

DAVID RAMIREZ, Complainant

v.

BROOKHAVEN NATIONAL LABORATORY, Respondent.

OHA Case No.LWA-0002, LWX-0013

FINAL DECISION AND ORDER

This is an appeal by respondent Brookhaven National Laboratory ("BNL"), of the Initial Agency Decision by an Office of Hearings and Appeals Hearing Officer who found, following two days of hearings, that complainant David Ramirez, an electrician formerly employed by a subcontractor of BNL, had established that his safety disclosures were a contributing factor in BNL's decision to lay him off on March 20, 1992. The Hearing Officer further found that BNL failed to satisfy its burden under the DOE regulations of proving "by clear and convincing evidence" that the challenged personnel action would have occurred even absent the claimant's protected activities. See 10 C.F.R. 708.9(d).

1. On appeal, BNL challenges the Hearing Officer's finding that safety disclosures were a contributing factor in BNL's decision to lay off the complainant. However, it is well established that this type of finding of fact will be overturned only if it is clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting Federal Rule of Civil Procedure 52(a). Measured against this standard, my review of the matter discloses no basis for overturning OHA's fact-based determinations.

2. Aside from challenging OHA's factual findings, BNL asserts that the Hearing Officer erred in ruling in a Supplemental Order that the complainant's award not be decreased by the \$17,700 he received in unemployment compensation. In this respect, the Hearing Officer's decision is consistent with the majority view in similar employment contexts that damage awards will not be reduced because of such payments. *See, e.g., NLRB v. Gullet Gin Co.*, 340 U.S. 361 (1951); *Gaworski v. Commercial Finance Corp.*, 17 F.3d 1104, 1112-1114 (8th Cir. 1994).

Accordingly, the Initial Agency Decision and Supplemental Order are affirmed and hereby adopted as the Final Agency Decision in this case.

Dated: December 2, 1994

William H. White

Deputy Secretary