

April 22, 2002

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: Raymond Gallegos; Andrew Sanchez

Date of Filing: July 3, 2001

Case Numbers: VBH-0070; VBH-0071

This Initial Agency Decision concerns a whistleblower complaint filed by Raymond Gallegos and Andrew Sanchez (the Complainants) against their previous employer, Business Environments (BE), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. BE is a subcontractor that provides office furniture to the DOE's Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico. The complainants worked as furniture installers for BE until they were both terminated on December 11, 2000. The complainants allege that BE terminated them in retaliation for their refusing to work without proper paperwork.

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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an independent fact-finding by an investigator from the Office of Hearings and Appeals (OHA), a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

Prior to their termination, the Complainants worked for BE in Los Alamos. Their direct supervisor, James Daniel, worked at BE's office in Albuquerque, New Mexico. They communicated by cellular telephone and facsimile machines. Hearing Transcript (Tr.) at 161-62. The Complainants version of the events

leading to their termination differs from that of BE, offered through Mr. Daniel. On December 1, 2000, Mr. Daniel asserts that he received a telephone call from LANL, asking that furniture be moved immediately. *Id.* at 165. BE had previously installed the furniture. Mr. Daniel called the Complainants to inform them of the request. *Id.* The Complainants told Mr. Daniel that they did not have the correct paperwork to perform the job onsite. Since the office machines, including its facsimile machine, had recently been removed, Mr. Daniel could not FAX the correct paperwork to the Complainants. Therefore, he told them to use the paperwork they had used that morning at a prior job at LANL. *Id.* at 166. He directed them to copy the old form and “white-out” the data on those forms. The correct information could then be written into what would then be a blank form. Mr. Daniel told the Complainants to take the completed forms and have them signed by the appropriate authorities. *Id.* at 46, 132, 165. The Complainants resisted. For the most part, the Complainants agreed with Mr. Daniel’s version of the facts of December 1, 2000. They disagree with whether his request would violate the health or safety regulations of LANL – a matter I will discuss later.

Mr. Gallegos claims that in his telephone conversation with Mr. Daniel, he explained that he believed it would be fraudulent to use the old paperwork. Mr. Sanchez testified that they were expecting a delivery at the BE Los Alamos warehouse and could not leave to move the furniture at LANL. Tr. at 21. He further stated that Mr. Daniel suggested that one of them go move the furniture and the other wait for the delivery. *Id.* However, Mr. Gallegos could not drive the truck and Mr. Sanchez who could drive the truck was not site-specific trained⁽¹⁾ for the area at LANL where the move was to occur. *Id.* Both Complainants stated affirmatively that Mr. Daniel told them to have the “whited-out” paperwork signed by the proper LANL employee. The furniture was not moved on December 1, 2000.

Mr. Daniel received a call on December 7, 2000, complaining that the furniture had not yet been moved. Tr. at 168. On December 8, 2000, he called the Complainants and asked why the job had not been completed. Once again, the Complainants claim they told Mr. Daniel they did not have the proper paperwork and refused to “white-out” old paperwork. After terminating the telephone call, Mr. Daniel decided to drive to Los Alamos and deal with the problem.

Mr. Daniel’s recollection of the events of December 8, 2000, differs from the Complainants’ recollections. Mr. Daniel testified that he arrived at the warehouse around 12:30 p.m. Neither of the Complainants were present, and the company truck was missing. Tr. at 169. Mr. Daniel stated that he left the warehouse to get some lunch, and then he started calling Mr. Sanchez’ cellular telephone, Mr. Gallegos’ pager, and Mr. Gallegos’ father. *Id.* He called the Albuquerque office to determine if there were any messages for him there. There were not. He called Mr. Baird Brandow, who had escorted the Complainants at their morning job, and asked if he knew where they were. Mr. Brandow indicated he did not know where they were. *Id.*

The Complainants disagree with Mr. Daniel’s recollection of the facts. Mr. Sanchez stated in testimony at the hearing in this case that he became ill around lunchtime and left. Tr. at 23. When he arrived home, he says he passed out for five to six hours and had a fever of 102 degrees. *Id.* Mr. Sanchez stated that he tried to call Mr. Daniel to tell him he was leaving because he was ill, but Mr. Daniel did not answer his cellular telephone and his voice mail was not activated. *Id.* at 24. Mr. Sanchez stated that he was too sick to call the Albuquerque office of BE. *Id.* at 36. As for Mr. Gallegos, he indicated that, after returning to the warehouse, he stayed until 2 p.m. and then left the warehouse. He tried to call Mr. Daniel and got no response. *Id.* at 106. Mr. Gallegos indicated that he took the company vehicle, although he did not have a driver’s license, because he car pooled to work and his car pool had already left. Both the Complainants stated that it was understood that when they finished their assigned work for the day, they could leave – even if it was not yet quitting time.

On the evening of December 8, 2000, BE decided to terminate the Complainants for leaving their jobs early on that day without proper authorization and for taking the company truck. This was officially communicated to the Complainants on December 11, 2000, during a meeting between the Complainants and Mr. Daniel at the Los Alamos warehouse. At that time, Mr. Daniel determined that Mr. Gallegos had taken the truck, not Mr. Sanchez. When notified of his termination by BE, Mr. Sanchez attempted to give

Mr. Daniel a doctor's note.

C. Procedural History

After being terminated on December 11, 2000, the Complainants filed this action with the Albuquerque Operations Office of DOE under Part 708. Pursuant to the Part 708 Regulations, the matter was referred to the Office of Hearings and Appeals for an investigation on March 8, 2001. The Report of Investigation was issued on July 3, 2001, at which time I was appointed the Hearing Officer in this matter. A Hearing was held on December 10, 2001. At the Hearing, the Complainants were given the opportunity to introduce evidence that their refusal to perform the work requested of them led to their termination by BE. Conversely, BE had the opportunity to defend itself and show by clear and convincing evidence that it would have terminated the Complainants absent their refusal to perform the requested work.

II. Legal Standards Governing This Case

A. The Complainant's Burden

In the present case, it is the burden of the Complainants under Part 708 to establish by a preponderance of the evidence that they refused to participate in an activity that they believed would have constituted a violation of federal health or safety laws or caused them to have a reasonable fear of serious injury to themselves or others, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. (2) 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Although the regulations do not specifically state that a complainant must have a "reasonable" belief that an activity would violated federal health or safety laws, amendments to this section were made in 1999 that were intended to exclude trivial disclosures. *See* 64 Fed. Reg. at 12866 (March 15, 1999). Thus, it is consistent with these changes to deem that the Complainants must have had a "reasonable" belief that using "whited-out" paperwork would have violated a health or safety regulation.

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against her, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure." 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case, if Messrs. Gallegos and Sanchez establish that they refused to participate in an action covered by section 708.5 and that refusal was a contributing factor to an adverse personnel action, BE must convince me that it would have taken the same actions even if the Complainants had not refused to participate in an action. *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 at 89,034-35 (1994).

III. Whether the Complainants Have Made A Prima Facie Case of Retaliation

The Complainants have not alleged that they feared serious injury by following Mr. Daniel's instructions. Therefore, the initial question before me is whether they reasonably believed following the instructions to use "whited-out" paperwork would violate a federal health or safety law. 10 C.F.R. § 708.5(c)(1). After

reviewing the record, I find the Complainants did not have a reasonable belief that presenting “whited-out” paperwork to LANL officials in order to enter the site would violate a health or safety regulation at LANL.

There is no dispute that if the Complainants had performed the work without the proper paperwork, it would have violated health or safety regulation at LANL. The paperwork that was necessary to enter the area where the furniture was to be moved included an Environmental, Safety, and Health form. This form lists the hazards to which those entering the particular work area might be exposed. Such exposure could lead to later health or safety issues. The paperwork is required under the health and safety regulations at LANL. Thus, the dispute hinges on whether the Complainants could have reasonably believed use of “whited-out” paperwork would violate the safety and health regulations at LANL.

The record developed before me indicates that the Complainants had not gone forward with the work because of several reasons, none of them related to a concern about violating the health or safety regulations of LANL. I find that their belief that the action requested of them would violate the health or safety regulations of LANL originated only after they were terminated, in an attempt to be covered by the Part 708 regulations.

The Complainants testified as follows about the paperwork at issue. They both stated at the hearing that it was not their job to prepare paperwork. Tr. at 47, 48, 50, 130. During a hearing before the State of New Mexico Department of Labor regarding Mr. Gallegos’ unemployment compensation, Mr. Gallegos stated under oath that once the Los Alamos office was closed, he felt all the work was piling up on him. Also during that hearing, it was alleged that Mr. Daniel called late on December 1, 2000, to assign the work to them and the Complainants would be required to work overtime. BE Ex. No. 16 at 33. Apparently, neither of them wished to do that, so they stated that they refused to “white-out” the paperwork. Both Complainants also claimed they did not have the correct paperwork in the warehouse to copy. Mr. Sanchez also stated that he was not site-specific trained in the area where the furniture was to be moved and Mr. Gallegos could not drive the truck, so they could not separate to do two jobs.(3) As is evident, the Complainants have given conflicting reasons for not completing the paperwork.

Another argument the Complainants have advanced is that Mr. Daniel told them to violate the regulations. At times during the hearing, both Complainants claimed they could not remember if Mr. Daniel had asked them to enter without first getting permission; yet at other times, they affirmed that he told them to have the “white-out” paperwork signed. Given the evidence before me, I do not believe that the Complainants were asked to perform the work without getting the “whited-out” paperwork signed by proper LANL officials or to try to enter the LANL facility without getting permission from LANL authorities. I conclude that Mr. Daniel did not ask the Complainants to mislead LANL officials about whether the form was new or “whited-out.”(4)

After reviewing the record in this case, I cannot find that the Complainants had a reasonable belief based on the preponderance of the evidence presented that entering the site with “whited-out” paperwork would violate a health and safety regulation at LANL. First, there is evidence that Mr. Gallegos had entered the site based on “whited-out” paperwork previously. Further, I do not think that there is any reasonable basis for thinking a “whited-out” form would be any different from a blank form. Also, any difficulties that might arise would be resolved when the paperwork was taken for the LANL authority’s signature. Finally, I believe from the evidence presented to me at both the Hearing and in exhibits that the Complainants attempted to rely on Part 708 after they were terminated as a means to recover damages or their employment. I do not believe the record shows that they believed, at the time they were asked to complete the work, that the use of the “whited-out” paperwork would violate a health or safety regulation of LANL. The Complainants made many conflicting statements about what occurred on December 8, 2000, both at the hearing, before the investigator, in their complaint letters, and in other accounts.(5) Because these conflicts remain unresolved, I cannot credit their story of why they did not complete the work Mr. Daniel requested. Consequently, I find that the failure of the Complainants to do what Mr. Daniel asked of them on December 1, 2000, and again on December 8, 2000, is not a “refusal to participate” protected under Part

IV. Whether BE Would Have Terminated the Complainants in Absence of their Conduct

If I had found that the Complainants' refusal was a protected activity, BE would need to show that it would have terminated the Complainants even if they had not refused to perform the job on December 1, and 8, 2000.(6) As a result of my review of the record, I also find that BE has made that showing. I believe that BE would have terminated both Mr. Gallegos and Mr. Sanchez, absent their refusal. I will discuss them separately.

During the hearing held in this case, Mr. Gallegos admitted in his testimony that BE had cause to terminate him for taking the company truck on December 8, 2000, without proper authority. Mr. Gallegos was not permitted to drive the company vehicles because of prior driving violations and the fact that his license had been revoked. Mr. Gallegos stated during his testimony that he had no license at that time and that was the reason he car pooled. Tr. at 106. Nevertheless, Mr. Gallegos misappropriated and drove the company vehicle. Further, BE submitted evidence that it had previously terminated employees for unexcused absences. Mr. Gallegos admitted that he left work at 2 p.m., without contacting Mr. Daniel or the Albuquerque office of BE. I believe that BE would have terminated Mr. Gallegos for misappropriation of the company vehicle and his unexcused absence, notwithstanding his alleged protected refusal to perform the requested work.

Mr. Sanchez claims that he left at lunchtime on December 8, 2000, because he was ill. BE maintains that Mr. Sanchez was fired for an unexcused absence. In response, Mr. Sanchez argues that the absence should be considered properly excused because he attempted to contact Mr. Daniel to let him know he was ill and leaving early. At the hearing, he stated that he tried to call Mr. Daniel's cellular telephone but did not get an answer or voice mail. He stated that he went home and slept for six or seven hours. However, after reviewing the evidence presented, I do not believe Mr. Sanchez' absence from work on December 8, 2000, was an excused absence. There is no evidence to support his assertion that Mr. Sanchez attempted to contact Mr. Daniel. In fact, there is evidence to the contrary. Mr. Sanchez' cellular telephone bill does not show a call to Mr. Daniel's cellular telephone.(7) Nor does Mr. Daniel's telephone bill show any incoming telephone call from Mr. Sanchez. Further, despite Mr. Sanchez' testimony that he did not receive voice mail when he called Mr. Daniel, there was testimony that his brother had reached Mr. Daniel's voice mail on that telephone prior to December 8, 2000. Also, the bill for Mr. Daniel's cellular telephone shows that voice mail was available. Further, Mr. Daniel's bill shows one minute telephone calls to Mr. Sanchez' cellular telephone at 1:05 p.m., 1: 20 p.m., 1:43 p.m., and 2:05 p.m. Mr. Sanchez' bill shows corresponding voice mail retrieval on his cellular telephone.

The record before me, therefore, casts significant doubt as to Mr. Sanchez' account as to why he left the warehouse early and whether he attempted to contact BE to inform him he was leaving. I believe that Mr. Sanchez tried to construct an explanation for his absence after he found out that evening that he was going to be terminated at BE. My belief is based on the following. His co-worker Gallegos provided no support for Mr. Sanchez' account of his illness. At no time prior to the hearing did Mr. Gallegos state that Mr. Sanchez told him he was ill on December 8, 2000. Mr. Sanchez claimed that he was vomiting that day, something that Mr. Gallegos would have noticed since they worked closely together.(8) Further, Mr. Sanchez' story has been inconsistent. He has stated that he visited the doctor on December 8, directly from work. He did not. He stated that Mr. Gallegos drove him home. He drove himself home. His doctor's note is dated December 9, 2000, after he had been informed that he would be terminated because he left work early on December 8.

Both Mr. Gallegos and Mr. Sanchez have also tried to claim that they were permitted to leave work early if they had completed their assigned tasks for the day. I do not believe that is the case. Mr. Gallegos was

disciplined on September 13, 2000, for leaving work early without informing Mr. Daniel. Also, the Complainants' prior time sheets do not show that either Complainant had left work early at any time before December 8, thereby disputing their claim that it was permitted. Both Mr. Gallegos and Mr. Sanchez admit that they would normally inform Mr. Daniel that they were leaving early for the day. Given the inconsistencies in Mr. Sanchez' story and the fact that the only support for his contention that he was sick was obtained after he found out he was to be terminated, I find that BE has shown, by clear and convincing evidence, that Mr. Sanchez' absence was unexcused and that BE had cause to terminate(9) Mr. Sanchez for reasons independent of his refusal to perform the requested work.

V. Conclusion

The record convinces me that the failure of the Complainants to complete the work asked of them on December 1, 2000, and again on December 8, 2000, is not a "refusal to participate" protected under Part 708. I do not believe the Complainants had a reasonable belief based on the preponderance of the evidence presented that entering the site with "whited-out" paperwork, with the proper signatures, would violate a health and safety regulation at LANL. Further, the record shows that BE has proven by clear and convincing evidence that the Complainants' discharge would have happened notwithstanding their refusal to performed the requested work. Mr. Gallegos' termination occurred because he took the company truck without authority and without a driver's license and because he left work early without informing his direct supervisor. Mr. Sanchez' termination occurred because he left work early without informing his direct supervisor. Thus, their discharge would have occurred even in the absence of the refusal to perform the work.

Accordingly, I will deny Mr. Gallegos and Mr. Sanchez' requests for relief under 10 C.F.R. Part 708.

It is Therefore Ordered That:

(1) The complaints for relief under 10 C.F.R. Part 708 submitted by Raymond Gallegos, OHA Case No. VBH-0070, and Andrew Sanchez, OHA Case No. VBH-0071, are hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: **April 22, 2002**

(1)Site-specific training would have allowed him to go into the area by himself to move the furniture. Without the site-specific training, he had to be escorted or accompanied by someone who had site-specific training.

(2)The pertinent part of Section 708.5 provides that an employee of a contractor may file a complaint against his employer alleging retaliation if the employee "refus[ed] to participate in an activity, policy, or practice [he] believe[d] . . . would – (1) constitute a violation of a federal health or safety law; or (2) cause [the employee] to have a reasonable fear of serious injury to [himself], other employees, or member of the public." 10 C.F.R. § 708.5(c).

(3) At the hearing, Mr. Sanchez alleged that there was no way for them to do the work, because they were waiting for a truck to make a delivery. He stated that Mr. Daniel told them to split up. He implied that they could not because he was not site-specific trained and Mr. Gallegos could not drive the truck. I agree that

Mr. Gallegos could not drive the truck; however, at the Hearing, I questioned Mr. Noble, the facility coordinator at the site where the work was requested, if it would be permissible for one of the Complainants to enter the area with an escort such as Mr. Brandow. Tr. at 101. He stated that it would. Therefore, Mr. Sanchez could have contacted Mr. Brandow and asked him to escort him into the area.

(4) At the Hearing, I asked Mr. Daniel if he had ever used such paperwork previously. He stated that he had. Mr. Larry Noble, facility coordinator for LANL at the site where the work was requested, stated that he did not see a problem with using a form where old information had been “whited-out.” Mr. Mike Daniel, Mr. James Daniel’s brother and supervisor at BE, testified that the “white-out” procedure is still being used and submitted to me, as evidence at the Hearing, a form from October 9, 2001, as an example. Tr. at 155. In addition, an example of Form 1694 entitled Activity Hazard Analysis submitted by BE appears to have been “whited-out” previously and authorized Mr. Gallegos to perform work at LANL. Form 1694 was one of the forms Mr. Daniel requested the Complainants to “white-out.” Therefore, it is apparent that Mr. Gallegos had used “white-out” forms previously and should have known or inferred that it was permissible to do so as long as the proper signatures were obtained.

(5) BE has submitted a copy of the transcript of Mr. Gallegos’ hearing before the New Mexico Department of Labor Unemployment Compensation Officer. Statements made at that hearing conflict with other statements Mr. Gallegos has made about the facts of this case. Be Ex. No. 16.

(6) To facilitate any potential appeal of my opinion, I will review the issue of whether BE would have terminated the Complainants notwithstanding their refusal to “white-out” the paperwork.

(7) After the hearing, I kept the record open to receive a copy of Mr. Sanchez’ cellular telephone bill, which would show whether he attempted to call Mr. Daniel on December 8, 2000. There is one call to Mr. Daniel on December 8 at 7:54 a.m. There are no other calls shown to Mr. Daniel’s cellular telephone number or to the BE office in Albuquerque. In fact, the bill seems to belie Mr. Sanchez’ claim that he left work around noon on December 8, 2000, and “passed out.” The bill shows voice mail retrieval at 1:05 p.m., 1:21 p.m., 1:30 p.m., 1:43 p.m., 1:56 p.m. 2:05 p.m., 2:16 p.m., 4:18 p.m., 4:20 p.m., 5:36 p.m., 7:04 p.m., 7:11 p.m., and 8:13 p.m. The longest period is between 2:16 p.m. and 4:18 p.m., a time of two hours, not the six or seven hours Mr. Sanchez claims during which he slept or passed out.

(8) At the hearing, Mr. Gallegos stated that Mr. Sanchez asked him if it was okay for him to leave because he was sick. Tr. at 125. Mr. Gallegos then stated that as of the morning of December 8, 2000, he knew Mr. Sanchez was sick because of the way he sounded when he spoke. *Id.* However, Mr. Gallegos admitted that he never mentioned Mr. Sanchez’ illness in either his written statement or in the interview with the OHA Investigator. *Id.* at 126. He claimed he didn’t believe it was important at the time. *Id.* Even if Mr. Sanchez was ill, both he and Mr. Gallegos knew that they needed to contact Mr. Daniel, or if he was unavailable his brother, if they needed to leave early. In fact, Mr. Gallegos had been disciplined in October 2000 for leaving work sick without contacting Mr. Daniel. Tr. at 163-64; BE Ex. No. 23 at 5.

(9) BE submitted evidence showing that at least two previous employees had been terminated for being absent without authorization. BE Ex. No. 27.