July 8, 2005

**DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: Gilbert J. Hinojos

Date of Filing: May 13, 2005

Case Number: TBA-0003

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on April 27, 2005, involving a Complaint filed by Gilbert J. Hinojos (also referred to as the employee or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Hinojos claims that his former employer, DOE contractor Honeywell Federal Manufacturing & Technologies (Honeywell or the contractor), retaliated against him for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that the employee engaged in activity that is protected under Part 708, but that Honeywell showed that it would have taken the same personnel action in the absence of the protected activity. Hinojos appeals that determination. As set forth in this decision, I have decided that the determination is correct.

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 taken adverse personnel actions against an employee for such a disclosure or for seeking relief in a "whistleblower" proceeding [a "protected activity"], will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Hinojos in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of the Complaint are fully set forth in the IAD. *Gilbert J. Hinojos* (Case No. TBH-0003), 29 DOE ¶ 87,005 (2005)(hereinafter IAD). For purposes of the instant appeal, the relevant facts are as follows.

Hinojos was employed by Honeywell as a "material control coordinator, sr." at a DOE facility in Albuquerque, New Mexico. In July 2002, he filed a Complaint under Part 708, alleging that his employer retaliated against him for filing several complaints with the Equal Employment Opportunity Commission (EEOC) and the New Mexico Human Rights Division (NMHRD). These complaints alleged discrimination based on national origin. In January 2003, while the Complaint under Part 708 was pending, the employee was discharged from his position with the Contractor. The employee was permitted to amend his Part 708 Complaint to include this termination as a retaliation for participating in conduct protected under Part 708. 10 C.F.R. § 708.5(b). 1/

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Hinojos requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The hearing lasted two days. Hinojos testified as to why he believed his termination was a result of the filing of his Part 708 Complaint. He presented no other witnesses. The contractor

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1/ The Hearing Officer dismissed the EEOC and NMHRD claims because they are barred under Section 708.4. However, the claim of the termination as a retaliation for participating in a proceeding under Part 708 was permitted. *Gilbert J. Hinojos*, 28 DOE ¶ 87,037 (2003).

presented the following witnesses: (i) the director of the contractor's New Mexico operations (the director); (ii) the employee's supervisor (the supervisor); (iii) the contractor's manager of environment, safety & health (the ESH manager); (iv) the contractor's human resources manager (HR manager) and (v) a forklift operator who was a co-worker of Hinojos (co-worker or forklift operator). The contractor also submitted an exhibit book with numbered exhibits (hereinafter referred to as Ex.)

After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that it is the burden of the complainant under Part 708 to establish by a preponderance of the evidence that he or she engaged in a protected activity, and that the activity was a contributing factor to an alleged retaliation. *See* 10 C.F.R. §§ 708.5 and 29. The IAD further noted that if the employee has met this burden, 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. The IAD considered the application of these elements to the Hinojos proceeding.

A. Protected Activity and Contributing Factor

The IAD found that the employee's initial Part 708 Complaint was made in good faith. The IAD also found that a human resource manager who participated in the separation review board that made the decision to terminate Hinojos' employment had knowledge of his Part 708 Complaint. Further, given the pendency of the employee's Part 708 hearing request at the time of his termination, the IAD determined that there was sufficient temporal proximity to conclude that filing the Part 708 Complaint was a contributing factor to the termination. Based on these findings, the Hearing Officer concluded that the employee satisfied his burden of proof under Part 708. IAD, slip op. at 4.

B. Whether Honeywell would have terminated Hinojos absent the Protected Activities

At the hearing, the contractor's witnesses maintained that the complainant was terminated because he was a safety risk. The IAD recounted testimony describing the following incident which was the reason given for his discharge. On December 6, 2002, the employee was assigned to drive a government-owned flat-bed truck carrying large, aluminum containers, known as CRTs, from the contractor's facility to an off-site vendor. The CRTs weigh about 250 pounds each. The co-worker, who operated a fork lift, assisted the employee in loading the CRTs onto the flat bed of the truck. The CRTs were not secured in the bed of the truck, but merely stacked on top of each other. The employee then proceeded to transport the CRTs over public roadways to a facility where the CRTs were to be sandblasted in order to remove rust buildup. During transport of the CRTS, the employee stopped the truck suddenly, and the unsecured CRTs shifted and struck the rear window of the truck cab, shattering the glass, and shifting part of the load to the top of the cab. It was the testimony of the contractor's witnesses that the accident was very severe, and although no one was injured, the accident "had the potential to be a very serious incident and in and of itself was a very serious incident." IAD at 4-6; Transcript of Hearing (Tr.) at 253.

The contractor's witnesses testified that it was the employee's responsibility to make sure the CRTs were secured with tie-down straps that were provided for this purpose. IAD at 9. In this regard, the forklift operator testified that he provided the employee with a tie-down strap and told him to secure the load. According to contractor witnesses, the employee stated in one interview that the forklift operator/co-worker might have told him to secure the load, but he did not remember exactly. Ex. 16 at 637. In another interview, the employee purportedly stated that he asked the forklift operator whether he needed to tie down the load, and the forklift operator replied that it did not need to be tied down. Ex. 16 at 642. IAD at 9. The IAD ultimately found that as the driver of the vehicle, the employee was responsible for ensuring that the load was secure prior to transport. The IAD also noted the contractor's testimony that the employee had received specific training on securing loads. IAD at 5.

The IAD also addressed the issue of the contractor's assessment that the accident was severe and the contractor's contention that the employee's reaction to the accident demonstrated indifference to the importance of safety and a lack of understanding of the

severity and potential consequences of the accident. In particular, the IAD noted the testimony of the HR manager that in a post-accident interview, the employee was asked if he realized "how close he was to being severely injured by the CRT coming through the back of the window." The witness testified that the employee used words to the effect that "it wasn't that big of a deal." It was the employee's testimony that the accident could not have had the severe consequences that the contractor's witnesses believed could have occurred, and that he did not see the danger in driving with the unsecured load. He denied saying that the accident was not "that big of a deal," but stated that he did not put himself or anyone else at risk. The IAD agreed with the contractor's assessment that the accident was a serious one, and also found that the employee did not believe that the accident could have had grave consequences. The IAD therefore agreed with the contractor's position that the employee's attitude constituted a safety risk. IAD at 11-12. Finally, the IAD found highly relevant the evidence of the contractor that in a previous incident, in which a senior maintenance worker failed to take proper safety measures and cut through an electrical conduit while digging a trench in an area with electrical lines, the worker was terminated outright solely as a result of the incident. According to the contractor, of all its terminations, that termination incident was most similar to the instant case, because they both involved potential for severe consequences, even multiple fatalities. IAD at 6.

The IAD therefore found clear and convincing evidence that Hinojos would have been terminated whether or not he engaged in protected activity under Part 708. In sum, the IAD concluded that Hinojos was not entitled to relief.

III. Analysis

Hinojos filed a statement identifying the issues that he wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). Honeywell filed a Response to the Statement. 2/ 10 C.F.R. § 708.33.

2/ There is no need in the instant case to set out the specifics of the response, some of which are incorporated into my analysis below.

After fully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case.

The employee first claims that the Hearing Officer "merely accepted as credible the contractor's self serving statement" that he was terminated because he was a safety risk, and not because he engaged in protected activity. In this regard, the employee argues that "instead of giving weight to [Hinojos'] testimony, the Hearing Officer accepted at face value" the version of the facts offered by contractor management officials.

This assertion is incorrect. The Hearing Officer did not simply "accept" as credible the contractor's statement as to the reason for the termination. In fact, the contractor brought in the testimony of five witnesses, including the director of the contractor's New Mexico operation, the employee's supervisor, the contractor's manager of environmental safety & health, the contractor's human resources manager and a forklift operator who was a co-worker of the employee. These witnesses consistently supported the contractor's overall position that the individual caused a safety incident that in itself was serious and could have caused severe damage. The only testimony brought forward by the employee was his own. The employee's testimony on this point was that the event was not particularly serious, and overall was not his fault. The Hearing Officer analyzed all the testimony in detail, and concluded that the testimony of the contractor's witnesses was more persuasive. This is the very essence of the role of the Hearing Officer: to listen to the testimony of witnesses, observe their demeanor, and make a judgment as to their credibility. I see no error in the judgment of the Hearing Officer that the five contractor witnesses were more credible than the employee and that, overall, their testimony outweighed the employee's testimony. In fact, given that the only testimony in this case that supported the employee was his own, I am inclined to believe that it was the employee's testimony that was self serving, and not that of the contractor's witnesses.

The employee next reargues the issue of whether the accident was severe, claiming that the accident, when reviewed in light of the evidence presented, was not severe. As described above, the accident involved large pieces of heavy equipment that were placed in the bed a truck that was being driven on public streets. The equipment was dislodged, pierced the glass window of the cab and shifted to the roof of the cab of the truck. In my view this incident in and of itself is a very serious one, and could have been disastrous. For example, the employee could have been seriously

injured by the glass and equipment that pierced the cab. Other drivers on the public road could also have been seriously injured. The Hearing Officer's determination that the accident was severe was clearly well supported by the record. I reviewed the photos of the accident that were included in the exhibits submitted in this case. Exh. 8. They are in my view irrefutable, graphic evidence that not only was this indeed a serious incident, but also that only by sheer good fortune was it not a horrific one. 3/ The employee's assertion that the accident was not particularly severe is subterfuge or self-delusion. I see no Hearing Officer error here.

In this regard, the employee raises once again an argument about his own attitude toward the seriousness of the accident. He believes that it was "well within his rights to disagree with the contractor's assessment," and for the Hearing Officer not to weigh this into his decision was arbitrary and capricious. I concur that the employee had the right to disagree with the determination of the contractor regarding the seriousness of the accident. However, as I indicated above, I believe that the accident was very serious, and that the Hearing Officer made a correct determination in this regard. The employee's protestation to the contrary leads me to believe that he has a rather callous view of this serious safety incident. It does not cause me to make any adjustment in the IAD.

The employee next raises the issue of training. He states that "it is clear that Mr. Gibb Lovell [the fork lift operator] was not trained in how to load and secure material." This is irrelevant. It is simply a transparent but useless attempt to shift the blame to another employee. In this regard, I have reviewed the record in this case and I see no error in the Hearing Officer's determination that it was the employee's responsibility to secure the load. I note the testimony of the fork-lift operator, safety manager and the supervisor that the driver of the load has responsibility for securing the load. IAD at 9. It is convincing. This operating procedure makes more common sense than the procedure put forth by the employee, i.e., that it was the fork lift operator's job to see that the load was secure.

3/ In his testimony, the employee denied that a CRT pierced the glass and another CRT shifted to the roof of the cab. IAD at 10. I agree with the Hearing Officer's finding that the contractor's version was more plausible. The photos belie the testimony of the employee.

I further note the employee's testimony that contractor policy did not require him to use the straps to take the CRTs over to be sandblasted, but only on the way back. The reason, purportedly, was that on the way over, the rust would keep the CRTs from shifting, but on the way back they needed protection so they would not be scratched. Tr. at 99-100 This nonsensical explanation is wholly unconvincing. It does not convince me that the contractor's policy did not require the driver to secure the load. In fact, it is simply another example of inconsistent explanations that the employee has put forth in this case: on the one hand he states that it was the fork lift operator's job to secure the load, and on the other hand he states that the load needed to be secured only on the return trip. These statements lead me to suspect the overall credibility of the employee.

Finally, the employee contends that he was never provided with a copy [of the report] of the investigation by the Human Resources Department and was never given notice of the separation committee meeting or allowed to refute the basis for his termination, including any inconsistent statements that were attributed to him.

None of these contentions indicates that the result in this case should be overturned. As I concluded above, the company policy is that the driver of the vehicle has the ultimate responsibility to secure the load. Therefore, the employee's argument that he did not make inconsistent statements about tying down the load is ultimately irrelevant. Even if he convinced me that he made no inconsistent statements, it would not cause me to change the result here. 4/

Finally, I see no harm to the employee in connection with his assertion that he did not have the opportunity to appear before the separation committee. Even if he was entitled to appear before the committee and was not provided that opportunity, I see no reason to conclude that the employee did not have the chance to fully air any response to committee's conclusions in the context of the hearing and on this appeal. I see no unfairness that should be redressed by any change in the result of this case.

4/ As I indicated above there is at least one instance in his hearing testimony in which the employee made inconsistent statements. This leads me to think that the contractor's assertion that the employee gave inconsistent statements in his post-accident interviews is probably correct.

In sum, I am convinced that there was sufficient evidence in the record in this case to support the hearing officer's conclusion that Honeywell clearly and convincingly established that it would have terminated Hinojos absent his protected activity.

V. CONCLUSION

As is evident from the above description of the IAD, this case involves factual issues which are strongly disputed. Ultimately, it was the role of the Hearing Officer to make findings of fact based on his assessment of the witnesses and their testimony. The Hearing Officer did so, and after the reviewing the entire record, I find no error. I see nothing in the Hinojos Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Gilbert Hinojos on May 13, 2005 (Case No. TBA-0003), of the Initial Agency Decision issued on April 27, 2005, be and hereby is denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 8, 2005