

**United States Department of Energy
Office of Hearings and Appeals**

In the matter of John Robertson)		
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Filing Date: May 30, 2012)	Case No.:	WBH-12-0002
)		
_____)		

Issued: January 8, 2013

Initial Agency Decision

Steven J. Goering, Hearing Officer:

This Decision and Order involves a Complaint of Retaliation filed by John Robertson (“complainant”) against KQ Services (“KQ” or “respondent”) under the DOE’s Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The complainant was an employee of KQ, a subcontractor of Savannah River Nuclear Solutions, LLC (SRNS), which, since 2007, has been the management and operating contractor for the DOE’s Savannah River Site (SRS) in Aiken, South Carolina. KQ is a furniture relocation company that provides moving services to SRNS at the SRS. Mr. Robertson worked as a truck driver and furniture mover for KQ from November 22, 2010, until the company terminated his employment on July 28, 2011. Mr. Robertson alleges that his termination was in retaliation for activity protected under Part 708. For the reasons set forth below, I will deny Mr. Robertson’s Complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE’s Contractor Employee Protection Program was established to safeguard “public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse” at DOE’s government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from consequential reprisals by their employers. Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. 10 C.F.R. § 708.36.

B. Procedural History

On January 4, 2012, Mr. Robertson filed his complaint against KQ. *See* ECP Concern No. RP2011-12-01. On January 12, 2012, KQ responded to the Complaint by expressing interest in resolving the issues raised in the Complaint (the KQ Services Response). KQ Services also provided company records relevant to the issues raised in the Complaint. *See* Letter from Jerome Millender, CEO, KQ Services to Eric T. Adams, Acting Director, DOE SR-ECP OCR (January 12, 2012). The DOE-SR ECP attempted to resolve the Complaint informally through mediation. The parties participated in mediation on January 26, 2012, but did not reach a settlement. Mr. Robertson then requested that his Complaint be forwarded to the OHA for investigation, followed by a hearing. Memorandum from Carla Camara, Director, SR-OCR, to Director, Office of Hearings and Appeals (OHA) (February 13, 2012).

On March 5, 2012, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Mr. Robertson's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on May 30, 2012. In the ROI, the OHA Investigator discussed three disclosures that Mr. Robertson claims to have made to KQ management officials prior to his termination. The Investigator noted disputes as to whether Mr. Robertson in fact made two of the disclosures, one regarding the condition of the lift gate of a KQ truck, and the other reporting that a filing cabinet had fallen off the lift gate of that truck. ROI at 6-8. As for the third alleged disclosure, made by Mr. Robertson to his supervisor and also regarding the condition of the lift gate, the Investigator found that it would not be protected under Part 708, as the supervisor already knew about the reported problem. *Id.* at 5. The Investigator also identified a factual dispute as to whether Mr. Robertson reasonably believed that the condition of the lift gate constituted a substantial and specific danger to health and safety. *Id.* at 7.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. I subsequently convened a hearing in this case, in Aiken, South Carolina, on October 3 and 4, 2012, and took the testimony of one witness via videoteleconference on October 8, 2012. Mr. Robertson introduced 15 exhibits into the record of this proceeding, and presented the testimony of three witnesses, in addition to his own testimony. KQ introduced 32 exhibits, and presented the testimony of three witnesses.

II. Analysis

The threshold issue in this case is whether the complainant engaged in conduct protected under Part 708. Under the regulations governing the DOE Contractor Employee Protection program, protected conduct includes:

- (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals
 - (1) A substantial violation of a law, rule, or regulation;
 - (2) A substantial and specific danger to employees or to public health or safety;
or
 - (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
- (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or

(c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-

(1) Constitute a violation of a federal health or safety law; or

(2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

As noted above, the complainant alleges that he made two disclosures pertaining to the condition of a lift gate on a KQ truck, and a third disclosure, reporting that a filing cabinet had fallen off the same lift gate. The only provision of Section 708.5 that would arguably protect these alleged disclosures is that protecting disclosure of a “substantial and specific danger to employees or to public health or safety; . . .”¹

Under Part 708, the complainant has the burden of establishing, by a preponderance of the evidence, that he made a protected disclosure. 10 C.F.R. § 708.29. The term “preponderance of the evidence” means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, 29 DOE ¶ 87,034 at 89,180 (2007) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)). As discussed below, I cannot find that the complainant has met this burden with respect to any of the alleged disclosures.

A. Condition of the Lift Gate

In his Complaint, Mr. Robertson alleges that he informed his supervisor, KQ Project Manager Leon J. Green, Jr., of “safety issues needing to be addressed about one of the trucks.” Complaint at 1. Specifically, he allegedly told Mr. Green that the platform of the lift gate of the truck “was bent and that it was unsafe for anybody to unload or load furniture/supplies.” *Id.* The complainant also claimed that he notified KQ Site Manager Jim Nicholson of the condition of the lift gate on a “day when Mr. Green was late getting there, and Mr. Nicholson was there that morning to talk to us while we did our safety briefing.” Hearing Transcript (Tr.) at 30.

First, regarding the complainant’s alleged disclosures to Mr. Green, I agree with the finding of the Investigator that “Mr. Robertson did not disclose anything to Mr. Green about the lift gate, because Mr. Green already knew about the problem.” ROI at 5. In his hearing testimony, the complainant confirmed that his coworker Curtis Williams originally brought the lift gate issue to the complainant’s attention and told the complainant that he had already brought it to the attention of Mr. Green. Tr. at 79-80, 204-05.

In a case decided under the Whistleblower Protection Act (WPA), upon which Part 708 is modeled, the U.S. Court of Appeals for the Federal Circuit concluded that the term “disclose” means “to reveal something that was hidden and not known.” *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001). The court also found it “quite significant that Congress in the WPA did not use a word with a broader connotation such as ‘report’ or ‘state.’” *Id.* at 1350. Thus, the court held that

¹The Complainant does not allege that his disclosures revealed what he believed to be a substantial violation of a law, rule, or regulation.

reporting to a wrongdoer that “there has been misconduct by the wrongdoer . . . is not making a ‘disclosure’ of misconduct. If the misconduct occurred, the wrongdoer necessarily knew of the conduct already because he is the one that engaged in the misconduct.” *Id.*

Here, similarly, it is clear that the issue regarding the condition of the lift gate had already been brought to the attention of Mr. Green, and that the complainant knew this before reporting the issue to him. Applying the same reasoning as the court in *Huffman*, I find that the complainant has not met his burden of establishing that he made a “disclosure” as that term is used in Part 708 when he allegedly reported the condition of the lift gate to Mr. Green. See *Eugene M Kilmer*, Case No. TBH-0111 (2011) (citing *Huffman* 263 F.3d at 1349-50).

With respect to the alleged disclosure of this issue to Mr. Nicholson, there is no evidence that he already would have known about any problem prior to when the complainant contends he notified Mr. Nicholson of the condition of the lift gate. However, Mr. Nicholson denies that the complainant ever made such a disclosure to him. Tr. at 261. Mr. Nicholson further testified that, had the complainant done so, “that would have been something that I would have remembered, And, then, I would have [given] further instructions. And, that further instruction is: Put it on your Maintenance Sheet, or have the driver put it on the Maintenance Sheet.” *Id.* at 286.

Asked about this, the complainant told the Investigator that “the checklist for maintenance issues did not include the lift gate, so he raised his concerns about the lift gate to Mr. Green and Mr. Nicholson verbally.” ROI at 6. At the hearing, the complainant provided a different reason for not using the maintenance checklist to report a problem with the lift gate, stating that the checklist was provided for the driver of the truck to complete. Tr. at 60. “This wasn’t for me to tell them [the drivers]. It’s for me to come tell Mr. Green. That’s what they tell me to do, come notify Mr. Green and Mr. Nicholson, so that’s what I did.” *Id.* at 61.

Though clearly an oral disclosure would be as protected under Part 708 as one made in writing, the fact remains that the complainant produced no contemporaneous documentation of this disclosure, and called no witnesses to testify at the hearing who could corroborate his claim. Having observed the testimony of both Mr. Robertson and Mr. Nicholson, I found the complainant’s testimony on this point to be no more credible than that of Mr. Nicholson. As such, I cannot find it more likely than not that Mr. Robertson’s allegation of a disclosure to Mr. Nicholson is true, and thus the complainant has not met his burden of establishing, by a preponderance of the evidence, that he made such a disclosure.

Moreover, even if I were to find that the complainant made disclosures regarding the condition of the lift gate to both Mr. Green and Mr. Nicholson, I would not be able to find that the disclosures were of information that Mr. Robertson reasonably believed revealed a substantial and specific danger to employees or to public health or safety, as required for the disclosures to be protected under Part 708. 10 C.F.R. 708.5(a)(2).

The most compelling testimony regarding any actual danger posed by the condition of the lift gate was that of Teresa Elliot, an SRNS safety engineer whose job it is to inspect subcontractor’s vehicles, including those used by KQ. On September 7, 2011, Ms. Elliot inspected the truck in question, during which the

lift tail gate was raised to meet the bed of the truck. It was noted that there an approximate gap of 3/4" - 1" from the tail gate to the bed platform. It did not seem to be a problem with the 2 workers that were assigned to the truck. They are aware of the gap

and . . . they compensate for it. A suggestion of how it could be fixed was given to the contract manager.

Respondent's Exhibit 27 (E-mail from Teresa Elliott to Vernon Walters, Lead Investigator, SRNS Employee Concerns Program) (September 7, 2011)).

Ms. Elliot testified that she considered the lift gate "to be safe, but I also made a suggestion as to how they might fix it." Tr. at 462. Specifically, she suggested that an angle-iron be welded underneath the lift to bring it "level with the back of the truck." *Id.* at 463. She testified that, despite her suggestion, she did not consider the condition of the lift gate to be "dangerous," *id.* at 474, nor did she believe that the need for the movers to compensate for the gap from the lift gate to the truck bed presented a safety problem. *Id.* at 474. In her interview with the OHA Investigator, Ms. Elliot stated that the truck had been taken out of service for other repairs at the time that she inspected it, and that if she had discovered this problem with the lift gate during an inspection when the truck was in use, she probably would have asked KQ Services to get the truck scheduled for repairs within the next week or two. She did not think, however, that identifying the bend in the lift gate would have merited taking the truck out of service. ROI at 7.

On the other hand, in statements to the OHA Investigator, several KQ employees expressed opinions that the condition of the lift gate did present a safety issue, *id.* at 6, though the complainant presented no hearing testimony of coworkers in support of this opinion. While I do not completely discount these statements of KQ employees, I give more weight to testimony of Ms. Elliot on this point. First, Ms. Elliot's testimony, unlike the KQ employees, was presented before me, under oath, and subject to cross-examination. Moreover, as a safety engineer and an employee of SRNS, not KQ, I find Ms. Elliot's opinion to be more informed and objective on this issue.

Finally, the complainant's alleged belief regarding the safety of the lift gate is undermined by contemporaneous evidence in the record--a July 26, 2011, statement the complainant wrote concerning a July 14, 2011, incident, discussed in more detail below, in which a file cabinet fell off the lift gate. Respondent's Exhibit 6. In his statement, the complainant makes no mention of the condition of the lift gate as a factor in this accident. Instead he states, "the only way the fire king [file cabinet] fell off was because . . . no one was hold[ing] the fire king . . ." *Id.* at 2. Indeed, in his hearing testimony, the complainant stated that, despite what he estimated was a four to five-inch gap between the lift and the truck bed when under the load of a heavy file cabinet on July 14, 2011, he did not think at the time that it was unsafe to load the cabinet. Tr. at 55-56.

Thus, considering the record as a whole, I find that the complainant has not met his burden of establishing, by a preponderance of the evidence, that he made the disclosure he alleges regarding the condition of the lift gate, nor that, had he made the disclosure, it would have revealed what he reasonably believed to be a substantial and specific danger to employees or to public health or safety.

B. July 14, 2011, Incident

On July 14, 2011, the complainant and two coworkers were to have moved a number of file cabinets from one location to another at SRS, using the same truck with the lift gate, discussed above, to load and unload the cabinets. When the crew arrived at the location where the file cabinets were housed, they discovered that the cabinets were Fire King file cabinets. A Fire King cabinet weighs approximately 1000 lbs, and an accident involving one has the potential to cause serious injury. ROI at 7. Prior to moving the cabinets, the truck driver and crew leader, Mr. Williams, called Mr. Green and informed him that the cabinets were Fire Kings. Tr. at 31, 162, 345, 494. Mr. Green asked whether the crew could

move them safely, and after Mr. Williams told them they could, Mr. Green told them to proceed. *Id.* at 31, 345.

The complainant testified that when his crew began loading the file cabinets, he held on to them as the lift gate raised them to the level of the truck bed, as he considered this to be safest way to load the cabinets. *Tr.* at 168-69. However, as they were loading the cabinets, Mary Krepps, a worker at the location from which the cabinets were being moved, told the crew that it was unsafe to hold the cabinets as the lift raised them, as it could injure the worker holding it if a cabinet were to fall off the lift. *Id.* at 31.

The complainant testified that, before the crew loaded another cabinet, Mr. Williams called Mr. Green and advised him as to what Ms. Krepps had said. *Id.* at 114-15. After the call, Mr. Williams, according to the complainant's testimony, told the crew that Mr. Green wanted them to continue loading the cabinets in the same manner, *i.e.*, holding on to the cabinets as they were being lifted. *Id.* at 115, 165-66. Nonetheless, the crew decided to follow Ms. Krepps's advice and not hold the next cabinet they loaded. *Id.* at 115-16, 166-67, 173.²

While the next cabinet was being raised on the lift, without being held, it slipped off the lift gate onto the ground. *Id.* at 54 (testimony of complainant); *id.* at 494-95 (testimony of Mr. Hazel); *but see id.* at 32 (testimony of complainant that one cabinet was loaded successfully without being held before the next one loaded fell while being raised). After the cabinet fell, Mr. Williams called Mr. Green and, according to the testimony of both the complainant and Mr. Hazel, told Mr. Green that the cabinet had fallen from the lift. *Id.* at 33, 526.

The complainant testified that, after telling this to Mr. Green, Mr. Williams

said that he act[ed] like he didn't understand.

And, so, I asked him, "Hand me over the phone, and I[']ll explain it to him." And I told him exactly what happened, and I told him that the Fire King slid off the truck and fell on the ground, and that the handles and stuff were broke on it, and we picked it up.

Id. at 33. Mr. Hazel testified that he heard Mr. Williams tell Mr. Green that "we had an accident on 714 L. The Fire King just fell off the truck." *Id.* at 526. After this, according to Mr. Hazel, Mr. Williams handed the phone to Mr. Robertson, who told Mr. Green that "[w]e had an accident here next to 714, and [a] Fire King fell off a truck." *Id.* at 528. According to the complainant, he again told Mr. Green, after he arrived on the scene, that the cabinet had "slid off the truck. It fell on the ground." *Id.* at 34.

Mr. Green, in his testimony, denied that either Mr. Williams or Mr. Robertson told him on that day that the cabinet fell off the lift. *Id.* at 390. Mr. Green stated that he received only one call after Ms. Krepps talked to the crew, and that call was from Mr. Williams, stating that Ms. Krepps had "told him to stop, stop working because it did not look safe. And, at, at the time she told them to take the hands off, [and] that the Fire King slid." *Id.* at 346; *id.* at 349 (testimony of Mr. Green that Mr. Williams told him the cabinet slid, but not that it slid off the lift). Mr. Green testified that he told Mr. Williams to stop working

² When asked why he would not follow his supervisor's instructions, the complainant replied that Ms. Krepps had said it was unsafe and that Mr. Green "didn't show us how to load it on the truck and off the truck." *Id.* at 116. Later in his testimony, the complainant testified that he had previously been told not to hold items being loaded, and "that came back to my, my mind from when we first was told that, not be holding them." *Id.* at 167. The third member of the crew, Antwan Hazel, contradicted the complainant's testimony, stating that he had been taught to hold Fire Kings while loading to steady them. *Id.* at 502.

and that he was on his way. *Id.* He further stated that he did not recall speaking to Mr. Robertson on the telephone that day. *Id.* at 359.

Mr. Green testified that, when he arrived, Mr. Williams came to meet him, and that there was a Fire King standing upright, which Mr. Williams identified as “excess.” *Id.* at 346-47. Mr. Green stated that he saw no damage to any Fire King or any handles on the ground. *Id.* at 382. He testified that he then spoke to Ms. Krepps to find out why she had told them to change the way they were doing their work. *Id.* at 347. According to Mr. Green, Ms. Krepps told him that “it just looked dangerous,” and he told Ms. Krepps that the crew knew how to do their job. *Id.* at 347, 387. Mr. Green testified, and Ms. Krepps confirmed in her testimony, that she did not tell Mr. Green that a cabinet had fallen from the truck. Tr. at 387, 434.

Mr. Green stated that he then went to the room where the cabinets were housed and saw “oversized Fire Kings [and] that actually, there was a room full.” *Id.* at 347. He testified that Fire Kings come in different sizes, and that when Mr. Williams called him earlier in the day to tell him that the cabinets were Fire Kings, he did not tell him what size the cabinets were. *Id.* at 396. Mr. Green stated that he decided that the crew would move no more cabinets that day, both because of the size of the cabinets and because it was a hot day. *Id.* at 396-97; *see id.* at 440 (testimony of Ms. Krepps that Mr. Green stated “he did not realize on the Work Order that they were Fire Kings, and that they were going to have to, I guess, reevaluate”).

According to Mr. Green’s testimony, he first became aware that a Fire King may have fallen from the truck when he received a call from Mr. Nicholson on July 26, 2011, asking him if he had heard anything about a Fire King falling. *Id.* at 393. Mr. Green stated that he told Mr. Nicholson that he did not know, but that he would check into it. *Id.* at 352. He testified that he contacted Mr. Williams, and after Mr. Williams confirmed that the cabinet had fallen from the truck, Mr. Nicholson told Mr. Green to get written statements from all three members of the crew. *Id.* at 352-53. Mr. Green stated that he provided these statements to Mr. Nicholson. *Id.* at 353; *see* Respondent’s Exhibits 6, 7, and 8 (July 26, 2011, statements of Mr. Robertson, Mr. Williams, and Mr. Hazel, respectively).

With regard to the events of July 14, 2011, the issue of fact to be decided in this case is fairly simple, that is, whether or not the complainant, on that day, made a disclosure protected under Part 708. The complainant has alleged that he orally informed Mr. Green that a Fire King file cabinet had fallen from their truck’s lift gate. Mr. Green denies that the complainant made such a disclosure. For the reasons explained below, I cannot find that the complainant has established, by a preponderance of the evidence, that he made a protected disclosure that day.

More than any other reason, what makes Mr. Green’s account more credible is that, if he had been told on July 14 that a Fire King had fallen from the truck, he would have had no discernible motive not to immediately report the incident to SRNS and KQ management. Mr. Nicholson testified that Mr. Green had never before failed to report an incident to him. In addition, there is ample evidence in the record of Mr. Green’s report of prior incidents. *See* Respondent’s Exhibit 13 (December 17, 2010, report by Mr. Green of incident involving damage to handtruck while moving a Fire King); Respondent’s Exhibit 14 (June 16, 2011, sworn statement by Mr. Robertson, completed at Mr. Green’s behest, Tr. at 72, regarding drop of printer); Respondent’s Exhibit 15 (email discussing report by Mr. Green of injury to Mr. Hazel incurred while loading desk).

By contrast, the members of the crew loading the Fire Kings that day *did* have a motive to conceal the fall of the cabinet, particularly because it occurred, according to the complainant’s own testimony and statement, *immediately after and because* the crew had disregarded Mr. Green’s instructions as to how to load the cabinets. *Id.* at 115-16, 166-67, 173; Respondent’s Exhibit 6 at 2. As those closest to, and

arguably most responsible for, the accident, the crew had every reason to both conceal the fall of the cabinet, and to provide hearing testimony that would put their actions that day in a more favorable light. This, for example, could account for Mr. Robertson's testimony, in explaining why he disregarded Mr. Green's instructions, that he had previously been told not to hold items as they were being raised on the lift, *id.* at 167, contradicting the testimony of his coworker Mr. Hazel, who stated that he had been taught to keep his hands on Fire Kings to steady them while being lifted. *Id.* at 502.

In support of the complainant's account, Mr. Hazel, as noted above, testified that he witnessed the complainant tell Mr. Green by telephone that "[w]e had an accident here next to 714, and [a] Fire King fell off a truck." *Id.* at 528.³ However, Mr. Hazel also provided self-serving testimony that he later acknowledged was not accurate. Specifically, he initially testified that, after Mr. Green had been called and was on his way, the crew "left the file cabinet on the ground. That way he could see that we had an accident." *Id.* at 495. He repeated this claim again, *id.* at 500 ("[w]e did not pick that Fire King off the ground"), until presented with his July 26, 2011, sworn statement, in which he wrote that the crew picked up the cabinet prior to calling Mr. Green. *Id.* at 509-10; Respondent's Exhibit 8. After it was pointed out to Mr. Hazel that his testimony also contradicted the statement that he had provided to the OHA Investigator, he acknowledged that his prior statements, as opposed to his testimony, were more accurate. *Id.* at 531.⁴

Finally, neither the complainant nor Mr. Hazel, in their July 26, 2011, sworn statements, allege that Mr. Green was informed of the dropped cabinet on July 14, nor more specifically that the complainant made any such report to Mr. Green. Respondent's Exhibit 6 and 8.⁵ Considering the entirety of the record, I find that the credible evidence supporting the complainant's account does not outweigh that supporting the account of Mr. Green, and therefore conclude that the complainant has not established, by a preponderance of the evidence, that he informed Mr. Green that a Fire King fell from the lift of their truck on July 14, 2012.⁶

³ Ms. Krepps testified that she saw the complainant "on the phone" after the cabinet fell. *Id.* at 434. However, while this testimony would support a finding that the complainant made a telephone call to someone at that time, it does not make it more likely that he was speaking to Mr. Green than anyone else he could have called, nor does it provide any evidence as to the content of any conversation the complainant was having.

⁴ Ultimately, there was agreement between the testimony of Mr. Robertson, Mr. Hazel, and Mr. Green, that the cabinet was standing up when Mr. Green arrived. *Id.* at 346-47, 483-84, 531. Ms. Krepps, however, testified that the cabinet was lying on the ground, with the handle-side facing down, upon Mr. Green's arrival. I find that the weight of the evidence supports a finding that the cabinet was likely standing upright when Mr. Green arrived on the scene.

⁵ Curtis Williams alleged in his July 26, 2011, statement that "the incident was reported last week (myself, Mr. Robertson)." Aside from the fact that this statement does not allege that Mr. Green was informed of the drop of the file cabinet on the day it took place, Mr. Williams was not available to be interviewed by the OHA Investigator, and the complainant did not present Mr. Williams as a witness at the hearing, before the hearing officer, where his testimony would have been under oath and subject to cross-examination. Accordingly, I give little, if any, weight to this statement in making a finding as to the complainant's alleged disclosure of July 14, 2011.

⁶ Although I ultimately find Mr. Green's account of the events of July 14, 2011, more credible than those of the complainant or Mr. Hazel, I note that, if I had found the testimony of the crew members to be accurate, it would raise a separate question of law as to whether the complainant's made a disclosure protected under Part 708. This is because the testimony of the complainant and Mr. Hazel regarding Mr. Williams's telephone conversation with Mr. Green would support a finding that Mr. Williams disclosed the drop of the file cabinet to Mr. Green prior to any subsequent conversation between the complainant and Mr. Green. Were I to make this finding, despite the complainant's contention that Mr. Williams "act[ed] like" Mr. Green did not understand what he was being told, I would also find, following the reasoning of the court in *Huffman*, discussed above, that the complaint did not "disclose" information to Mr. Green as that term is used in Part 708.

In summary, for the reasons set forth above, I will deny Mr. Robertson's Complaint of Retaliation, as he has not proven by a preponderance of the evidence that he made disclosures, or engaged in any other conduct, protected under Part 708.

It Is Therefore Ordered That:

- (1) The Complaint filed by John Robertson under 10 C.F.R. Part 708, OHA Case No. WBH-12-0002, is hereby denied.
- (2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: January 8, 2013