustments, it would be better that BCDAD - Application and Reporting should send an interoffice document with all your supervisors' (including GM) stamps and all relevant document[s] supporting any transactions related to or similar to Portfolio Transfer in the future.

(JX 10.)

Mr. Alcantara's supervisor, Ms. Garcia, whom Complainant had copied on this exchange, intervened. She reiterated Mr. Alcantara's explanation and assured Complainant that no event in LIQ showed a change in the deal expense code and that Respondent would never try to "trick" the Controllers to make an adjustment. (See JX 10.)

Ms. Garcia explained that Complainant reported a break, or a discrepancy imbalance, between the sub-ledger and general ledger to Mr. Alcantara on November 27, 2013. (Tr. at 250.) Ms. Garcia researched the issue and emailed the results of her inquiry to Ms. Lew, explaining that the loan administrator changed the deal expense code, which caused an offset between Loan IQ and the General Ledger and went to a different expense account than the principal entry intended. Ms. Garcia seemed to acknowledge a defect in the system, as she told Ms. Lew that she was looking to an integrity check report that would compare the LIQ deal expense code to the portfolio expense code to identify future discrepancies. Going forward, the report would be verified on a weekly basis. (See JX 14.)

In fairness to Complainant, it appears as if he brought a defect to the attention of Respondent. However, one can more accurately characterize Complainant's initial warning to Mr. Alcantara regarding the double booking as quality control rather than protected activity. Despite the accusatory tone of his email, Complainant identified a flaw in Respondent's accounting software program, which set in motion Ms. Garcia's efforts to rectify the problem. Ms. Garcia's explanation of the November 2013 discrepancy supports this account in both her testimony and her email correspondence with Ms. Lew. Ms. Garcia testified that one can enter an expense code into Loan IQ in two ways: at the deal level and at the portfolio allocation level.

Mr. Alcantara, a new employee at the time, misidentified the expense code at the portfolio allocation level, not the deal level, which caused a break between the general ledger and sub-ledger. (Tr. at 253-254.) Raising a quality control issue, however, does not equate to blowing the whistle regarding fraudulent activity.

Fraud, as defined by an element of deceit, is an integral element of a SOX claim. See Wengender v. Robert Half Int'l. Inc., 2005-SOX-059, slip op. at 15 (Mar. 30, 2006). In Wengender, a salesperson articulated concerns about individuals receiving commissions that they did not actually earn. Id. at 10. From a subjective point of view, Complainant articulated a belief that deception had occurred when he accused Mr. Alcantara of “tricking” the Controllers Group. He inferred a common theme between the delayed execution date of the June 2013 transaction and November 2013 portfolio transfer. Specifically, Complainant sought to link these discrepancies by showing that they both represented an attempt to claim unearned commissions by booking a deal into two expense codes, causing Respondent to improperly award two bonuses for one transaction. To support this theory, Complainant referenced an excerpt of the BCDAD Loan & Credit Services manual, located at WX 7. Pursuant to this guidance, Respondent should have manually eliminated one of the expense codes upon discovery of two expense codes assigned to one transaction, according to Complainant. Had Complainant authorized the transaction, he felt as if he would be covering up a trail of deception. Nothing in the automated system enabled Complainant to identify which expense code the transaction actually belonged to and he believed Ms. Lew did not thoroughly investigate this irregularity. (Tr. at 124-126.)

Complainant did not waver in his testimony that he believed that entering the expense code represented a cover-up. He also cited an excerpt from Respondent’s procedural manual as a basis for this belief. Even assuming Complainant genuinely believed that the loan administrator double booked a single transaction that resulted in a duplicate commission, he still has the burden of proving that he reasonably believed that this practice falls under the purview of the Act. In Wengender, the ALJ granted the employer’s motion for summary decision in part because SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud and is instead limited to specifically enumerated laws or regulations related to fraud against shareholders. See Wengender, 2005-SOX-059 at 15. While the salesperson in that case need not have shown an actual violation of securities law or federal regulation, he nevertheless failed to show that he actually believed the reported activity violated such a law or regulation, the ALJ held. Id. at 16. Complainant has likewise failed to prove that this allegation amounts to anything more than, at most, a possible internal accounting violation. Asked point blank whether he told Mr. Cheung or Ms. Lew that the BCDAD group had engaged in fraudulent or unlawful activity, Complainant responded “I can only say wrong, not unlawful.” (Tr. at 166.) His answer triggered the following exchange with Respondent’s counsel:

Q: Wrong in the sense of not following the procedures that you were used to following at the bank; is that correct?

A: Yes. And I can say the policy procedure manual [has] other things that related to contracts and some regulation laws, things like that, so I would just say I would point [out] that policy manual procedures to them. Then, as a CPA, both

of them...have extensive knowledge about what those transaction[s]...are related to. And the reason why the Loan IQ subsystem purposefully [has to be] made manually, have to be checked by one person, two person and three person before they can go through the whole thing, I believe they should understand why.

Q: Did you tell anybody else at the bank, before you were terminated, that you thought that what BCDAD group had done was fraudulent or unlawful in any way?

A: I can only say wrong, but unlawful or whatever—

Q: Wrong, but not fraudulent or unlawful?

A: I cannot determine—I can only say wrong, but...Matthew Judge did look at that email. So he has, I think, Sandy and Tak direct[ed] that email to Matthew Judge, and someone in human resources...should have a knowledge about what are those. And if they don't have knowledge about those, I think they can consult [an] internal auditor, because they have an internal controller that does understand...the connection between the BCDAD loan services operations and PDAD controller's accounting practice. So I believe they should have some sort of understanding about that.

(Tr. at 166-167.)

Complainant is not obligated to demonstrate an actual violation of SOX constituting securities fraud or other federal regulations related to SOX; he must only believe that the reported activity constitutes such a violation. Based on this testimony, Complainant makes a vague allusion to an internal policy procedural manual, not to a law or regulation covered by the Act. He very clearly stated that he could not determine whether BCDAD committed unlawful or fraudulent misconduct. Moreover, he speculatively relied on imputed knowledge of various individuals, including two CPAs, an auditor, and a human resources official, to make his case, and not knowledge of his own. Reliance on the speculative thoughts of others does nothing to further his claim of a subjective belief. Moreover, his reference to BCDAD's loan services and PDAD controller's accounting practice echo the generic allegations of accounting and GAAP violations not covered by the Act, as explained in Wengender. Indeed, Complainant discusses GAAP irregularities in his testimony, but not in relation to the BCDAD incident. He certainly did not link any GAAP irregularities to the Act per se. For these reasons, Complainant has failed to show that he reported an activity that falls under the purview of the Act.

Even assuming that Complainant could prove that he reasonably believed that refusing to enter the portfolio transfer fell under the auspices of the Act, Wengender dictates that he must also demonstrate materiality of the portfolio transfer. In that case, the ALJ deemed the financial implications of the salesperson's protected activity did not rise to the level of materiality required under SOX, as the complainant alleged that a reassignment of credits devalued the company's stock by \$12,500, when the company's financial statements were comparatively rounded to the nearest million dollars. See Wengender 2005-SOX-059 at 17. Here, the only time that

Complainant testified to Respondent's share price of its stock appeared to come during a discussion of the alleged April 2013 protected activity, not in relation to the portfolio transfer. There, Complainant did not detail the material impact a duplicate commission would have on Respondent's share price. For example, Complainant averred that the overstated income from the April 2013 booking disagreement would "somehow impact possibly...the stock price because, the income statement affect[s] the stock price as well, especially [in] this fiscal year end report. So that's why I decline[d] to make the adjustment that make[s] the...income amount even more than it already is." (Tr. at 107-108.) Complainant further explained that the discrepancy between books can have an "impact on [Respondent's] company cash account. The most significant part is this has significant impact on cash...because a lot of investor[s] look at the cash account to define the liquidity of that company." (Tr. at 116.) If indeed investors looked at the cash account to ascertain Respondent's liquidity, a proposition for which Complainant did not provide support, he did not describe the discrepancy as a material misrepresentation. The ALJ in Wengender deemed not material a diminution of the \$12,500 worth of stock for a company with millions of dollars reflected in its financial statements. Here, Complainant did not even try to quantify the impact of the booking error in proportion to Respondent's overall financial health. Indeed, Complainant did not controvert Ms. Lew's testimony as to the immateriality of a \$22,000 overstatement. (Tr. at 190.) Therefore, Complainant's complaint does not pass the materiality test.

In sum, although Complainant subjectively perceived a deceptive practice of assigning two expense codes to a single transaction which manifested as a break between the general ledger and sub ledger, he did not prove an objective belief that such conduct fell under the purview of SOX. Even had he done so, he did not address whether such activity was material under the Act. Thus, Complainant did not engage in protected activity when he reported the error between the ledgers.

e. November 2013 Removal of Cognos Report

On November 19, 2013, Complainant lodged a complaint that Hui Bing Situ moved a Cognos daily exchange report without notifying him such that he no longer could access the report on his computer. Complainant's email to Ms. Lew stated the removal of the report created "a lot of inconvenience" for him. (See JX 7.)

Complainant testified that he needed the report to perform daily ethics error reconciliation between the general ledger book and the foreign exchange rate for the sub-ledger system book, which he would upload and send to other employees. One day, Ms. Situ moved the report and Complainant could not locate it without asking her. He perceived Ms. Situ's actions as harassment because he could not complete his job, so he filed a report with Ms. Lew. He also believed that Ms. Situ purposely rejected parts of his report instead of correcting his work. This caused a deterioration in his relationship with Ms. Situ and Ms. Lew, especially after the March transaction. In related complaints, Complainant alleged that Ms. Situ harassed him by unnecessarily inviting him to a meeting and that IT Consultant Irina Tishelman delayed by more than a month giving him what turned out to be a disorganized report that made it more difficult for him to complete his work. (Tr. at 129-137.)

According to Ms. Situ's testimony, the daily exchange report shows and validates all of the inputs from the foreign exchange ("FX") department. She instructed Ms. Tishelman to remove the report, but she did not do so to harass Complainant. The head of the foreign exchange department requested that all reports move from the old system to the new system as part of a data migration. Based on the request, Ms. Situ decided to move the report from one folder to another to allow the FX department access to that particular folder. Had Ms. Situ not moved the report, the FX department would have been closed off from it. (Tr. at 275-278.)

Ms. Situ first learned of Complainant's issue on the morning of November 19, 2013 when Ms. Tishelman told her that Complainant had sent her an instant message inquiring as to the location of the report. (See JX 7.) Ms. Situ directed Ms. Tishelman to make a copy of the report and save it to the original folder. Right after, according to Ms. Situ, Complainant approached Ms. Situ at her desk and, in rude and hostile tone, criticized the report as ridiculous. Ms. Situ was upset by this interaction because Complainant simply could have approached her or Ms. Tishelman to inquire as to the location of the report. Ms. Situ acknowledged that Complainant needed access to the report and that she had not notified Complainant of the move beforehand. (Tr. at 278-284.)

The Board has held that a "mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is **not enough.**" Harvey, ARB Nos. 04-114, -115 at 15. This particular complaint does not even meet the standard that the Board interpreted as insufficient to qualify as protected activity in Harvey. At no point does Complainant even argue that the removal of the daily exchange report as a result of the migration upgrade could adversely affect Respondent's financial condition. He only complained of his perceived lack of access to it. The same goes for his complaint about an invitation to a meeting that he felt did not concern him and his complaint about Ms. Tishelman's late delivery of a report to Complainant. As Complainant failed to link Ms. Situ's and Ms. Tishelman's actions to his belief that they committed any of the enumerated kinds of fraud under the Act, the undersigned finds that Complainant did not reasonably believe that he engaged in protected activity by complaining about the report's relocation.

f. Conclusion

Complainant has alleged five instances of protected activity. For the reasons articulated above, he has failed to prove, by a preponderance of the evidence, that he engaged in statutorily-protected activity under SOX on any of these five occasions. This finding necessarily obviates the question of whether Respondent knew that Complainant engaged in protected activity. As such, Complainant has failed to make out his *prima facie* case and the matter must be dismissed. However, the undersigned will extend her analysis in the alternative to discuss the issues of adverse action and contributing factor.

2. Adverse Action

The ARB clarified the standard of what constitutes an adverse action against SOX whistleblowers in Menendez v. Halliburton, Inc., ARB Nos. 09-002, -003, ALJ No. 2007- SOX-5 (ARB Sept 13, 2011). The Board cited to the plain language of SOX section 806 which states

that no employer “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” Id. at 15. By explicitly proscribing non-tangible activity, the language of SOX demonstrated a clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers, according to the Board. It further found that the express statutory language of section 806 is more expansive than the Title VII provisions addressed in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), and consequently demands a correspondingly broader interpretation.

The Board elaborated, “Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” Id. at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” Id. at 20. Accordingly, the Board views “the list of prohibited activities...as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions...which are coupled with a reference of potential discipline.” Williams v. American Airlines Inc., ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 (ARB Dec. 29, 2010).⁴ However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Complainant identifies three adverse actions: his placement on a performance enforcement plan (“PEP”) on August 9, 2013, his negative PEP progress report on December 3, 2013 and the termination of his employment on December 6, 2013. See Complainant’s Brief at 6, 8.

A written warning or counseling session will be considered presumptively adverse where: (a) it is considered discipline by policy or practice; (b) it is routinely used as the first step in a progressive discipline policy; or (c) it implicitly or expressly references potential discipline. See Williams, ARB No. 09-18 at 11. When Ms. Lew conferred with Mr. Judge, Respondent’s Vice President of Human Resources, he advised her that they could place Complainant on a PEP as a first measure geared toward rectifying Complainant’s misconduct. (Tr. at 292.) The PEP warned that if his superior did not see an improvement in his performance and did not achieve the goals set out in the PEP, Complainant would be subject to discipline up to and including termination. (See JX 6.) Because Mr. Judge characterized the PEP as a first step in a progressive discipline policy and warned Complainant of potential discipline, the issuance of the PEP amounts to an adverse action.

Following what Respondent deemed Complainant’s unsatisfactory performance, Mr. Judge issued a progress report as part of the PEP on December 3, 2013. The progress report explicitly gave Complainant a Final Warning and the accompanying memorandum informed Complainant of his ineligibility for promotion, transfers, or tuition reimbursement. It also

⁴ “Because of its similarity to the adverse action language construed in Williams...we adopt the Williams standard of actionable adverse action as likewise applicable to Section 806 cases.” Menendez, ARB Nos. 09-002,-003 at 17.

advised that a lack of substantial and sustained improvement in his performance would trigger additional disciplinary action. (See JX 15, 16.) Because the PEP progress report referenced disciplinary measures for Complainant if he did not improve his performance, Complainant suffered an additional adverse action when he received his progress report.

An adverse action need not stem from a retaliatory or illegal motive. It must simply constitute an unfavorable employment action. See Vannoy v. Celanese Corp., ARB No. 09-118, ALJ No. 2008-SOX-064, slip op. at 13-14 (Sept. 28, 2011)(holding that complainant suffered an adverse action when employer terminated his employment irrespective of motive). As termination of employment represents the ultimate act that would dissuade an employee from engaging in protected activity, the undersigned finds that Complainant also suffered an adverse action when Respondent discharged him on December 6, 2013.

3. Contributing Factor

To prevail on a SOX claim, Complainant need not disprove Respondent's asserted reasons for the issuance of his PEP, progress report, and subsequent discharge. Instead he must prove, by a preponderance of the evidence, that SOX-related protected activity represented a contributing factor to these adverse actions, whether in isolation or conjunction with other factors. See Seguin v. Northrup Grumman Systems Corp., ARB Nos. 15-038,-040, ALJ No. 2012-SOX-037, USDOL/OALJ Rptr. at 7 (May 18, 2017).

As discussed above, Complainant has failed to establish protected activity under the Act. However, even if any of Complainant's complaints had constituted protected activity, the evidence indicates that Respondent assigned him a PEP, gave him a negative progress report and subsequently discharged him for reasons other than reporting fraudulent activity.

Complainant attributed the introduction of the PEP to three incidents: the conflict with Ms. Lew regarding the March 2013 manual adjustment; the discrepancy regarding an overstatement and understatement that came to light in April 2013; and the argument with Ms. Lew concerning the accounting dates of the manual adjustments on checks received by Respondent. In particular, Complainant averred that Respondent did not issue the PEP to rectify his performance, but to threaten Complainant so that he would make manual adjustments based on Ms. Lew's directions. See Complainant's Brief at 8-9. However, the reasons Respondent set forth in the PEP did not invoke any of these incidents as a rationale for placing Complainant on a PEP. Instead, it cited three performance areas in which Respondent sought improvement: Professionalism/Teamwork, Corporate Values/Conduct, and Attendance and Punctuality. (See JX 6.) Complainant has not presented any probative evidence suggesting that protected activity, and not these problem areas, motivated Respondent's assignment of the PEP. For example, Complainant conceded that he tended to arrive at work late. (Tr. at 142.)

He also argued that Respondent could not provide any documents supporting its articulated concerns on the PEP. Moreover, Complainant averred that the PEP did not reference the email advising Ms. Lew that not reopening Book 880101 would violate U.S. law. See Complainant's Brief at 8. That Mr. Judge omitted this allegation from the PEP, however, actually belies Complainant's argument that his accusation contributed to the issuance of the PEP. Instead, the omission of this incident serves to strengthen the argument that it did not

contribute to Complainant's placement on the PEP. If Respondent wanted to retaliate for Complainant's action, surely Mr. Judge would have referenced Complainant's accusation that Ms. Lew's actions violated U.S. law in the PEP. Complainant has not otherwise shown that the reasons cited on the PEP, none of which can be considered protected activity, were pretext for drafting the PEP. Complainant also contended that only Ms. Situ, and no one else, complained about his behavior and that Respondent could not provide specific dates for his tardiness or a guideline for its lateness policy. However, these claims, even if true, do nothing to assist Complainant in proving that Respondent issued the PEP due to protected activity. Rather, the testimony of the witnesses shows that Mr. Judge placed Complainant on the PEP for his failure to follow the instructions of his supervisor, Ms. Lew.

As to the second adverse action, Complainant attempted to link these aforementioned incidents, along with his conflict with Ms. Lew over the execution date and approval date of the portfolio transfer, to the negative progress report he received on December 3, 2013. See Complainant's Brief at 9. Just as with the original PEP, Complainant maintained that the purpose of the first progress report was to threaten him into complying with Ms. Lew's instructions. See Complainant's Brief at 11. Respondent found Complainant's progress deficient, noting his "inability to resolve issues in a constructive and professional manner," that his continued questioning of management directives created confusion for colleagues and clients, and that he presumed a position above his role in the department under the Professionalism/Teamwork criterion of the progress report. (JX 15.) Complainant has acknowledged that he refused to follow his supervisor's guidance. See Complainant's Brief at 10. This, along with several other episodes discussed above, are consistent with the criticism leveled against Complainant in the progress report. Mr. Judge also noted Complainant's failure to communicate in a professional, respectful, and productive manner and the impact of his refusal to follow Respondent's policies, in addition to his repeated tardiness, as causing his lack of confidence in Complainant and his ability to perform his job functions. The progress report does not, however, cite anything resembling protected activity as a reason for his deficient performance.

The closest Complainant comes to successfully arguing that Respondent gave him a negative review due to protected activity appears in the email excerpt in which Mr. Palmieri asked Mr. Cheung and Ms. Lew whether they had followed proper procedure in connection with the November 27, 2013 portfolio transfer. See Complainant's Brief at 11. The undersigned presumes that Complainant views this email as an admission of wrongdoing. However, Complainant takes this quote out of context. The email from Mr. Palmieri, referencing Complainant's repeated emails, reads "How long is this going to continue? **Is he now insinuating that** we are not following procedure? Please call Gina directly if we need to provide any further explanation." (JX 12) (Emphasis added). In his brief, Complainant omitted the bolded text of the email. Taken in its full context, Mr. Palmieri does not acknowledge that Respondent has not followed procedure in this email, but instead seeks clarity as to what Complainant is alleging. Even assuming Respondent did not follow procedure, Complainant has not established that such failure to follow company policy falls under SOX as fraudulent activity.

Finally, Complainant again ascribed the above-mentioned episodes to the termination of his employment, adding Respondent's alleged failure to follow or maintain BCDAD's policy and

procedure manual as an additional contributing factor. See Complainant's Brief at 12. As discussed previously, Complainant has not presented credible evidence that a) Respondent did not follow procedure; b) that violating such procedure falls under the whistleblower protection provision of the Act; or c) that such a violation contributed to his termination.

Mr. Cheung made the ultimate decision to terminate Complainant's employment. He cited Complainant's attitude toward his co-workers, hostility toward his manager and the deterioration of the Controllers Group's relationship with BCDAD as reasons for his decision, especially because these developments occurred at a stressful time as the reporting quarter came to an end. Complainant's conduct also hurt department morale, according to Mr. Cheung. (Tr. at 324.) Testimony from a number of co-workers and superiors corroborates this justification. Many of these episodes precipitated the issuance of the PEP, the poor marks on Complainant's progress report, and his eventual discharge.

According to Ms. Lew, after she approached Complainant to request that he demonstrate better teamwork, Complainant sat back, smiled disrespectfully, and told Ms. Lew not to step in his cubicle unless she had something to show him and told her to set a meeting with him in advance for future assignments. (Tr. at 193.) He accused a member of BCDAD of attempting to trick the Controllers Group and sent additional emails reiterating this baseless accusation. (See JX 10.) Looming over a seated Ms. Situ, Complainant confronted her in a loud, rude, and hostile manner when he could not find a missing report. (Tr. at 280-281.) Also in a hostile and unprofessional tone, Complainant told Ms. Situ not to include him as a required attendee for meetings going forward. (Tr. at 273.) Both incidents upset Ms. Situ. When Complainant met with Mr. Judge to receive the PEP, he refused to sign it. (Tr. at 294.) In a subsequent contentious meeting, Complainant refused to listen to Mr. Judge and Ms. Lew, interjected himself into the conversation when others spoke, and otherwise demonstrated his lack of professionalism. (Tr. at 297-298.) These accounts of Complainant's behavior are consistent with Mr. Cheung's description of Complainant as hostile toward others and detrimental to the Controller Groups' relationship with BCDAD. Complainant did not contest that these incidents occurred.

Ms. Lew's memorandum made in advance of the PEP both substantiated these confrontations and also shed light on events that further support Mr. Cheung's reasons for firing Complainant. (See JX 13.) She cited Complainant's continual objection to the company's practice of closing Book 880111 based on totally irrelevant data and his repeated tardiness. At no point in the course of this litigation has Respondent strayed from its justification for discharging Complainant. For these reasons, even assuming Complainant engaged in protected activity, he would not have proven, by a preponderance of the evidence, that such activity contributed to the adverse actions taken by Respondent.

IV. CONCLUSION

For the reasons explained above, Complainant has failed to demonstrate that Respondent violated Section 806 of SOX by taking adverse employment actions against him because he engaged in protected activity.

V. ORDER

Complainant is not entitled to relief under the Act.

SO ORDERED

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, NJ

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

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

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

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

If 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. §§ 1980.109(e) and 1980.110(b). 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. § 1980.110(b).