

Case No. LWA-0005

July 29, 1994

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Francis M. O'Laughlin

Date of Filing: January 10, 1994

Case Number: LWA-0005

This Decision involves a complaint filed by Francis M. O'Laughlin (O'Laughlin) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. O'Laughlin contends that certain reprisals were taken against him after he raised concerns relating to health and safety with Boeing Petroleum Services, Inc. (BPS), a DOE contractor. The alleged reprisals included wrongfully denying O'Laughlin a management position to which he ostensibly was entitled, and later taking adverse personnel action against O'Laughlin which included a demotion and corresponding salary reduction. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and found that O'Laughlin had not actually made health and safety disclosures that might entitle him to relief for the alleged reprisals under Part 708. O'Laughlin requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. ' 708.9(a), reasserting his claim that reprisals were taken against him by BPS as a result of raising health and safety concerns. The hearing in this case was held on May 18 and 19, 1994, in New Orleans, Louisiana.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or -leased 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. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

Before Part 708 was promulgated, contractor employee protection at DOE's government-owned, contractor-operated (GOCO) facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

The following summary is based on the testimony of witnesses at the May 18 and 19, 1994 hearing as cited below (the hearing transcript is hereinafter "Tr."), and pleadings submitted on behalf of O'Laughlin and BPS in the course of this proceeding. Except as indicated below, these facts are uncontroverted.

O'Laughlin is a logistics engineer who in March 1987 began working for BPS, then the management and operating (M&O) contractor for the DOE's Strategic Petroleum Reserve (SPR), at BPS' central SPR office facilities located in New Orleans, Louisiana. In January 1990, O'Laughlin was promoted to the position of Integrated Logistics Systems (ILS) Manager, a subgroup of the Engineering Directorate which was one of several directorates within the BPS organization. As described below, the actions underlying the present complaint stem from a BPS reorganization that was devised in March and April 1991, and then implemented in May 1991. This reorganization had the effect of splitting the ILS and substantially reducing the scope of O'Laughlin's management responsibilities.

Under O'Laughlin, ILS was generally divided into two components comprised of management organizations which performed these functions: (1) Reliability, Availability and Maintainability (RAM), and (2) Maintenance Management Information Systems (MMIS). See Tr., O'Laughlin Exhibit 1. The RAM division was primarily charged with conducting an ongoing performance analysis of SPR equipment and provisioning inventories for parts replacement on a priority basis. See Tr., Vol. I at 35. The principal functions of MMIS were preventive maintenance (PM) reporting and reliability centered maintenance (RCM). These MMIS functions warrant greater discussion.

Preventive maintenance at the SPR crude oil storage and transfer facilities was generally conducted by maintenance personnel in the field by adherence to a schedule of thousands of preventive maintenance procedures for the various equipment at the SPR sites. As these procedures were scheduled and completed, that information was put into a database which could then be accessed by various departments within BPS. Under the PM reporting function performed by ILS, this data was retrieved by MMIS personnel located at the central SPR office in New Orleans, who then generated a monthly PM status report for use by BPS management and the DOE. See Tr., Vol. I at 38-39.

The RCM function involves a system of anticipating potential equipment failure through an ongoing analysis of whether the equipment is performing in accordance with prescribed specifications. The RCM function performed by ILS under O'Laughlin was part of the Logistics Service Support Analysis (LSSA) program, a maintenance corrective action program that was adopted by BPS and endorsed by the DOE in late 1989 after a consultant study. The LSSA established a list of recommended procedures and initiatives designed to improve SPR logistics and maintenance, referred to as "milestones", which were to be scheduled and completed. See Tr., Vol. I at 35-36, and at 358-59. Under O'Laughlin, it was the responsibility of the ILS, working in conjunction with and assisted by other affected departments within BPS, to see that the LSSA milestones, including RCM, were completed as scheduled. See Tr., Vol. II at 20-21.

However, in late 1990, the President of BPS, Jerry E. Siemers (Siemers), determined that the firm should be reorganized in order to remedy material and logistics deficiencies on the part of BPS under the SPR M&O contract that had been identified by DOE. See Tr., Vol. I at 390-92, Vol. II at 506-08. Siemers determined that a new directorate, the Material Directorate, should be formed and headed by Anthony J. George (George), who had previously worked at BPS, but was then at a BPS affiliate. In January 1991, George accepted the position as Manager of the Material Directorate and, in March and April 1991, conducted a series of meetings with BPS management personnel in order to determine which organizations should become part of the new Material Directorate. See Tr., Vol. II at 283.

During the reorganization planning meetings in March and April 1991, one of the options proposed involved splintering ILS among several directorates, including moving the MMIS from the Engineering Directorate to the Operations and Maintenance (O & M) Directorate. According to George, it was not his preference to split up ILS and he therefore solicited reasons from affected managers, including O'Laughlin, in support of keeping the ILS intact. See Tr., Vol. II at 285-87. Notwithstanding, in May 1991, it was ultimately determined by BPS management that the reorganization would proceed with the break up of ILS among three directorates as follows: (1) the Engineering Directorate retained the RAM function, (2) the MMIS, including the PM reporting and RCM functions, was placed under the O & M Directorate, and (3) all other logistics functions, involving logistical analysis and provisioning, were placed within the new Material Directorate under a newly created Logistics Manager position. See Tr., Vol. I at 25-26, Vol. II at 287.

When presented with the ILS breakup under the reorganization during the March and April 1991 meetings, O'Laughlin raised the following five concerns to George and others:

- 1) The Logistics Service Support Analysis (LSSA) milestones would not be met on a timely basis if Integrated Logistics Systems (ILS) were split up under the reorganization. See Tr., Vol. I at 48, Vol. II at 376. Although many of the LSSA milestones had already been completed, O'Laughlin believed that under the Operations and Maintenance (O & M) Directorate, the maintenance manager in charge of completing the remaining LSSA milestones, Charlie Mitchell, did not view the milestones as a priority. See Tr., Vol. I at 88, Vol. II at 51. O'Laughlin maintained this concern although the responsibility for monitoring the completion of the LSSA milestones remained in the Logistics Manager under the Material Directorate. Id. at 225.
- 2) The dispersal of logistics functions under the reorganization would be in violation of a pertinent DOE logistics order governing the SPR, SPRPMO 4000.1B. Although O'Laughlin concedes that the policy directive in this DOE order may reasonably be subject to a different interpretation, he believed that this order required that all logistics functions be integrated in one department rather than separated. See Tr., Vol. I at 48-49, and at 234-35.
- 3) It would be unwise to place the preventive maintenance (PM) reporting function under the Operations and Maintenance (O & M) Directorate whose personnel was responsible for performing maintenance since O & M would not objectively view the data sent in from the field in preparing the PM reports. O'Laughlin described his concern in this regard as "like putting the fox in the henhouse", although George did not recall his use of that expression. See Tr., Vol. I at 20, 49, Vol. II at 377. O'Laughlin's concern was based upon the possible falsification of data entered into or reported from the PM database, but was aware that there were independent departments within BPS responsible for monitoring the accuracy of data relating to PM performance and reporting. See Tr., Vol. I at 241-42, Vol. II at 296-97.
- 4) The reliability centered maintenance (RCM) milestone, described above, would not be done if Integrated Logistics Systems (ILS) were split up. Tr., Vol. I at 49. Similar to the other LSSA milestones, O'Laughlin had doubts concerning the willingness of Charlie Mitchell, the manager within O & M who would receive this responsibility, to perform this milestone. Id. at 89, 121. George could not recall O'Laughlin conveying this specific concern. Tr., Vol. II at 379.

5) Data concerning the packaging, handling, storage and transportation (PHST) of hazardous material should be incorporated into the logistics database. Tr., Vol. I at 50. O'Laughlin was aware that this data was already contained in a database maintained by the Property Control Division within BPS, which was in charge of handling the movement of any hazardous materials, but O'Laughlin believed that there should also be an integrated logistics PHST database. Tr., Vol. II at 66-68, and at 299-300. Although O'Laughlin maintains that George rejected his idea, the PHST data was incorporated in a database maintained by the Catalogue Division under the Logistics Manager following the reorganization. Id. at 300-01.

In communicating the five concerns described above, O'Laughlin made no references to health and safety, did not describe any dangerous situation, nor did he convey his concerns in those terms. See Tr., Vol. I at 233, 254, Vol. II at 45. However, O'Laughlin maintains that George, as Manager of the Material Directorate, knew or should have known that safety is among the issues involved in the reorganization. Id. at 255.

According to O'Laughlin, reprisals were taken against him by BPS in retaliation for the five communications which he made to George. O'Laughlin states that he was led to assume that under the reorganization, he would be given the position of Logistics Manager, who would report directly to the Manager of the Material Directorate, George. See Tr., Vol. I at 216. George confirms that O'Laughlin started out being the leading candidate for the job. See Tr., Vol. II at 320. But instead, on May 13, 1991, the day office space was being reassigned under the reorganization, O'Laughlin was informed by George that O'Laughlin would not be the Logistics Manager, but that he had been given the position of ILS Manager, reporting to David Ryan who had been selected as Logistics Manager. See Tr., Vol. I at 136-38.

O'Laughlin contends that a second act of alleged reprisal occurred on August 15, 1991, when O'Laughlin was issued a Corrective Action Memo (CAM) which informed him that he had been demoted from his management position for failure to perform certain assigned duties as ILS Manager. Id. at 145-47. O'Laughlin was then transferred from his position as ILS Manager to the function of Policy Compliance, a non-management position, with a demotion that entailed a 7 percent reduction in annual salary, amounting to approximately \$4,000. Finally, O'Laughlin claims that thereafter he continued to be subjected to harassment and intimidation by BPS management to the extent that he felt compelled to submit his resignation to BPS, which became effective May 15, 1992.

C. Procedural History of the Case

Beginning in August 1991, O'Laughlin initiated attempts of informal resolution of the adverse personnel action through internal BPS procedures. These attempts having been unsuccessful, however, O'Laughlin filed a complaint with the SPR Office pursuant to 10 C.F.R. Part 708, on April 1, 1992. That complaint was forwarded to DOE's Office of Contractor Employee Protection (OCEP) on April 3, 1992, but was initially dismissed by OCEP on April 10, 1992, for failure to state an actionable claim under Part 708. In reaching this determination, OCEP found that O'Laughlin's complaint did not reveal that he had made disclosures that related to actual or potential health or safety issues or that his disclosure contributed to the adverse personnel actions taken against him. On May 8, 1992, O'Laughlin filed for review with the Deputy Secretary of DOE and submitted an amended complaint asserting that his disclosures involved issues of health and safety, as well as possible waste, mismanagement, and the violation of a DOE Order. On August 30, 1992, the Deputy Secretary reinstated the complaint, and afforded an opportunity for attempts at informal resolution. During the interim, O'Laughlin submitted his resignation to BPS, which became effective on May 15, 1992.

Then, having been informed by the SPR Office that attempts at informal resolution had failed, OCEP performed an on-site investigation of the matter during the period February 28 through March 5, 1993, and issued a Report of Investigation and a Proposed Disposition on December 16, 1993. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that O'Laughlin's communications regarding the ILS reorganization did not present disclosures relating to health and safety protected under Part 708; it further concluded that the adverse personnel actions taken against him were not the result of any protected disclosure.^{1/} Accordingly, OCEP proposed to deny O'Laughlin's request for relief under Part 708.

During the deliberative stage of the OCEP proceeding, a change of the M&O contractor occurred at the SPR. On March 31, 1993, BPS ceased operations in that capacity and, on April 1, 1993, DynMcDermott Petroleum Operations Company (DynMcDermott) assumed the SPR M&O contract. As the succeeding M&O contractor, DynMcDermott has generally hired the employees formerly employed by BPS with the exception of upper management.

On January 2, 1994, O'Laughlin submitted his request for a hearing pursuant to 10 C.F.R. ' 708.9 to OCEP. On January 10, 1994, OCEP transmitted that request, together with the investigative file, to the OHA, and requested that a Hearing Officer be appointed. I was appointed Hearing Officer on January 11, 1994. On February 10, 1994, procedures and a briefing schedule were established for the hearing in this case under ' 708.9(b).^{2/} Noting that O'Laughlin had requested reinstatement among the remedies he sought in compensation for the alleged whistleblower reprisals,^{3/} I determined that DynMcDermott should also be served with the Proposed Disposition and Report of Investigation, and provided the firm an opportunity to file a pre-hearing brief on the same basis as the other parties in the proceeding. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to John A. Poindexter, General Counsel, DynMcDermott, January 31, 1994.

On March 24, 1994, BPS filed its pre-hearing brief which included a Motion to Dismiss the O'Laughlin complaint on grounds of timeliness and failure to state an actionable claim under Part 708. On March 25, 1994, DynMcDermott similarly filed a pre-hearing brief, in the form of a Motion to Dismiss the firm as a party to the proceeding. In his pre-hearing brief, also filed on March 25, 1994, O'Laughlin reasserts his claim and request for relief under Part 708. On April 8, 1994, BPS and O'Laughlin filed respective Responses to the pre-hearing briefs of the other parties.

On April 20, 1994, I issued an interlocutory Decision and Order in which I determined that BPS' Motion to Dismiss the O'Laughlin complaint should be denied. Boeing Petroleum Services, Inc., 24 DOE & 87,501 (1994). I further determined,

however, that DynMcDermott's motion to be dismissed as a party should be granted on the basis of our finding that, under the particular circumstances of this case, reinstatement was not a remedy properly available to O'Laughlin even assuming his claim were successful on the merits. See 24 DOE at 89,006-08. Thereafter, on May 3, 1994, a conference telephone call was conducted among the OHA Hearing Officer and respective counsel for O'Laughlin and BPS, in order to clarify matters concerning pertinent issues to be addressed, proper witnesses and the conduct of the hearing. As previously indicated, the hearing was conducted on May 18 and 19, 1994 at the SPR facilities in New Orleans, Louisiana. On June 20, 1994, O'Laughlin and BPS filed post-hearing briefs that were authorized by the Hearing Officer at the close of the hearing. Finally, on June 30, 1994, O'Laughlin and BPS filed responses to the post-hearing brief of the opposing party.

II. Legal Standards Governing This Case

In 10 C.F.R. Part 708, we find the rule applicable to the review and hearing of allegations of reprisal based on protected disclosures made by an employee of a Department of Energy (DOE) contractor.⁴ Proceedings under Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE & 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has ". . . [d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences . . . a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5 (emphasis added).

The Complainant's Burden

The regulations describe the burdens of proof in a whistleblower proceeding as follows:

The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under ' 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

10 C.F.R. ' 708.9(d).

It is the task of the finder of fact to weigh the sufficiency of the evidence presented by both parties at trial. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 *McCormick on Evidence* ' 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). O'Laughlin has the burden of proving by evidence sufficient to "tilt the scales" in his favor that when he communicated the five specific concerns discussed above, he disclosed information which evidenced his belief in good faith⁵ that there was a substantial and specific danger to employees or public safety. 10 C.F.R. ' 708.5(a)(1)(ii). If this threshold burden is not met, O'Laughlin has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a contributing factor in a personnel action taken against the complainant. 10 C.F.R. ' 708.9(d); see *Universities Research Association, Inc.*, 23 DOE & 87,506 (1993).

The Contractor's Burden

If the complainant has met his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See *Hopkins*, 737 F. Supp. at 1204 n.3. Thus if O'Laughlin has established that it is more likely than not that he made protected disclosures that were a contributing factor to his demotion and/or non-selection as manager of the new unit, BPS must convince us that it would have taken these actions despite the five concerns communicated by the complainant to his managers from March through April 1991.

III. Analysis

In this case, the scope of the acts protected by this program are restricted to disclosures related to issues of health and safety that O'Laughlin made to the DOE and its M&O contractor for the Strategic Petroleum Reserve, Boeing Petroleum Services, Inc. (BPS). See *Boeing Petroleum Services, Inc.*, 24 DOE & 87,501 at 89,002 and n.2 (1994). To be considered protected disclosures for purposes of the Contractor Employee Protection Program, O'Laughlin's disclosures must have divulged "information that the employee in good faith believes evidences . . . (ii) a substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1).

In the course of this proceeding, O'Laughlin alleges that he made five distinct disclosures to various BPS employees, most notably to Anthony George, who was designated to become Manager of the Material Directorate under the BPS reorganization. According to O'Laughlin, George knew or should have known that implicit in these disclosures were his good faith concerns for health and safety. As a group, the disclosures clearly relate O'Laughlin's concerns that the proposed (and ultimately adopted) reorganization of BPS' logistics component would adversely affect its ability to carry out its mission. It is clear from the record that O'Laughlin had concerns about the success of the contractor's logistics operations under the reorganized structure, and

expressed them both before and after the reorganization was implemented. His concerns alone, however, are not sufficient to raise his disclosures to the level of health and safety disclosures protected under the Program's regulations.

In considering this case, I must observe initially that the nature of O'Laughlin's principal disclosures are different from the type of health and safety disclosure where we have found the protection of Part 708 appropriate, involving the good faith belief on part of the complainant of an actual, existing danger to health and safety. For instance, in *Ronald Sorri, 23 DOE & 87,503* (1993), the complainant, a technician, had disclosed an actual health and safety danger relating to the contractor's use of over-pressurized gas cylinders containing lethal gas in its production facilities. Similarly in *David Ramirez, 23 DOE & 87,505* (1994), the complainant, an electrician, disclosed an unexplained high voltage power reading and his good faith belief that there was asbestos present in the ceiling from which he was removing electrical fixtures. In the present case, however, the purported health and safety dangers, claimed by O'Laughlin to be evident in his stated concerns, were not tangible but instead conditioned upon his belief, not shared by or within the reasonable perception of senior management, that under the BPS reorganization certain individuals would tend to be derelict or deceptive in their performance of the assigned duties for which he had previously been responsible.

The context in which O'Laughlin's disclosures were made also differentiates this case from the typical case involving a health and safety disclosure, such as *Sorri* and *Ramirez*. In those cases, the disclosures were made to the contractor by the complainant after having independently perceived or determined what the complainant in good faith believed to be a danger to health and safety. In other words, it was the perception of the health and safety danger that precipitated the disclosure. In the present case, however, O'Laughlin's concerns were actually solicited by BPS management, in the context of canvassing all affected managers for reasons for and against keeping ILS intact under the reorganization.

Finally, by his own admission, O'Laughlin never expressed his concerns in terms of health and safety or specified any dangerous situation possibly inherent in his concerns. While this is not determinative, particularly in a situation where a substantial health and safety danger is manifest in a complainant's disclosures, it certainly has bearing here in evaluating the relatively amorphous nature of the health and safety matters which O'Laughlin claims were evident in his stated concerns. The burden is on O'Laughlin to establish, by a preponderance of the evidence, that in communicating his concerns, he disclosed within the reasonable understanding of BPS management his good faith belief concerning a danger to health and safety.

Each of O'Laughlin's disclosures will be discussed in detail below. After reviewing the various pleadings submitted in this case and the testimony elicited at the hearing, I have concluded that O'Laughlin has not established by a preponderance of the evidence that his disclosures were of a nature that warrant protection under Part 708, because they did not meet the Program regulations' threshold test of disclosing "information that the employee believes evidences . . . a substantial and specific danger to . . . health or safety." 10 C.F.R. ' 708.5(a)(1)(ii).

1. The LSSA Milestones

As ILS Manager, O'Laughlin initiated performance of the Logistics System Support Analysis (LSSA) milestones before the time period at issue in this proceeding. *Tr.*, Vol. I at 73. These milestones were published in a September 1989 report. *Id.* At the hearing, O'Laughlin described a "milestone" as "a date by which a project is estimated to become completed or some status on that project is to be identified as completed." *Tr.*, Vol. I at 75. O'Laughlin testified that he communicated his concern that the LSSA milestones could not be completed on time in one-on-one meetings with George and in larger meetings with George, and affected managers, Tim Hewitt, Jim Morris, and in some instances Richard Dropik and Billy Mitchell. *Tr.*, Vol. I at 52. He also communicated his reasons for his concern: under the reorganization, some of the logistics functions over which he had formerly had control were transferred to other directorates, and he had little confidence that the other directorates would complete the milestones on time. *Tr.*, Vol. I at 48, 52. Regarding completion of the LSSA milestones, O'Laughlin had reservations about Charlie Mitchell (not related to hearing witness Billy Mitchell), who would acquire this responsibility: "The manager in charge of maintenance, Charlie Mitchell, I had been working with for a number of years [a]nd it was my opinion that these milestones would not be accomplished, primarily due to priorities that they viewed these milestones . . . different from mine." *Tr.*, Vol. I at 88.

From the outset of this proceeding, however, O'Laughlin has been remiss in describing any health and safety matter which he actually communicated in expressing this, among other, concerns regarding the reorganization, but has instead expended considerable effort reemphasizing that there is general relationship between SPR equipment maintenance and health and safety. After gauging the tenor of O'Laughlin's pre-hearing brief, I admonished counsel for O'Laughlin that I was prepared to take notice that there is, of course, a relationship between preventive maintenance and health and safety, and that he should instead focus his presentation upon the actual content of the alleged health and safety disclosures made by O'Laughlin. Letter of April 26, 1994, from Fred L. Brown, Deputy Assistant Director, OHA, to J. Arthur Smith, III, counsel for O'Laughlin and Stanford O. Bardwell, Jr., counsel for BPS. Accordingly, at the outset of the hearing, I took notice of the general relationship between preventive maintenance and health and safety. See *Tr.*, Vol. I at 12-13. Notwithstanding, O'Laughlin focused much of his testimony on this general relationship rather than following my admonition to discuss what was actually stated in the pertinent communications with BPS management.

In the hearing, O'Laughlin testified at length that several of the LSSA milestones concern health and safety in his opinion. *Tr.*, Vol. I at 76-85. Much of O'Laughlin's testimony centered on the general nature of logistics and the inherent concern for safety "within the functional process." *Tr.*, Vol. I at 76. As O'Laughlin addressed each of the milestones he considered to have health and safety considerations, he focused for the most part on implicit aspects. For example, discussing LSSA Milestone 1, which concerns evaluating the logistic support function, he stated, "Obviously, you want to ensure that training is available to personnel so they can do the work safely. And in that context I believe that particular milestone has health and safety implications." *Tr.*, Vol. I at 76-77. In another instance, regarding Provisioning Milestone 1, which concerns incorporating actual failure data into a particular database, O'Laughlin testified that it is important to distinguish between equipment that "failed in a

safe mode or failed in an unsafe mode." Tr., Vol. I at 79. He also testified that equipment repair is a matter of health and safety, and that milestones concerning preventive maintenance and repair have health and safety implications. Tr., Vol. I at 84-85. 6/

Evidence that safety in the most general sense was referred to does not satisfy the regulatory standard of the complainant having actually disclosed information which in good faith is believed to evidence a substantial and specific danger, that applies to protected health and safety disclosures. We must instead consider whether O'Laughlin's actual communications imparted his good faith belief that failure to meet a specific milestone presented a "substantial and specific danger to employees or public health or safety." In this regard, the testimony elicited during the hearing demonstrates that although O'Laughlin clearly expressed his concerns that the LSSA milestones would no longer be met, he did not communicate to others any health and safety implications he may have in good faith believed to be inherent in his concerns. Indeed, when asked that in communicating this concern regarding completion of the LSSA milestones to George, whether he stated that there was any danger of someone getting hurt, O'Laughlin replied: "I don't remember saying anything like that." Tr., Vol. I at 233; see also Pre-Hearing Brief of Francis M. O'Laughlin, Appendix A at 3.

Richard Dropik (Dropik) testified that he heard O'Laughlin express his concerns in meetings that the split-up of the ILS functions into different directorates would impede timely completion of the LSSA milestones. Tr., Vol. I at 295. He also stated, however, that O'Laughlin never explicitly expressed in these meetings any health and safety concerns concerning the milestones. Tr., Vol. I at 337. Consequently, although he, as a logistician, perceived health and safety implications in O'Laughlin's communications, he believed that the others present in those meetings, including George and David Ryan, lacked the experience in the field of logistics to perceive those implications. Tr., Vol. I at 337-338, 343. Dropik's belief that O'Laughlin's health and safety concerns were not communicated to others attending the meetings is corroborated in the testimony of George. Tr., Vol. II at 290-291, 376. In addition, David Ryan, O'Laughlin's immediate supervisor after the reorganization testified that O'Laughlin never communicated to him that the split-up of ILS would create a potential safety or health problem on the SPR. Tr., Vol. II at 414, 447.

After reviewing the record in this proceeding, and in particular the testimony presented at the hearing, I have determined that O'Laughlin has not met his burden of establishing the disclosure of information which conveyed his good faith belief of a substantial and specific danger to health and safety in his expressing his concerns regarding completion of the LSSA milestones under the reorganization. Under the circumstances of O'Laughlin's communications, when BPS management was seeking alternative views concerning the proposed reorganization, I find that the reasonable perception of BPS management was that in expressing the LSSA concern, O'Laughlin was merely identifying a potential performance difficulty rather than attempting to convey any substantial and specific danger to health and safety. Moreover, to the extent that there was a health and safety concern implicit in O'Laughlin's communication based upon the general nexus between preventive maintenance and health and safety, I cannot find that O'Laughlin revealed his good faith belief of any "substantial danger" to health and safety where, as here, the danger was not actual but potential and conditioned upon the listener agreeing with his unilateral judgment concerning the ability of BPS to handle logistics functions under the reorganization.^{7/} Nor can I find that O'Laughlin disclosed a "specific danger" to health and safety when he never expressed his concern in those terms and the health and safety danger was not apparent on the basis of what he said.

2. SPRPMO Order 4000.1B.

O'Laughlin testified at the hearing that this order "identifies the ILS requirements[,] policy[, and] procedure for the SPR." Tr., Vol. I at 48. In his opinion, splitting up the ILS functions or decentralizing them violated this order. Tr., Vol. I at 49. O'Laughlin raised this issue with George individually, in group meetings with George also attended by Tim Hewitt and Billy Mitchell, and with Bill Smollen of the DOE. Tr., Vol. I at 52. O'Laughlin did testify, however, that his interpretation of the order, which required the ILS functions to remain within a single organization, was not an exclusive interpretation, but in fact someone could read the order to require only that all logistics functions be performed rather than be integrated in one organization. Tr., Vol. I at 234-235.

Thus, on its face, O'Laughlin's concern with regard to the DOE order presents only an issue of interpretation and does not portend any health and safety matter. Further, O'Laughlin neither gave direct testimony nor produced any other evidence to demonstrate that he intimated any health and safety concern in raising this possible infringement of the DOE order. George testified that although he believed O'Laughlin raised the issue of potential violation of the order with him, Tr., Vol. II at 376, he did not recall the issue of safety or health problems being raised in that context. Tr., Vol. II at 293.

The burden of proof lies with O'Laughlin to establish by a preponderance of the evidence that he made a disclosure of information that he, in good faith, believed demonstrated a substantial and specific health or safety danger. Based on the record developed in this proceeding, I find that O'Laughlin has not met this burden in this instance. Although it is clear that he raised the issue of potential violation of SPRPMO Order 4000.1B with George and possibly others, there is no evidence any health and safety concerns were ever communicated. Nor is there any evidence that these concerns represented a substantial and specific health or safety danger. The little evidence regarding this disclosure seems to indicate that it is highly debatable whether the split-up of the ILS functions would actually constitute a violation of the order, let alone whether such a violation would create a health and safety danger of any type at all.

3. Preventive Maintenance Reporting

The third disclosure that O'Laughlin maintains is entitled to protection under the Program regulations consists of his objections to the transfer of the preventive maintenance (PM) reporting function under the reorganization, from the Maintenance Management and Information Systems (MMIS) component of ILS to the Operations and Maintenance (O & M) Directorate. Essentially, this function entailed preparing a monthly PM status report from data that was retrieved from a PM database which was continually updated by maintenance personnel in the field at the SPR facility sites as PM procedures were completed as

scheduled. As the maintenance personnel were under the O & M Directorate, O'Laughlin expressed his belief that it would be improper to also place the PM reporting function under that Directorate since, according to O'Laughlin's testimony, permitting those performing the maintenance to measure their own performance was "like putting the fox in the henhouse." Tr., Vol. I at 49. In particular, O'Laughlin was concerned that the "level of objectivity would be diminished" in preparing the report, and that in analyzing the PM data to prepare the report "this evaluation may not have maintained the same standardized level it had in the past." Id. at 105, 253. Similar to the disclosures discussed above, O'Laughlin put forth this concern to George, individually and at staff meetings attended by others including Tim Hewitt and Billy Mitchell, and to Billy Mitchell and Bill Smollen individually. Tr., Vol. I at 53.

O'Laughlin's testimony on cross-examination again reveals, however, that he never expressed his concern regarding transfer of the PM reporting function in terms of health and safety. He admittedly did not tell George that this transfer could create a dangerous situation for any employee. Tr., Vol. I at 254. The testimony of other witnesses also indicate that the health and safety dangers O'Laughlin may have perceived were not communicated to others. Richard Dropik testified that, in the meetings he attended, the gist of O'Laughlin's stated opposition to the split-up of the ILS functions was that a decentralized ILS organization would be unable to perform its required tasks. Tr., Vol. I at 285-286. Billy Mitchell testified that, in the meetings he attended, he could not recall any discussion of the possibility of employee safety issues arising as the result of the split-up of ILS. Tr., Vol. I at 379-380. George testified that O'Laughlin never made him aware that the MMIS transfer would create a potential safety problem. Tr., Vol. II at 293-294.

Despite conceding that no explicit health and safety matter was stated in expressing this concern regarding the reorganization, O'Laughlin nonetheless maintains that he expected that George, as head of the Material Directorate, "would know or should have known" that safety was among the issues inherent in transferring the PM reporting function. Tr., Vol. I at 255. However, the context of O'Laughlin's stated concern leads me to disagree. It is important to note that there is no direct connection between PM reporting and the actual performance of maintenance by field personnel at the SPR sites. In performing this function, the PM component of ILS did not perform or oversee maintenance, but merely captured information from a database, which was accessible throughout BPS, concerning completion status of scheduled PM procedures. For this reason, Billy Mitchell referred to PM reporting as "primarily a bean-counting function." Tr., Vol. II at 372. O'Laughlin asserts that there would be an adverse affect upon PM performance if the O & M Directorate falsified or failed to include pertinent data in preparing the PM status report. See Tr., Vol. I at 104-07. However, the pertinent testimony indicates that a cognizable likelihood of false PM reporting existed only in O'Laughlin's view. George testified that it was ultimately the oversight responsibility of O & M to assure the actual performance of maintenance, and the actual completion of PM procedures was monitored by a BPS division referred to as PP&C (Program, Planning and Control). Tr., Vol. II at 296-97.

Based on the record before me, I have determined that O'Laughlin has not effectively met his burden of establishing, by a preponderance of the evidence, that he communicated information which evidenced a substantial and specific danger to employees or public health or safety when he raised his objection to the transfer of the PM reporting function to the O & M Directorate. O'Laughlin's stated concern was couched in terms of performance efficiency with regard to the reorganization, and the speculative health and safety consideration which was arguably implicit in that concern did not rise to the level of communicating his belief of a health and safety danger which was either "substantial" or "specific."

4. Reliability Centered Maintenance

O'Laughlin's fourth disclosure focuses on his belief that reliability centered maintenance (RCM), a principal LSSA milestone conducted by the MMIS division of ILS, would not be conducted after the reorganization. According to O'Laughlin, responsibility for this milestone shifted to an O & M Directorate organization that, he believed, did not want to do it. Tr., Vol. I at 49, 121. O'Laughlin stated that the health and safety issue that he sees in this disclosure is "operational safety, being able to identify a piece of equipment before it fails and, in particular, fails catastrophically where it might injure somebody or contaminate the environment." Tr., Vol. I at 122. O'Laughlin testified that he raised this issue individually with George, Billy Mitchell and Bill Smollen. Tr., Vol. I at 53, 121, 132. Billy Mitchell testified that at one meeting he attended, "the concern was expressed that if that function went to the maintenance department, it may be in jeopardy of [not] being implemented." Tr., Vol. I at 361-362. George could not recall whether O'Laughlin ever raised this issue with him. Tr., Vol. II at 298, 379.

Again, O'Laughlin has presented no evidence and does not maintain that he expressed his concerns regarding the RCM milestone in terms of health and safety. 8/ Although George did not recall the RCM issue being raised, Billy Mitchell confirms that he never heard O'Laughlin express any health and safety danger in stating his objections, including the RCM milestone issue, to the proposed reorganization. See Tr., Vol. I at 379-80. For the reasons discussed above in considering O'Laughlin's objections to the reorganization regarding the LSSA milestones, I have concluded that O'Laughlin has not established, by a preponderance of the evidence, that in his statements to George and others concerning RCM he disclosed a good faith belief of a substantial and specific danger to employees or public health or safety.

5. Packaging, Handling, Storage and Transportation (PHST)

The final matter claimed by O'Laughlin as a protected disclosure involves his recommendation that data concerning the packaging, handling, storage, and transportation (PHST) of hazardous materials should be incorporated into the logistics database. Tr., Vol. I at 50. O'Laughlin testified that he made this recommendation once to George individually during a meeting in April 1991, prior to the reorganization. See Tr., Vol. I at 125-26. In making this recommendation, O'Laughlin was aware that this data was already contained in a database maintained by BPS' Property Control Division which had PHST responsibility; indeed, he had conferred with the Property Control Division concerning PHST data. See Tr., Vol. II at 66. O'Laughlin believed, however, that PHST data should be incorporated into the logistics database since military standards called for it, although the particular military standard which he cited had not been adopted by BPS at that time. See Tr., Vol. I at 126. He testified at the hearing that he addressed this concern to George once "for clarity and approval to proceed." Tr., Vol. I at 53-54.

I am again unable to find that in making this recommendation to George, O'Laughlin disclosed information evidencing a substantial and specific danger to health and safety. In claiming that this was a protected disclosure, O'Laughlin asserts the obvious, that "[a]ny type of hazardous material you're dealing with has a health and safety implication. . . [and] the packaging, handling, storage, and transportation of those materials, to me, is a safety concern . . ." Tr., Vol. I at 125. However, the record of this proceeding reveals that the only matter actually communicated to George by O'Laughlin was his desired enhancement of the logistics database to include PHST information that was already maintained by the BPS division having this ultimate responsibility.

My view is confirmed by George's testimony in this regard. According to George, he was well aware that before and after the reorganization, the Property Control Division had the responsibility "for handling, safeguarding, and moving what little transportation of hazardous materials we had," and that Division maintained a Supply Services Manual that governed this function. See Tr., Vol. II at 300. George further testified that the idea to incorporate PHST data into the logistics database "came up from a number of camps" (id. at 299), but recalls that O'Laughlin made this recommendation:

Not as a concern. I remember him raising the issue of hazardous materials to me . . . in the context that it would be an enhancement to the logistics database . . . if we were able to use it in some fashion to identify hazardous materials or to expand it to incorporate the hazardous-materials area.

Tr., Vol. II at 379-380. 9/

Once again, the record clearly indicates that O'Laughlin made the statements he claims to have made. Once again, however, the record lacks a preponderance of evidence that indicates that, through his statements, O'Laughlin disclosed "information that [he] in good faith believe[d] evidence[d] . . . [a] substantial and specific danger to employees or public health or safety." 10 C.F.R. ' 708.5(a)(1)(ii).

IV. Conclusion

As set forth above, I have determined that O'Laughlin has not met his burden of proof of establishing by a preponderance of the evidence that he made disclosures protected under 10 C.F.R. Part 708. It is clear that O'Laughlin had some specific concerns about the reorganization of BPS, and expressed those concerns to both DOE and contractor personnel. He did not, however, explicitly disclose any matter of health and safety which may have also been within his contemplation. Nor am I persuaded that he implicitly communicated a cognizable health and safety danger by his stated concerns, since the adverse impact upon health and safety that O'Laughlin claims "should have been known" was in fact highly general and speculative, based upon his uniquely subjective perspective of BPS' capacity to perform logistics functions under the reorganization. Finally, the ostensibly self-serving nature of O'Laughlin's stated objections is also a consideration from which I cannot escape. The unavoidable reality is that the BPS reorganization, which was encouraged by DOE to remedy certain logistics supply failures, came at the expense of O'Laughlin's management authority. I am therefore drawn to the view that O'Laughlin was adamant in attempting to keep ILS intact for personal reasons, and I am indelibly left with that impression by the record of this proceeding. I find any health and safety motivation O'Laughlin claims to have had to be transparent.

On this basis, I conclude that O'Laughlin has failed to show by a preponderance of the evidence that he disclosed information evidencing any health and safety danger, let alone a danger which rises to the level of substantial and specific. Because O'Laughlin has failed to make a prima facie case, there is no need to address the remaining regulatory criteria, e.g., whether the disclosures were contributing factors in the personnel actions taken, or whether Boeing would have taken those actions absent O'Laughlin's disclosures. 10 C.F.R. ' 708.9(d).

It Is Therefore Ordered That:

- (1) Francis M. O'Laughlin's request for relief under 10 C.F.R. Part 708 is hereby denied.
- (2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Fred L. Brown

Hearing Officer

Office of Hearings and Appeals

Date: July 29, 1994

NOTES

1/ OCEP states that although information relating to O'Laughlin's alleged disclosures regarding possible waste, mismanagement, and violation of a DOE Order was also examined, OCEP did not assert jurisdiction under Part 708 on the basis of these alleged disclosures. Notwithstanding, OCEP found in the Proposed Disposition that "[O'Laughlin]'s continued disagreement with the reorganization did not constitute disclosures of possible waste or mismanagement that merit protection under Part 708, had jurisdiction under that criteria been asserted in this case." Proposed Disposition at 15.

2/ Section 708.9(b) provides that hearings conducted under Part 708 "will normally be held . . . within 60 days from the date the complaint file is received by the Hearing Officer . . ." However, upon initial contact, O'Laughlin informed the OHA Hearing

Officer in this case that he would not be available within the 60-day time frame since he was about to begin 90 days of previously scheduled duty with the U.S. Naval Reserve. O'Laughlin therefore requested, and I as Hearing Officer approved, an extension of time for the convening the hearing until after the completion of his duty assignment in May 1994.

3/ OCEP states in the Report of Investigation that during the attempted informal resolution of the matter, O'Laughlin sought the following remedies: (1) reinstatement to his prior position, (2) back pay and benefits, and (3) removal from his personnel files of any reference to the events and personnel actions surrounding the complaint. Report of Investigation at 5-6.

4/ I note at this time that the respondent BPS has renewed its objection to these proceedings, arguing that the rule (1) was applied retroactively and (2) does not comply with the Administrative Procedure Act (APA), 5 U.S.C. ' 551 et seq. Post-Hearing Brief of BPS at 1. I disagree. First, the original motion to dismiss was denied by the Hearing Officer. See Motion to Dismiss, Boeing Petroleum Services, Inc., 24 DOE & 87,501 (1994). It is DOE's position that the 60-day filing period of 10 C.F.R. '708.6 (d) was tolled while O'Laughlin contacted BPS' parent company seeking resolution of his complaint. For the same reason, I again deny this objection. Second, these proceedings are not "subject to and governed by" the APA as interpreted by the Supreme Court in *Ardestani v. I.N.S.*, 112 S. Ct. 515, 518-19 (1991) (holding that proceedings that fall "under section 554" are required by statute to be determined on the record after opportunity for an agency hearing). 5 U.S.C. ' 554 delineates the scope of proceedings governed by the formal adjudication requirements of the APA. "On the record" is interpreted as a proceeding held before an administrative law judge; the OHA Hearing Officer is not required to be and generally will not be an administrative law judge.

5/ The regulations provide protection for a good faith disclosure, even if incorrect. See *Universities Research Association, Inc.*, 23 DOE & 87,506 (1993).

6/ Cross examination of O'Laughlin revealed that many of the LSSA milestones which he identified as involving health and safety had already been designated as completed in company reports, prior to the reorganization. See Tr., Vol. II at 51.

7/ As confirmed by the testimony of Billy Mitchell, simply moving the MMIS to the O & M Directorate did not, in and of itself, have any health and safety ramification. See Tr., Vol. I at 372-73. Furthermore, the actual business context of the reorganization is significant. According to the testimony of Ted Williams, a DOE employee who oversees the SPR M&O; contract, and Jerry Siemers, President of BPS, the reorganization was undertaken and in fact encouraged by DOE primarily to remedy logistics supply failures that had occurred in BPS' management of the SPR, while O'Laughlin was ILS Manager. See Tr., Vol. II at 507-09. It is therefore no surprise that when O'Laughlin continued to raise potential performance difficulties with the breakup of the ILS, his concerns "fell on deaf ears." Testimony of Richard Dropik, Tr., Vol. I at 295. Finally, senior BPS management did not share O'Laughlin's opinion that Charlie Mitchell was incapable or unwilling to perform the LSSA milestones under the O & M Directorate. See also note 8, *infra*. Siemers testified: "I have all the confidence in the world in Charlie Mitchell and his performance. So I had no concern with that reorganization." Tr., Vol. II at 517.

8/ O'Laughlin's testimony revealed that, similar to the other LSSA milestones, he doubted the commitment of Charlie Mitchell, an O & M Directorate manager, to administer RCM. According to O'Laughlin, he was told by Reggie Swanson, a maintenance engineer who had previously worked under him but then worked under Charlie Mitchell, that Charlie Mitchell was "not going to do RCM." Tr., Vol. I at 121. O'Laughlin states that when he informed George, "George told me that it wasn't my concern anymore; it was Charlie Mitchell's concern." *Id.* at 132. O'Laughlin stated nothing more concerning the content of their conversation regarding RCM.

9/ There was a conflict in the testimony concerning George's attitude towards O'Laughlin's PHST data recommendation. O'Laughlin believed his recommendation was "turned down" by George who felt that "we didn't need to do it." (cont'd) Tr., Vol. I at 50, 126. However, George testified that he thought "it was a good idea" (Tr., Vol. II at 300) and following the reorganization, incorporated PHST data within a database maintained by the Catalogue Division under the Logistics Manager. Tr., Vol. II at 301-02. O'Laughlin testified that he was unaware that PHST data had been incorporated into a database under the Logistics Manager following the reorganization. *Id.* at 68.