United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. U. S. POSTAL SERVICE, Respondent.	OSHRC DOCKET No. 18-0462

ORDER GRANTING SECRETARY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSES NUMBERED 8 & 9 IN THE RESPONDENT'S ANSWER

On February 26, 2018, the Secretary issued a one-item other-than-serious citation (Citation) to the Respondent, the United States Postal Service (USPS). The Citation's sole item alleged that on or about August 29, 2017, at USPS's Pleasant Hills facility in Pittsburgh, Pennsylvania, USPS "issued a seven-day working suspension to a carrier because he reported a work-related injury on August 16, 2017." The citation item alleged that this action violated 29 C.F.R. § 1904.35(b)(1)(iv), which provides that an employer "must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness." The Citation proposed a penalty of $5543 and required abatement by March 9, 2018.

USPS timely contested the Citation and thereby invoked the jurisdiction of the Occupational Safety and Health Review Commission (Commission) pursuant to section 10 of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659. The Secretary thereafter duly filed a complaint pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), wherein the Secretary re-asserted the Citation's alleged violation, proposed penalty, and abatement.

USPS duly filed an answer pursuant to Commission Rule 34(b), in which it denied the allegations of the Citation and interposed a number of affirmative defenses, including the following two defenses:

- "The alleged standard and/or penalties are invalid as ultra vires."
- "The alleged standard and/or penalties lack(s) a rational basis and/or are arbitrary and capricious."

The Secretary filed a motion for partial summary judgment dated September 14, 2018, seeking judgment as a matter of law on those two affirmative defenses. (If the motion were granted, the remedy on the motion would be to strike the affirmative defenses.) The Respondent filed a memorandum in opposition to the motion, and the Secretary filed a reply memorandum on October 24, 2018.

The first issue for decision, which will be dispositive of the "ultra vires" defense, may be stated as follows:

> Did Congress intend the procedure prescribed by section 11(c) of the Act to be the exclusive means to redress retaliatory acts that both (a) violate an employee's 11(c) rights, and (b) undermine OSHA's duty to collect accurate injury and illness data?

If the section 11(c) procedure is exclusive, that would be the end of the matter—OSHA's attempted enforcement of section 1910.35(b)(1)(iv) by issuing a citation and abatement order under section 9(a) of the Act (along with a proposed penalty under section 10(a) of the Act) would contravene the Act and be ultra vires. In that event, the Citation would be ordered vacated.

But, if the enforcement mechanism prescribed in section 11(c) is *not* exclusive, then the following issue, which would be dispositive of the "arbitrary and capricious" defense, must be resolved:

> Did the Secretary act arbitrarily and capriciously in promulgating a regulation that proscribes certain conduct (i.e., employer

> retaliation against an employee for having reported a work-related injury or illness) that is already proscribed by section 11(c) of the Act?

As described below, the answers to both questions are negative, so the Secretary's motion is GRANTED, and the two affirmative defenses described above shall be ordered stricken from the answer.

Statutory and Regulatory Background

Secretary's Authority to Promulgate Recordkeeping Regulations

Section 2(b) of the Act states that the Act's overarching purpose—which is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources"—is served in part "by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this [Act] and accurately describe the nature of the occupational safety and health problem." 29 U.S.C. § 651(b)(12).

Section 24(a) of the Act thus directs the Secretary to

> *[C]ompile accurate statistics on work injuries and illnesses* which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

29 U.S.C. § 673(a) (emphasis added).

Toward that end, section 8(c)(2) of the Act directs the Secretary to "*prescribe regulations requiring employers to maintain accurate records of ... injuries and illnesses* other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(2). (emphasis added). And in section 8(g)(2), Congress delegated even broader lawmaking power to

the Secretary, directing the Secretary to "prescribe such rules and *regulations as he may deem necessary* to carry out [his] responsibilities under this Act." 29 U.S.C. § 657(g)(2) (emphasis added). Section 8(c)(1) of the Act requires employers to comply with the Secretary's recordkeeping regulations—it provides that "[e]ach employer shall make, keep and preserve … such records regarding his activities relating to this Act *as the Secretary ... may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses.*" 29 U.S.C. §657(c)(1) (emphasis added).

Section 9(a) of the Act directs the Secretary to enforce "any regulations prescribed pursuant to this Act" by conducting inspections or investigations and issuing citations for perceived violations. 29 U.S.C. § 658(a).

Section 11(c) of the Act and the
Interpretive Regulation at 29 C.F.R. Part 1977

Section 11(c) of the Act prohibits certain retaliatory acts against employees and includes an enforcement mechanism for remedying such unlawful acts. 29 U.S.C. § 660(c). The 11(c) enforcement mechanism is triggered by an employee filing a complaint with the Secretary alleging retaliation for having exercised "any right afforded by this Act." Section 660(c)(1). Section 11(c) provides in its entirety as follows:

> (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this [Act].
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> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation

> to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.
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> (3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

A few years after the enactment of the Act, the Secretary promulgated a regulation (now codified at 29 C.F.R. pt. 1977), the stated purpose of which is to "make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder." 29 C.F.R. § 1977.2. None of the provisions of part 1977 address the matter of whether the Secretary regards section 11(c) to provide an exclusive mechanism for redressing unlawful retaliation against an employee for a permissible reason other than to redress an employee's 11(c) rights.

Promulgation of the Cited Regulation, § 1904.35(b)(1)(iv)

Subparagraph (b)(1) of section 1904.35 (of which the cited subparagraph (iv) is a part) was recently promulgated with a declared effective date of August 10, 2016.[1] Final Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 81 Fed. Reg. 29624 (May 12, 2016) (to be codified at 29 C.F.R. pts. 1904 and 1902). The preamble to the final rule explains that section 1904.35(b)(1) was promulgated as a "regulation" under sections 8 and 24 of the Act, and not as an "occupational safety and health standard" under section 6 of the Act. *Id.* at 29656 & 29687; s*ee also Thermal*

[1] Although the regulation was effective on August 10, 2016, the Secretary delayed its enforcement until December 1, 2016. *See* Memorandum dated Nov. 10, 2016, "Interim Enforcement Procedures for New Recordkeeping Requirements Under 29 CFR 1904.35," available at www.osha.gov/dep/memos/recordkeeping_memo_11102016.html

Reduction Corp., 12 BNA OSHC 1264, 1266 (No. 81–2135, 1985) (noting that OSHA's recordkeeping regulation was promulgated pursuant to "the authority conferred by section 8").

The promulgation of subparagraph (b)(1) was part of a wider ranging amendment to OSHA's regulation for Recording and Reporting Occupational Injuries and Illnesses, which is codified at 29 C.F.R. Part 1904. Although the validity of only subparagraph (b)(1)(iv) is at issue here, the entirety of subparagraph (b)(1) provides important context. It provides as follows:[2]

> **§ 1904.35 Employee involvement.**
> (a) ….
> (b) *Implementation*—(1) *What must I do to make sure that employees report work-related injuries and illnesses to me?* (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;
> (ii) You must inform each employee of your procedure for reporting work-related injuries and illnesses;
> (iii) You must inform each employee that:
> (A) Employees have the right to report work-related injuries and illnesses; and
> (B) Employers are prohibited from discharging or in any manner discriminating against employees for reporting work-related injuries or illnesses; and
> (iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

The rulemaking process that resulted in the eventual promulgation of subparagraph (b)(1)(iv) formally commenced on November 8, 2013, when OSHA caused to be published a

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[2] Before the 2016 amendment, section 1904.35(b)(1) had provided as follows:

> (b) *Implementation. (1) What must I do to make sure that employees report work-related injuries and illnesses to me?*
> (i) You must set up a way for employees to report work-related injuries and illnesses promptly; and
> (ii) You must tell each employee how to report work-related injuries and illnesses to you.

Notice of Proposed Rulemaking (NPRM) "to amend its recordkeeping regulations to add requirements for the electronic submission of injury and illness information employers are already required to keep under OSHA's regulations for recording and reporting occupational injuries and illnesses." Proposed Rule, *Improve Tracking of Workplace Injuries and Illnesses*, 78 Fed. Reg. 67254 (proposed Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904 & 1952). The NPRM cited the provisions of sections 8 and 24 of the Act, described above, as providing the legal authority for the proposal. *Id.* at 67255; 29 U.S.C. §§ 657 & 673.

OSHA conducted a public meeting on the NPRM on January 9-10, 2014.[3] The preamble to the final rule describes certain comments made during that public meeting:

> A concern raised by many meeting participants was that the proposed electronic submission requirement might create a motivation for employers to under-report injuries and illnesses. Some participants also commented that some employers already discourage employees from reporting injuries or illnesses by disciplining or taking other adverse action against employees who file injury and illness reports.

81 Fed. Reg. at 29625; *accord* Supplemental NPRM, *Improve Tracking of Workplace Injuries and Illnesses*, 79 Fed. Reg. 47605 (Aug. 14, 2014).

These comments caused OSHA to consider "adding provisions that will make it a violation for an employer to discourage employee reporting in these ways," with a view toward "protect[ing] the integrity of the injury and illness data" that employers report to OSHA. 79 Fed. Reg. 47605. Consequently, OSHA issued a Supplemental NPRM on August 14, 2014 that solicited public comment on adding three requirements intended to promote the accurate reporting of work-related

[3] The administrative record on the rulemaking, which includes the transcripts of the public meeting, is available at the following URL: https://www.regulations.gov/docket?D=OSHA-2013-0023

injuries and illnesses, including a provision that would "prohibit employers from taking adverse action against employees for reporting injuries and illnesses."[4] *Id.*

The Supplemental NPRM's stated legal authority for these proposed additions to the recordkeeping regulation remained sections 8 and 24 of the Act, as had been cited in connection with the original NPRM. 79 Fed. Reg. at 47606. The Supplemental NPRM expresses the view that including the proposed anti-retaliation provision in the recordkeeping regulation would "fit comfortably within these various grants of authority," because "[i]f employers may not discipline or take adverse action against workers for reporting injuries and illnesses, workers will feel less hesitant to report their injuries and illnesses, and their employers' records and reports will be more 'accurate', as required by sections 8 and 24 of the Act." *Id.* The Supplemental NPRM noted that even before the original NPRM's electronic reporting proposal, there had been evidence that unlawful retaliation had the effect of suppressing employee reporting of work-related injuries and illnesses:

> Further, *given testimony that some employers already engage in such practices,* and the possibility that the proposed rule could provide additional motivation for employers to do so, prohibiting employers from taking adverse actions against their employees for reporting injuries and illnesses in this rulemaking is "necessary to carry out" the recordkeeping requirements of the Act. (See 29 U.S.C. 657(g)(2).).

79 Fed. Reg. at 47606-607 (emphasis added).[5]

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[4] The other two proposed requirements on which the Supplemental NPRM solicited public comment were to "(1) require that employers inform their employees of their right to report injuries and illnesses; [and] (2) require that any injury and illness reporting requirements established by the employer be reasonable and not unduly burdensome." *Id.* at 47606.

[5] OSHA had identified the suppressive impact of retaliation on the reporting of work-related injuries and illnesses well before the 2016 promulgation of the cited regulation. Another provision of the recordkeeping regulation that was originally promulgated in 2002, section 1904.36, contained the Secretary's interpretation that section 11(c) prohibits retaliation against an

The Supplemental NPRM recognized that section 11(c) provides a remedy for employees who have been subjected to retaliation for having reported a work-related injury or illness, but the Secretary did not regard the pre-existing statutory procedure to preclude promulgation of a

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employee for having reported a work-related injury or illness. As originally promulgated in 2002, section 1904.36 provided as follows:

> **§ 1904.36 Prohibition against discrimination.**
> Section 11(c) of the Act prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the Part 1904 records, or otherwise exercises any rights afforded by the OSH Act.

(The 2016 final rule amended section 1904.36 by changing its first sentence to read as follows: "In addition to § 1904.35, section 11(c) of the Act also prohibits you from discriminating against an employee for reporting a work-related fatality, injury or illness." The final rule left the second sentence of section 1904.36 unchanged. 81 Fed. Reg. at 29671.)

The preamble that was published in connection with the promulgation of original section 1904.36 described that regulation's purpose as follows:

> Section 1904.36 of the final rule makes clear that § 11(c) of the Act prohibits employers from discriminating against employees for reporting work-related injuries and illnesses. Section 1904.36 does not create a new obligation on employers. Instead, it clarifies that the OSH Act's anti-discrimination protection applies to employees who seek to participate in the recordkeeping process.
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> OSHA has also included in the final rule, in section 1904.36, a statement that section 11(c) of the OSH Act protects workers from employer retaliation for filing a complaint, reporting an injury or illness, seeking access to records to which they are entitled, or otherwise exercising their rights under the rule. This section of the rule does not impose any new obligations on employers or create new rights for employees that did not previously exist. In view of the evidence that retaliation against employees for reporting injuries is not uncommon and may be "growing" [citation to rulemaking record omitted], this section is intended to serve the informational needs of employees who might not otherwise be aware of their rights and to remind employers of their obligation not to discriminate.

Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 6050 & 6053 (Jan. 19, 2001) (to be codified at parts 1904 and 1952).

regulation (which is perforce enforceable by the issuance of a citation under section 9(a)) that proscribes that same retaliatory conduct. The Supplemental NPRM indicates the principal motivation for the proposed anti-retaliation regulation is not to redress an employee's 11(c) rights, but rather to advance OSHA's responsibility to collect accurate injury and illness statistics:

> Section 11(c) of the Act prohibits any person from discharging or discriminating against any employee because that employee has exercised any right under the Act. (29 U.S.C. 660(c)(1).) Under this provision, an employee who believes he or she has been discriminated against may file a complaint with OSHA, and if, after investigation, the Secretary determines that Section 11(c) has been violated, then the Secretary can file suit against the employer in U.S. District Court seeking "all appropriate relief" including reinstatement and back pay. (29 U.S.C. 660(c)(2).) Taking adverse action against an employee who reports a fatality, injury, or illness is a violation of 11(c), (see 29 CFR 1904.36); therefore, much of the primary conduct that would be prohibited by the new provision is likely already proscribed by 11(c).
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> The advantage of this provision is that it would provide OSHA with additional enforcement tools to promote the accuracy and integrity of the injury and illness records employers are required to keep under Part 1904. For example, under 11(c), OSHA may not act against an employer unless an employee files a complaint. Under the additions to the proposed rule under consideration, OSHA would be able to cite an employer for taking adverse action against an employee for reporting an injury or illness, even if the employee did not file a complaint. Moreover, an abatement order can be a more efficient tool to correct employer policies and practices than the injunctions authorized under 11(c).
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> As noted above, these retaliatory actions would likely be actionable under 11(c), as well as under the provisions that OSHA is considering as amendments to 1904.35. The remedy, however, would be different. Under this provision, OSHA could issue citations to employers under Section 9 of the OSH Act for violating the provision, and the employer could challenge the citations before the Occupational Safety and Health Review Commission. The citations would carry civil penalties in accordance with Section 17 of the OSH Act, as well as a requirement to abate the violation; the abatement could include reinstatement and back pay ….

79 Fed. Reg. at 47607 & 47608.

OSHA received 142 comments on the Supplemental NPRM. 81 Fed. Reg. at 29625. On May 12, 2016, OSHA promulgated the final rule that contained the annual electronic reporting provisions that had been proposed in the original NPRM (to be included in section 1904.41)[6] as well as the three additional requirements that had been proposed in the Supplemental NPRM, including the anti-retaliation provision cited here, section 1904.35(b)(1)(iv). 81 Fed. Reg. 29624.

The preamble to the final rule reiterated the rationale and statutory authority for the anti-retaliation provision that was originally expressed in the Supplemental NPRM:

> The Act's various statutory grants of authority that address recordkeeping provide authority for OSHA to prohibit employers from discouraging employee reports of injuries or illnesses. If employers may not discriminate against workers for reporting injuries or illnesses, then discrimination will not occur to deter workers from reporting their injuries and illnesses, and their employers' records and reports may be more "accurate", as required by sections 8 and 24 of the Act. Evidence in the administrative record establishes that some employers engage in practices that discourage injury and illness reporting, and many commenters provided support for OSHA's concern that the electronic submission requirements of this final rule and associated posting of data could provide additional motivation for employers to discourage accurate reporting of injuries and illnesses. Therefore,

[6] The Secretary has recently proposed to rescind the recently promulgated requirement set forth in section 1904.41 for the annual electronic submission by establishments with more than 249 employees of the information that is recorded on OSHA Forms 300 (Log of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). Proposed Rule, *Tracking of Workplace Injuries and Illnesses*, 83 Fed. Reg. 36494 (proposed July 30, 2018) (to be codified at 29 C.F.R. pts. 1904 & 1952). However, this proposed rescission would not affect other electronic reporting requirements promulgated in the 2016 final rule that those same large employers, as well as certain other smaller employers, electronically submit information that is recorded on OSHA Form 301A (Summary of Work-Related Injuries and Illnesses). Nothing in the public notice that announced the proposed partial rescission of the electronic reporting requirements in section 1904.41 suggests any backpedaling from the justifications for promulgating section 1904.35(b)(1) as stated in the 2016 preamble to the final rule.

> prohibiting employers from engaging in practices that discourage their employees from reporting injuries or illnesses, including discharging or in any manner discriminating against such employees, is "necessary to carry out" the recordkeeping requirements of the Act (see 29 U.S.C. 657(g)(2)).
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> If employers reduce the accuracy of their injury and illness records by retaliating against employees who report an injury or illness, then OSHA's authority to collect accurate injury and illness records allows OSHA to proscribe such conduct even if the conduct would also be proscribed by section 11(c).

81 Fed. Reg. at 29627.

The preamble acknowledges that the "conduct prohibited by § 1904.35(b)(1)(iv) of the final rule is already proscribed by section 11(c)," and that the rule "does not change the substantive obligations of employers." 81 Fed. Reg. at 29627 & 29671. Notwithstanding the absence of any new substantive obligations, the preamble states the anti-retaliation regulation "will have an important enforcement effect" by providing "an enhanced enforcement tool for ensuring the accuracy of employer injury and illness logs" that is not dependent upon an employee first filing a complaint under section 11(c) of the Act. 81 Fed. Reg. at 29671. The preamble notes that "[s]ome employees may not have the time or knowledge necessary to file a section 11(c) complaint or may fear additional retaliation from their employer if they file a complaint."

Further, in response to public comments that section 1904.35(b)(1)(iv) would interfere with section 11(c) "by infringing on an employee's right to bring a section 11(c) claim and by eliminating section 11(c)'s 30-day window for employees to bring complaints," the preamble stated:

> The final rule does not abrogate or interfere with the rights or restrictions contained in section 11(c). An employee who wishes to file a complaint under section 11(c) may do so within the statutory 30-day period regardless of whether OSHA has issued, or will issue, a citation to the employer for violating the final rule. OSHA

> believes that many employees will continue to file 11(c) complaints because of the broader range of equitable relief and punitive damages available under that provision.

Because section 1904.35(b)(1)(iv) is a "regulation" issued under the Act, the Secretary is empowered pursuant to section 9(a) of the Act to issue a citation for its alleged violation, as was done here. 29 U. S. C. § 658(a) (authorizing the Secretary to issue a citation to an employer for violating a requirement "of any regulations prescribed pursuant to this Act").

Standard of Review

The Commission has the authority to consider an enforcement challenge to the statutory validity of standards and regulations that the Secretary has promulgated pursuant to the Act. *See Rockwell Int'l Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980) (rejecting Secretary's argument that the Commission lacks authority to consider procedural challenge to occupational safety and health standards promulgated under § 6(b) of the Act), *overruled on other grounds, George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436 (No. 76-647, 1982); *see also CBI Servs., Inc.*, 19 BNA OSHC 1591, 1594, n. 7 (No. 95-0489, 2001) (noting that "Commission precedent does not distinguish between 'substantive' and 'procedural' issues in determining whether a validity challenge [to a standard promulgated pursuant to sec. 6(b) of the Act] is properly before the Commission").

The Commission considers a challenge to a regulation in the same manner as would a federal court. *Martin v. OSHRC* (*CF & I Steel Corp.*), 499 U.S. 144, 154 (1991) (concluding "that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context").

The two defenses at issue here amount to the functional equivalent of a challenge to the cited regulation under the Administrative Procedure Act (APA). *See La. Forestry Ass'n Inc. v.*

Sec'y of Labor, 745 F.3d 653, 668-69 (3d Cir. 2014) (considering a claim that the Department of Labor exceeded its authority in promulgating a certain regulation in a case brought under the judicial review provisions of the APA). The judicial review provisions of the APA require a court to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) & (C).

Such a challenge to a regulation may be resolved through a motion for summary judgment. *See Marshall Cnty. Health Care Auth. v. Shalala,* 988 F.2d 1221, 1226 (D.C. Cir. 1993) (noting that where the only arguments made were "about the legal conclusion to be drawn about the agency action" and not about issues of fact, "there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment"); *Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 440 n. 3 (D.C. Cir. 1999) (noting that when reviewing agency action, the "district court sits as an appellate tribunal, … and the question whether [the agency] acted in an arbitrary and capricious manner is a legal one which the district court can resolve on the agency record"); *La. Forestry Ass'n Inc.*, 745 F.3d at 667.

The two-step framework established by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), applies to resolution of the issue of whether the Secretary exceeded his statutory authority in promulgating the challenged regulation. *See City of Arlington v. FCC*, 569 U.S. 290 (2013) (holding that *Chevron* framework applies to resolve the contention that an agency's regulation was ultra vires as being outside the bounds of the agency's statutory authority); *La. Forestry Ass'n*, 745 F.3d at 669-70 (applying *Chevron* framework in case brought

under the judicial review provisions of the APA in considering a claim that the Department of Labor exceeded its authority in promulgating a certain regulation).

The *Chevron* framework similarly applies to a challenge to a regulation promulgated pursuant to a broad delegation of authority to prescribe regulations that the responsible agency deems "necessary" to advance a specified statutory purpose. *Chevron* 467 U.S. at 843–44 (stating that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that "implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (applying *Chevron* framework to review of a rule promulgated by Secretary of Labor pursuant to delegated authority to "prescribe such regulations as are necessary to carry out" the Family Medical and Leave Act); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (applying *Chevron* framework to the review of a rule that was promulgated pursuant to delegated authority to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code).

At the first step of the *Chevron* framework, a court must apply "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue," and"[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* at 842–

843; *see also City of Arlington*, 569 U.S. at 301 (stating that "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not").

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

A court may consider a statute's purpose and its legislative history in ascertaining whether the statute speaks to the precise question at issue. *See Chevron* at 862-63 (considering the Clean Air Act's legislative history at step one and finding it "as a whole [] silent on the precise issue before us"); *see also Arcadian Corp.,* 17 BNA OSHC 1345, 1348-49 (No. 93-3270, 1995) (considering legislative history to discern congressional intent, seemingly at *Chevron* step one); *but cf. United States v. Geiser*, 527 F.3d 288, 292 (3d Cir. 2008) (stating "that legislative history should not be considered at *Chevron* step one," although noting "ambiguous guidance from the Supreme Court" on the issue), *Geisinger Cmty. Med. Ctr. v. Sec'y H.H.S.*, 794 F.3d 383, 391 n. 5 (3d Cir. 2015) (noting that "the Supreme Court has often oscillated between considering and then refusing to consider legislative history at Step One"), and *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1098 (D.C. Cir. 2017) (holding that employees do not have a private cause of action under section 11(c) of the Act, and noting that "when statutory text resolves the issue, as it does here, the Supreme Court has said that we need not dig into the legislative history") (Kavanaugh, J.).

Only "if the statute is silent or ambiguous with respect to the specific issue," does the analysis continue to step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron* at 843. At *Chevron* step two, courts must "accept an agency's reasonable resolution of an ambiguity in a statute that the agency

administers," *Michigan v. EPA*, 576 U.S. —, —, 135 S. Ct. 2699, 2707 (2015), and "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011). Recently, in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), the Court provided a fuller summary of the standard for assessing whether certain rulemaking is arbitrary and capricious under the APA:[7]

> One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.,* 419 U.S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U.S.C. § 706(2)(A); *State Farm, supra,* at 42–43.

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[7] "Regulations" issued under the Act are subject to review under the APA's "arbitrary and capricious" standard, in contrast to the standard of review for a challenge to a health or safety standard, where the "substantial evidence" standard prescribed by section 6(f) of the Act is applicable. 29 U.S.C. § 655(f). *See Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1178 (D.C. Cir. 2014) (noting that the "substantial evidence" standard of judicial review under section 6(f) of the Act "demands more stringent review of OSHA rules than would the APA's arbitrary and capricious standard"); *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1466 (D.C. Cir. 1995) (dismissing for lack of jurisdiction an attempted pre-enforcement challenge to a recordkeeping regulation promulgated pursuant to section 8 of the Act that was initiated in the court of appeals pursuant to section 6(f) of the Act, and transferring the matter to the district court for APA review under 5 U.S.C. § 703).

<u>"Ultra Vires" Defense</u>

The issue to be decided at *Chevron* step one on the "ultra vires" defense may be framed as follows: Does the Act speak directly to the question whether, in order to enhance the accuracy of injury and illness information reported to OSHA, the Secretary is restricted to employing the section 11(c) procedure to deter and thwart retaliatory action against employees for having reported a work-related injury or illness?

Analysis of the text of the Act, employing traditional tools of statutory interpretation, shows that the Act is silent on this precise question at issue.

OSHA's statutory authority for promulgating the anti-retaliation provision of § 1904.35(b)(1)(iv) derives from the Act's recordkeeping provisions described in detail above. 29 U.S.C. §§ 657(c)(l), 657(c)(2), 657(g)(2), 673(a), 673(e). Nothing in the text of section 11(c) addresses recordkeeping. Rather, section 11(c) creates employee rights and establishes the exclusive remedy available to employees who believe they have been retaliated against for having engaged in certain protected activities (of which the reporting of work-related injuries and illnesses is but one). *Taylor v. Brighton Corp.*, 616 F.2d 256, 258 (6th Cir. 1980) (indicating that the class of persons that section 11(c) was intended to benefit are employees engaging in activity protected by 11(c), and holding that 11(c) does not provide employees with a private cause of action); *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1096 (D.C. Cir. 2017) (noting that 11(c) "supplies a remedy for employees who believe they have been subject to retaliation").

The text of section 11(c) contains no limiting language of any kind. The text does not "directly sp[eak] to the precise question at issue" of whether OSHA must rely on the section 11(c) procedure to vindicate and advance statutory interests other than the interest of employees to be protected from retaliation for engaging in protected activities. *Chevron*, 467 U.S. at 842. Rather,

the text of the Act reflects that "Congress did not have a specific intention" on the issue. *Id.* at 845; *see also Montford & Co. v. SEC*, 793 F.3d 76, 82 (D.C. Cir. 2015) (where text of statute does not "forclose[] other interpretations," it is regarded to be "silent … with respect to the specific issue" at *Chevron* step one). Put another way, nothing in section 11(c) speaks to whether OSHA may exercise its authority to promulgate regulations that promote accurate recordkeeping where anti-retaliation and recordkeeping goals overlap.

Interpreting the Act to permit the Secretary to promulgate a regulation that advances the accuracy of injury and illness data is consistent "with the design and structure of the statute as a whole." *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014), quoting *Univ. of Tex. Sw. Med. Ctr.. v. Nassar*, 570 U.S. 338, 353 (2013); *see also Gen. Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2041 (No. 76–5033, 1980) (noting that the Commission considers the reporting requirements of the Act to be "a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier," so that classifying recordkeeping violations as *de minimus* "would weaken significantly the reporting requirements of the Act and the Secretary's regulations").

This conclusion is supported by the Fifth Circuit's decision in *United Steelworkers, AFL-CIO v. St. Joe Resources*, 916 F.2d 294, 299 (5th Cir. 1990) (*St. Joe Resources*), which the Secretary cited in both the Supplemental NPRM and the preamble to the final rule as supporting promulgation of an anti-retaliation provision in the recordkeeping rule. 79 Fed. Reg. at 47607; 81 Fed. Reg. at 29627 & 29672. The court in *St. Joe Resources* ruled that the Commission had the authority to order an employer to abate a violation of the medical removal protection (MRP) provision of OSHA's lead standard at 29 C.F.R. § 1910.1025(k) by ordering back pay. In the course of reaching that conclusion, the court ruled that section 11(c) did not establish the exclusive

mechanism for requiring an employer to provide back pay—the court noting that employment discrimination statutes such as section 11(c) "redress different misconduct than general health and safety provisions," and concluding that "'the remedial purposes of [the OSH Act] would be undermined by a presumption of exclusivity.'" *Id.*, 916 F.2d at 298, quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23 (1983) (brackets in original) (holding that even though section 11 of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act of 1934 proscribe some of the same activity, the two provisions "address different types of wrongdoing" so the section 11 remedy is not exclusive).

USPS points to the legislative history of section 11(c) as establishing that "Congress contemplated and rejected making retaliation and/or discriminatory actions subject to a civil penalty through the issuance of an OSHA citation." (Mem. in Opposition, 6-8). The portions of the Act's legislative history identified by USPS do not include any material that suggests Congress intended the rights and remedy of section 11(c) to promote accurate recordkeeping. (*Id.*). The Sixth Circuit's thorough account of the legislative history of section 11(c) in *Taylor v. Brighton*, 616 F.2d at 259-263, confirms that no such congressional intent is reflected in the legislative history. The Sixth Circuit noted that section 11(c) grew out of a concern "that the possibility of retaliatory discharge might inhibit employees from reporting OSHA violations." *Id.* at 260, citing H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 27 (1970). That concern is different from a concern that employer retaliation against employees for having reported a work-related injury or illness might suppress employee reporting of the same.

Assuming for the sake of analysis that section 11(c)'s legislative history does give rise to some ambiguity as to whether Congress intended to the address the precise question at issue, the regulation also withstands an "ultra vires" challenge at step two of the *Chevron* framework. The

issue to be decided at *Chevron* step two is whether the enforcement of section 1904.35(b)(1)(iv) pursuant to sections 9(a) and 10(c) of the Act "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), citing *Chevron* at 843. The regulation will be deemed to exceed the bounds of the permissible if found to be "arbitrary or capricious in substance," as failing to meet the minimum requirements summarized in *Encino Motorcars, LLC v. Navarro* quoted above. The rulemaking record here far surpasses the minimum requirements articulated in *Encino Motorcars*. The preamble to the final rule reflects the Secretary having examined the relevant information and having provided cogent reasoning for including an anti-retaliation provision in the recordkeeping record as a means to promote increased accuracy of illness and injury data that the Act requires OSHA to collect.

USPS complains of the "sea change" wrought by section 1904.35(b)(1)(iv) in the enforcement against unlawful retaliation for reporting of work-related injuries and illnesses, noting that for "nearly fifty years … OSHA has never attempted to issue a civil citation or penalty" for a violation of section 11(c). (Mem. in Opposition, 8 & 15). This does not render the promulgation of the cited regulation arbitrary or capricious. " '[N]either antiquity nor contemporaneity with [a] statute is a condition of [a regulation's] validity.' " *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55, (2011), quoting *Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 740 (1996).

USPS also argues that the provisions of the Act that the Secretary cited as legal authority for the promulgation of the cited regulation violate the "non-delegation doctrine," and thus promulgation of the cited regulation is contrary to law. (Mem. in Opposition, 16). *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989) (addressing non-delegation doctrine and noting "our longstanding principle that so long as Congress provides an administrative agency with

standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred" [internal citations omitted]). Further apropos of the non-delegation doctrine, the Supreme Court has declared that "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns. Serv., Inc.*, 411 U.S. 356, 369 (1973); *see also Thermal Reduction Corp.*, 12 BNA OSHC 1264, 1266 (No. 81-2135, 1985) (citing *Mourning* for this proposition, and observing that the recordkeeping regulations requiring employers to maintain injury and illness records and to produce those records to the Secretary during an inspection "reasonably effectuates Congress's requirement that employers maintain and make available to the Secretary records pertaining to the incidence of injuries and illnesses in the workplace" and is consistent with the Act). The preamble to the final rule more than amply establishes that the anti-retaliation regulation is "reasonably related" to the requirements of the Act that employers provide and that OSHA collect accurate injury and illness data.

Enforcement of the anti-retaliation regulation is not rendered arbitrary and capricious simply because there could be parallel section 11(c) and section 9(a) proceedings involving the same alleged retaliatory act. To the extent that the Secretary may seek back-pay and similar relief in an order of abatement in a section 9(a) proceeding enforcing the anti-retaliation regulation, equitable principles would foreclose an employee's double recovery in a parallel section 11(c) proceeding. Similarly, one of the parallel proceedings could be stayed to conserve resources and potentially to permit application of issue or claim preclusion principles to the stayed proceeding.

In its memorandum in opposition to the motion, USPS points to discovery requests that were filed in a *different* proceeding before the Commission that also involves an alleged violation of section 1904.35(b)(1)(iv), which USPS argues would be irrelevant in a section 11(c) proceeding. The USPS seems to suggest that such discovery requests show that the cited regulation is both ultra vires and arbitrary and capricious. (Mem. in Opposition, 10-13). To the extent a litigant regards a discovery request in a particular matter to be outside the scope of permissible discovery, unduly onerous, disproportionate, or otherwise objectionable, such arguments are best addressed and resolved in the context of an appropriate discovery motion filed in a particular case, where such a discovery dispute would be concrete and ripe. This argument is not material to whether the cited regulation is ultra vires or arbitrary and capricious.

Enforcement of section 1904.35(b)(1)(iv) pursuant to section 9(a) of the Act is well within the bounds of permissible construction of the Act and is neither arbitrary nor capricious. This permissible interpretation of the Act is due "controlling weight" under *Chevron*, inasmuch as the anti-retaliation regulation was promulgated pursuant to Congress's express delegations of authority to the Secretary (a) to promulgate regulations "as necessary or appropriate for the enforcement of this [Act] or for developing information regarding the causes and prevention of occupational accidents" in section 8(c)(1), (b) to "prescribe regulations requiring employers to maintain accurate records of … work-related deaths, injuries and illnesses," in section 8(c)(2), and (c) to prescribe regulations deemed "necessary to carry out [his] responsibilities under this [Act]" in section 8(g)(2). *Chevron* at 843-44.

For these reasons, the Secretary's motion for summary judgment on the "ultra vires" affirmative defense set forth in paragraph 9 of the answer's "affirmative defenses" section, is GRANTED, and that defense is ordered STRICKEN from the answer.

“Arbitrary and Capricious” Defense

For the same reasons described in connection with the *Chevron* step two analysis immediately above, the Secretary’s motion for summary judgment on the “arbitrary and capricious” affirmative defense set forth in paragraph 8 of the answer’s “affirmative defenses” section, is GRANTED, and that defense is ordered STRICKEN from the answer. *See Judulang v. Holder*, 565 U.S. 42, 53 n. 7 (2011) (indicating that the analysis under *Chevron* step two is substantially the same as the analysis under the APA’s “arbitrary and capricious” standard at 5 U.S.C. § 706(2)(A)).

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: December 27, 2018