



In the Matter of:

OSCAR B. SHIRANI,

ARB CASE NO. 03-100

COMPLAINANT,

ALJ CASE NO. 2002-ERA-28

v.

DATE: September 30, 2005

COMED/EXELON CORPORATION,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael C. McDermott, Esq., *Chicago, Illinois*

For the Respondent:

Scott E. Gross, Esq., Darren R. Reisberg, Esq., *Sidley Austin Brown & Wood, Chicago, Illinois*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 2003), and implementing regulations at 29 C.F.R. Part 24 (2005). Oscar Shirani complains that his employer, Business Services Company, a subsidiary of the Exelon Corporation, violated § 5851 when it terminated his employment in December 2001. On April 30, 2003, a Labor Department Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending that Shirani's complaint be dismissed. For the reasons that follow, we concur and dismiss the complaint.

BACKGROUND

Oscar Shirani holds a Bachelor of Science and Masters degrees in civil engineering. Tr. 45. He commenced his employment with Commonwealth Edison

Company (ComEd) in 1990 as a structural engineer. Tr. 45, 54. In 1994, Shirani moved to the Supplier Evaluation Services (SES) group in ComEd's Quality Assurance Department. Tr. 68, 252. Shirani's primary duties in SES were to perform audits of nuclear suppliers who provided material or services to ComEd's nuclear power generation plants. Tr. 743.

In October 2000, ComEd became a subsidiary of the Exelon Corporation. Tr. 665. Shortly thereafter, Shirani moved to another Exelon subsidiary, Business Services Corporation (BSC), to take a position as a non-supervisory auditor in the internal audit unit. Tr. 396.

In October 2001, BSC substantially restructured internal auditing, created new positions, and posted the positions for bidding by Exelon employees. All employees were required to reapply for their jobs. Tr. 489. Though Shirani had no management experience and was still learning how to conduct financial audits, he applied for a principal/manager auditor position. Tr. 549. Shirani did not apply for the non-supervisory position he currently held, though encouraged to do so. Tr. 543. The internal audit manager rejected Shirani's application for principal auditor and instead selected applicants with substantial management and financial auditing experience. Tr. 546, 556-557. Since Shirani did not apply for the non-supervisory position he currently held, Com Ed/Exelon automatically terminated his employment. Tr. 398.

Shirani filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that ComEd/Exelon terminated his employment "in retaliation for his participation in Nuclear Regulatory Commission (NRC) proceedings." CX 1 at 1. After an investigation, OSHA found Shirani's complaint to be without merit. Shirani appealed OSHA's finding. A hearing was held in December 2002.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the

agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself”). In weighing a witness’s testimony, the fact-finder considers the relationship of the witness to the parties, the witness’s interest in the outcome of the proceedings, the witness’s demeanor while testifying, the witness’s opportunity to observe or acquire knowledge about the subject matter of the witness’s testimony, and the extent to which other credible evidence supported or contradicted the testimony. *Jenkins v. United States Env’tl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB will defer to an ALJ’s credibility determinations that are based on such observation. *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000). See *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) (“The Board gives great deference to an ALJ’s credibility findings that ‘rest explicitly on the evaluation of the demeanor of witnesses.’”), citing *NLRB v. Cutting*, 701 F.2d 659, 663 (7th Cir. 1983)).

FINDINGS OF FACT

Having reviewed the entire record, the ALJ’s recommended findings of fact, and the parties’ arguments on review, we make the following findings of fact. In so doing, we defer to the ALJ’s credibility finding that Ruth Ann Gillis, whose testimony contradicted Shirani’s testimony in significant part, “was a highly credible witness and her testimony compelling.” R. D. & O. at 24. We also note that our findings of fact are consistent with the ALJ’s findings in all material respects.

ComEd merger with PECO and creation of Exelon in 2000

ComEd, a subsidiary of Unicom, operates power generation plants in the Chicago area. Tr. 54. In October 2000, Unicom Corporation merged with PECO Energy Corporation, which operated power generation plants around Philadelphia. ComEd and PECO became subsidiaries of Exelon Corporation. Tr. 664-665.

The ComEd and PECO workforces were merged and downsized in a “re-staffing” process. Tr. 763. The re-staffing consisted of three steps: Exelon first determined its new staffing needs. Exelon then posted the new positions on the company computer network. Tr. 358-359. Any ComEd or PECO employee who wanted to work for Exelon could apply for a position. Incumbents who did not apply for a position were automatically terminated with severance benefits that included severance pay and re-employment assistance. Workers who applied but were not selected were also automatically terminated with severance benefits. RX 33.

In 2000, Shirani re-applied for the principal auditor position he already held in SES. Tr. 263, 763, 769. But he really wanted a promotion and applied for some management positions as well. Tr. 358-359, 361. Shirani was not selected for any of the management positions for which he applied, but he was re-selected for his SES principal auditor job. Tr. 470-471.

Shirani's career in SES from 1994 until January 2001

In his capacity as an SES auditor, Shirani participated in or served as group leader in numerous audits of nuclear equipment manufacturers and service providers. Tr. 82, 87. When he served as group leader, it was his responsibility to write the audit report, which included information about deficiencies, if any, in the audited product or service, and to make recommendations for remedial action. 84, 122, CX 17.

Shirani's SES supervisor approved every audit report and recommendation for remedial action that Shirani made. Tr. 435, 442-446, 447, 755-757, 787, 796. During his tenure in SES, Shirani received a promotion, favorable performance evaluations, important assignments, and frequent praise from his supervisor. Tr. 76-77, 82, 93, 438-439. When Shirani's supervisor re-selected him for the principal auditor position in 2000, he chose Shirani over other incumbents, whose employment was terminated.

Nonetheless, Shirani testified about two incidents which, he argues on review, show that high-level officials in ComEd were hostile to Shirani's work in SES. One involved an audit in 1997 at the General Electric Nuclear Energy (GENE) facility in San Jose, California. The other involved an industry symposium on the east coast in 2000.

In the 1997 GENE audit, Shirani and his team identified numerous safety deficiencies in the audited operations. Tr. 112 -122. During the exit interview, Shirani and one of GENE's managers, David Helwig, argued about Shirani's unwillingness to give GENE credit for corrective action it was already taking on its own. Tr. 209-212. In his report, Shirani recommended that ComEd issue a stop work order. Shirani's supervisor approved Shirani's report and stop-work recommendation and both were put into effect. Tr. 120-124, CX 4, CX 5.

In 1998, Helwig became a vice president of ComEd and participated in an effort to increase ComEd's nuclear power output. Tr. 174, 338. Over the next two years, Shirani sought Helwig out half a dozen times for career advice. Tr. 186-187, 230-231, 236, 466-467. "David, I need your assistance to mentor me more than any other time. . . . Please set up a convenient time that I can see you more frequently for mentorship. I really appreciate your help. Thanks!!!" RX 42 (September 7, 2000 email). Helwig encouraged Shirani to stay in nuclear auditing because that is Shirani's area of expertise. Tr. 186-189.

The second incident occurred in November 2000. Although he was not invited, Shirani attended an industry symposium sponsored by Holtec International. During an open discussion, Shirani raised questions relating to a Holtec audit in which he had participated. Tr. 17-18. Also attending the symposium was a Nuclear Regulatory Commission engineer, Ross Landsman. Tr. 18-19. After the discussion period, Landsman asked Shirani for a copy of the audit report. Tr. 401. Shirani passed on Landsman's request for the report to the appropriate office at ComEd, which forwarded the report to Landsman. Tr. 21-23, 401-402, 782. In January 2001, after Shirani had left

SES, Landsman called Shirani and asked him why he did not issue a stop work order against Holtec. Tr. 24-25. Shirani told Landsman he was afraid of losing his job. *Id.*; 400-403.¹

Move to BSC internal auditing

In early 2000, Shirani approached Ruth Ann Gillis, Vice President and Chief Financial Officer of Unicom, and asked her to be his mentor. Tr. 664. After that he often complained to her about his limited opportunities for advancement in SES. “I need your help because I am not getting it at our nuclear side of the house and I want to jump.” RX 8; cf. Tr. 669-672.

Around the time of the general merger, Shirani asked Gillis for a job in business services. Tr. 678. Gillis explained to Shirani that ComEd and PECO’s internal audit departments would not merge until the following year. ComEd had been outsourcing most of its internal auditing to Arthur Anderson in Chicago. PECO had an in-house internal audit unit in Philadelphia. Tr. 677, 506. Before merger and re-selection could begin, BSC would need to decide on the best structure for the integrated internal audit function. Gillis planned to hire a General Auditor sometime in 2001 to guide the reorganization and reselection. In the meantime, if Shirani were to take an internal auditor position in Chicago, he would have to report to Arthur Anderson, work without a formal position description, and be prepared for whatever changes the General Auditor might make. Tr. 397, 506, 675-682, 715-720; RX 9. In short, giving Shirani a job in internal audit at that point would mean Shirani could acquire new skills, especially in financial auditing but, Gillis emphasized to him, she was making “no promises whatsoever about Oscar becoming a manager.” Tr. 720.

At the time Shirani asked Gillis for a job in finance, his SES salary was \$86,887, in pay band E-3. The maximum salary for pay band E-3 was \$100,000. RX 9; Tr. 662. The principal auditor position Gillis offered Shirani in December 2000 had a salary of \$92,500, in pay band E-4. The maximum salary for pay band E-4 was \$126,000. RX 9, Tr. 662; 682-685; Tr. 387. Thus, Gillis’ offer meant a promotion from pay band E-3 to E-4, an immediate pay raise of 6.46 % and the opportunity to increase his salary by as much as \$26,000 in future merit pay increases. Tr. 661.

Shirani was disappointed with Gillis’ offer. He complained that it was not a promotion to a management position and that he would have commuting expenses in the new job that he had not had as an SES auditor. Tr. 478, 682-683. Gillis was sympathetic

¹ Shirani testified in great detail about the GENE audit and the NRC contact, as well as other events that, he argues, show that ComEd executives involved in nuclear power generation conspired against him because his nuclear safety standards were higher than theirs. However, Shirani failed to establish any connection between these alleged events and the adverse action of which he complains – non-selection for a principal auditor position in BSC. Thus, we recount this abbreviated version of Shirani’s history in SES primarily to assist the reader in understanding Shirani’s theory of the case.

to the commuting costs issue and increased the offer to \$94,000. Tr. 682-685; RX 9. Shirani took time to think it over and then accepted the revised offer on December 19, 2000. Tr. 480. He began his new job at BSC on January 15, 2001. Tr. 396.

Shirani participated in several internal audits over the next ten months under Arthur Anderson supervision. Tr. 689. In his first formal performance evaluation, Arthur Anderson gave him an overall rating between “achieves expectations” and “developmental.” RX 2. On his second evaluation, Arthur Anderson rated Shirani one step higher, between “achieves expectations” and “commendable.” *Id.*

Internal auditing merger and re-selection process

In April 2001, Gillis hired Ellen Caya from the accounting firm Price Waterhouse Coopers to fill the position of Director of Internal Audit. Tr. 524. In July, Caya gave Shirani and the Philadelphia auditors mid-term evaluations based on five criteria: technical expertise, industry knowledge, productivity, leadership/management skills, and problem solving. RX 1. Caya decided to give everyone an official rating of “on track” because the standards were being applied retroactively. Tr. 528-530. However, she also gave Shirani specific critical feedback based on her discussion with his Arthur Anderson supervisors and her own experience with him in May, June, and July. Tr. 531. Caya told Shirani that he needed more supervisory experience and to work on financial auditing and problem solving skills. Tr. 535, 553-556, 570-574, RX. 1.

Caya’s reorganization mandate was to evaluate the internal auditing arrangements Exelon had inherited from Unicom (in Chicago) and PECO (in Philadelphia), propose an internal audit department suited to Exelon’s needs, and run the resultant operation. Tr. 524, 526, 537. To that end, Caya elicited the views of an audit committee and senior managers on questions such as whether to outsource the internal audit function or bring it in-house, communication protocols, reporting, and other management and staffing issues. Tr. 538. Based on this information, Caya concluded that the internal audit function should be performed almost entirely in-house, with headquarters in Chicago and offices in both Chicago and Philadelphia. *Id.* Using statistical criteria and ratios between corporate assets and revenues, Caya calculated the appropriate size for the department, number of staff, and ratios of managers to staff. Tr. 539. Caya then developed an organizational structure that provided for a General Auditor (Caya’s position) in Chicago, one director, two principal/manager auditors and 11 senior/staff auditors in Chicago, and one director, one principal/manager auditor and three senior/staff auditors in Philadelphia. RX 3; Tr. 540. Caya recommended that the senior/staff auditor salaries be graded E-4, the principal/managers be E-5s, and the directors be E-6. Tr. 540.

All of Caya’s recommendations were approved except the salary levels. Tr. 541, 579, 693, 694-695. Caya’s pay grade as General Auditor was E-6. Under her proposal, the Chicago and Philadelphia office directors who would be reporting to her would also be grade E-6. Company rules prohibited one E-6 from reporting to another E-6.

Therefore, Caya had to downgrade each salary level below her one step, reducing the senior/staff auditors to E-3s. Tr. 541.²

Caya developed position descriptions. Tr. 545-546. Both the senior/staff auditors and principal/manager auditors had to be competent in seven categories: business risk assessment, business process analysis, analytical skills, industry experience, oral and written communication, problem solving/logic, and adaptability/quick learning. Principal/manager auditors had to be competent in four additional categories: leadership, negotiation, interpersonal skills, and multi-tasking. RX 5, RX 7, Tr. 546-549.

Caya wanted the principal/manager auditors to have extensive experience in financial, operational, and compliance auditing and strong management backgrounds. Tr. 527. Although Caya wanted staff auditors to have professional auditing or accounting accreditation and five to eight years internal audit experience, she was willing to accept other combinations of skills. For instance, she thought Shirani's experience auditing nuclear power generation equipment for safety and compliance with legal and other requirements would add a valuable perspective for an internal audit team whose other members had more conventional accounting and financial backgrounds. Tr. 544, 547, 558.

Shirani's application for principal/manager auditor

In August and September 2001, Shirani asked both Caya and Eliecer Palacios, Exelon director of ethics and compliance, whether he would be automatically disqualified for the E-4 principal/manager auditor position because he did not have eight to ten years financial audit experience. Caya and Palacios (after checking with Caya) both told Shirani that his lack of financial audit experience, plus the fact that he lacked management experience probably did disqualify him for the principal/manager positions but that his credentials made him a good candidate for the E-3 senior/staff auditor position. Tr. 543, 561, 594, 600.

Once Caya's merger proposal was approved, the new internal audit department had to undergo the re-staffing process that the rest of the company had undergone in 2000. Tr. 541, 583. The rules were the same: no one would be considered for a position for which he or she did not apply, and employees who submitted no applications or were not selected were automatically shunted into the severance process. Tr. 489, 545, 560, 642-643; RX 4. On October 5, 2001, Caya posted all the new internal audit positions. RX 4; Tr. 542-543.

Shirani understood that he could not be considered for the E-3 staff auditor position if he did not apply for it. Tr. 489. However, he decided not to apply for the E-3

² Subsequently, Caya became vice president of internal audit with an E-7 salary, and all the positions below her were upgraded one level, bringing the senior/staff auditor positions to the E-4 she had originally recommended. Tr. 576-577.

position because he was already near the top of the E-3 salary band and because he did not want to lose the title, principal auditor. Tr. 544, 551, 651. He did apply for the E-4 principle/manager position. Tr. 490-491; RX 35.

Caya did not select Shirani for an E-4 slot because she did not rate him high on analytical, negotiation or interpersonal skills or communication, problem solving, or adaptability, and because he had little financial audit or supervisory experience. RX 6; Tr. 493, 726. Instead, Caya selected two Arthur Anderson managers who had worked as contract auditors for ComEd and had strong financial audit and managerial backgrounds. Tr. 556-557. On October 26, 2001, Caya officially informed Shirani that he was not selected for a principal/manager auditor position and that in consequence his employment would be terminated effective December 26, 2001. Tr. 499; RX 33. Caya testified that neither Gillis nor anyone else told her anything about Shirani's history in SES or tried to influence her decision whether to hire Shirani as a principal/manager auditor. Tr. 561, 563-565.

DISCUSSION

The Legal Standard

Under the ERA whistleblower provision, it is unlawful for an employer to “discharge . . . or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” participated in a proceeding or in any other action to carry out the purposes of the ERA or the Atomic Energy Act of 1954. 42 U.S.C.A. § 5851(a). An employee establishes a violation of § 5851 by proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) his employer subjected him to an adverse employment action, (3) the employer was aware of the protected activity, and (4) the protected activity was a contributing factor in the employer's decision to take adverse action. *Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-7, slip op. at 3 (ARB July 30, 2004).

Where a complainant alleges that the adverse action was the prospective employer's refusal to hire him, the complainant must also establish that: (1) he applied and was qualified for a job for which the employer was seeking applicants; (2) despite his qualifications, he was rejected, and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Shirani failed to carry his burden of proof

1. Protected Activity

On the question of protected activity, Shirani contended that during the period 1997 through January 2001, he raised concerns within ComEd SES and to the Nuclear Regulatory Commission about safety deficiencies in products and processes that ComEd

used in its nuclear power generation plants. Exelon/BSC has not argued that Shirani's complaints while in SES were not protected by § 5851. Accordingly, the ALJ deemed that element of Shirani's case admitted. R. D. & O. at 21. Because we decide this case on other grounds, we assume without deciding that Shirani engaged in activities protected by § 5851.

2. Adverse Action

With respect to adverse action, the ALJ identified two adverse actions: failure to hire Shirani as an E-4 principal/manager auditor, and termination from employment. R. D. & O. at 21-22. Again, because Exelon/BSC did not argue that Shirani was not subjected to an adverse personnel action, the ALJ deemed that element of Shirani's case admitted. *Id.* at 22. We assume without deciding that Exelon/BSC took adverse action against Shirani by rejecting him for the principal auditor position for which he applied and for terminating his employment with BSC.

3. Employer knowledge and causal connection

The ALJ concluded that Shirani failed to prove that the persons who had input into the decision not to offer him a principal auditor position were aware of Shirani's safety activities while he was employed in SES from 1997 through January 2001. R. D. & O. 23. Nor did the ALJ find any other evidence of a causal connection between Shirani's activities in SES and his non-selection at BSC. *Id.* at 26. The overwhelming weight of the evidence supports the ALJ's findings and conclusions. Therefore, Shirani's case fails and we must dismiss his complaint.

Shirani asked Gillis for a job in her financial operations in late 2000, around the time of the merger. Gillis told him the only position he might be qualified for was internal auditing. But ComEd's internal audit function was going to be merged with PECO's, and the results of the merger could be anything from a wholly-outsourced audit function to a 100% in-house organization. She would be hiring someone to create an internal audit strategy for the merged companies. Thus, Gillis was not in a position to guarantee Shirani anything other than an opportunity to learn to be a non-supervisory auditor in the ComEd unit in Chicago, to be there when incumbents would have a chance to apply for new positions should they be created, and to find out in the course of auditing what other opportunities there might be for him in Exelon's subsidiaries.

Gillis testified that she knew from Shirani that he had been dissatisfied in SES because he wanted a promotion and salary increase that were not forthcoming there. But, she also testified, she was not aware of Shirani's encounter with Helwig at GENE or his conversations with NRC's Landsman, or any other conflicts between Shirani and his superiors while he worked at SES. None of the managers and executives who knew about Shirani's work in SES ever spoke to her about him. The ALJ made a specific demeanor-based credibility finding about Gillis' testimony. "I find Ms. Gillis to be a highly credible witness and her testimony compelling. Moreover, Ms. Gillis' testimony is supported by the evidence in the record." R. D. & O. at 24.

Caya testified that she, too, knew nothing about Shirani's work at SES and that no one ever suggested to her that she should or should not select Shirani. Nothing in the record calls Caya's testimony into doubt.

4. Shirani's objection on review

Shirani admits that he lacked both the supervisory and financial auditing qualifications for which Caya was looking. C. O. Br. at 2; Tr. 490-491. Nor does he dispute that Caya hired applicants for the E-4 principal/manager auditing positions who met Caya's criteria. And he testified that he did not apply for the E-3 senior/staff auditor position – for which Caya had already told him he was probably qualified – because he wanted the principal auditor title and the E-4 salary range. Tr. 490-491.

Nonetheless, Shirani argues that the ALJ erred in finding that BSC rejected him for non-discriminatory reasons. Shirani contends that the ALJ focused on the wrong question. “The Complainant's unanswered complaint is based on the theory that he was terminated as part of a broad conspiracy by ComEd to cover up the safety issues raised by Complainant since 1977.” C. Op. Br. at 2. “The ‘lone manager theory’ that one new hire [Caya] made the decision to terminate the Complainant without contact from anyone in upper management and in solitude, is too preposterous to believe and cannot be reconciled with the events of late November and early December 2000 [when Gillis offered and Shirani accepted the auditor position].” *Id.* at 6.

Shirani contends that Helwig was prejudiced against him because of the GENE exit interview and that other ComEd managers wanted to get rid of him because of his contacts with NRC through Landsman. To Shirani, the only conceivable explanation for the end of his career at BSC is that people on the nuclear side of the business influenced Gillis to lure him over to BSC where his credentials would be comparatively weak and the reorganization could be managed so there would be no positions for which he could qualify.

Shirani's theory barely rises to the level of rank speculation. The record conclusively demonstrates that Shirani voluntarily moved from SES to BSC, refused to apply for a position for which he had been told he qualified, applied only for a position for which he concedes he was not qualified, and as a result automatically passed into the severance process. Even if Shirani had demonstrated, which he did not, that he made safety complaints at SES which angered supervisors or managers, the lack of any evidence that Gillis or Caya knew about these events absolutely precludes Shirani's claim of retaliation.

We note that even as the ALJ analyzed the record and made findings on each of the four elements of a successful complaint – protected activity, adverse action, employer knowledge, and causal connection – he also sometimes couched his discussion in terms of the prima facie case. R. D. & O. at 21, 22, 23, 26. However, once a case is fully tried on the merits, “we move beyond the question of whether Complainant has presented a prima facie case.” *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 97-ERA-38, slip

op. at 9 (ARB July 31, 2002) (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711, 714 (1983)). Thus, we disregard the ALJ's finding that Shirani did not make a prima facie showing of failure to hire.³

Accordingly, we **DENY** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

³ The ALJ also mistakenly wrote that “a complainant must show that the protected activity was the **likely** reason for the adverse action.” R. D. & O. at 24 (emphasis added). However, the complainant must show only that the protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint.” 42 U.S.C.A. § 5851(b)(C). This misstatement of the complainant’s burden is de minimis, because the ALJ’s ultimate finding of fact, that Shirani’s protected activity played no role in the adverse action, is supported by a preponderance of the evidence.