

May 9, 2007

DECISION AND ORDER OF  
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Clint Olson

Date of Filing: November 18, 2005

Case Number: TBA-0027

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on October 27, 2005, involving a Complaint of Retaliation filed by Clint Olson (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. Olson was an employee of BWXT Pantex (also referred to as BWXT, the firm, or the contractor), the Management and Operating Contractor at the DOE's Pantex Plant in Amarillo, Texas. In his Complaint, Mr. Olson claims that BWXT retaliated against him for making disclosures that are protected under 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, and that BWXT did retaliate against him for the disclosures. BWXT has appealed that determination. As set forth in this decision, I have decided that the Appeal filed by BWXT should be granted, and that Mr. Olson's request for relief should be denied, on the ground that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting a proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures.

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 BWXT in the present Appeal, is performed by the Director of 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. Clint Olson (Case No. TBH-0027), 29 DOE ¶ 87,007 (2005) (hereinafter IAD). For purposes of the instant Appeal, the relevant facts are as follows.

From July 1999 until November 2004, Mr. Olson was employed by BWXT in the counter-intelligence unit (CIU) as a counter-intelligence officer (CIO) at the Amarillo Plant. In March 2004, he filed a Complaint under Part 708, alleging that BWXT retaliated against him for making disclosures regarding the handling of a classified hard drive. In this regard, Mr. Olson stated that in February 2002 he told his supervisor about BWXT personnel who he believed were grossly negligent in the handling of a classified drive. Mr. Olson indicated that BWXT’s security incident report regarding this matter reached an incorrect conclusion regarding the destruction of the classified hard drive. Based on his review of the report, Mr. Olson believed that the facts as stated in the report did not support the report’s conclusion that the missing classified hard drive had actually been destroyed. Mr. Olson also stated that in a March 2002 conversation he allegedly told BWXT’s Safety, Security, and Planning (SS&P) Manager that contrary to BWXT’s conclusion in the incident report, it was not clear that the classified hard drive had in fact been destroyed. Mr. Olson believed that disclosures that the report’s conclusion overstated the likelihood that the hard drive had been destroyed were protected under Section 708.5, which (in part) protects disclosures that concern substantial violation of a law, rule, or regulation. Moreover, Mr. Olson alleged that BWXT took retaliation against him for making these protected disclosures by taking no action on a pending request for a comparative salary increase for his working group, the CIU. IAD, 29 DOE at 89,022-24.

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Mr. Olson requested and received a hearing on this matter before an OHA Hearing Officer. At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of BWXT’s former Senior CIO, Curtis Broadus (the complainant’s supervisor); DOE’s former Safety, Security, and Planning (SS&P) Manager at Pantex; a Special Agent with the Federal Bureau of Investigation (FBI); the Chief of the Office of Defense Nuclear Counterintelligence in DOE’s National Nuclear Security Administration (NNSA), Catherine Sheppard (the Defense Nuclear CI Chief); BWXT’s

former Human Relations Compensation and Employment Manager, John T. Merwin (the former HR Compensation Manager); and BWXT's current Compensation Manager, Richard E. Frye. BWXT presented the testimony of BWXT's current Senior CIO, Darlene Holseth; DOE's Assistant Site Manager, Safeguards and Security, for the Pantex Site Office (the DOE Assistant Site Manager); BWXT's Division Manager for Safeguards and Security, Alexandra Sowa (BWXT's current S&S Manager); BWXT's former General Manager, Dennis Ruddy; and BWXT's current General Manager, Michael Mallory. IAD, 29 DOE at 89,022.

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. IAD, 29 DOE at 89,033 (citing 10 C.F.R. §§ 708.5, 708.29). 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. Id. The IAD considered the application of these elements to the Olson proceeding, as well as several procedural issues.

After finding that the Complaint was timely filed (IAD, 29 DOE at 89,033-35), the IAD held that Mr. Olson had shown, by a preponderance of the evidence, that on two occasions he had made protected disclosures under Part 708, which were a contributing factor to BWXT's decision not to grant the comparative salary increase to Mr. Olson's working group; and that BWXT had failed to show, by clear and convincing evidence, that it would have taken the same action, in not granting the comparative salary increase, in the absence of Mr. Olson's protected disclosures. Id. at 89,035-42. The IAD therefore concluded that BWXT should be required to take restitutionary action by making payment to Mr. Olson of "a sum equal to the fifteen percent comparative salary increase that he would have received if the Defense Nuclear CI Chief's March 2002 proposal had been accepted and implemented." Id. at 89,042.

## III. Analysis

BWXT filed a statement identifying the issues that it wished the Director of OHA to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). BWXT identified the following issues: (1) the Hearing Officer erred in finding that the Complainant's Part 708 disclosures involved a danger to public safety and health; (2) the Hearing Officer did not adhere to the regulations; (3) the IAD denied BWXT procedural due process; (4) the IAD is arbitrary and capricious and an abuse of discretion; (5) the Hearing Officer erred in finding that the Complaint was timely filed; (6) the Hearing Officer erred in finding that BWXT's failure to grant a pay raise was an act of retaliation; (7) the Hearing Officer erred in relying upon improper activities imputed to a

DOE official (Defense Nuclear CI Chief Catherine Sheppard, who had proposed the comparative salary increase for Mr. Olson's working group); and (8) the Hearing Officer erred in giving substantial weight to the testimony of Mr. Olson's former supervisor, Curtis Broaddus, and BWXT's former HR Compensation Manager, John Merwin. BWXT also filed supplemental information regarding issue (7) above. This supplemental material included a January 5, 2006 affidavit of Daniel E. Glenn, a DOE employee and the Site Manager at the Pantex Site Office, and a series of e-mail messages among DOE officials generated between April and June 2002. Mr. Olson filed a response to BWXT's Statement and supplemental information, in which he responded to the arguments raised by BWXT. 10 C.F.R. § 708.33.

After fully reviewing the arguments raised by BWXT, I find that the Appeal filed by BWXT should be granted, and that Mr. Olson's request for relief should be denied, on the ground that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting the proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures, for the non-retaliatory reason that DOE determined that its Defense Nuclear CI Chief lacked the authority to propose and fund that salary increase. BWXT identified that issue as number (7) in its Statement. Because that is the fundamental ground on which the Appeal is granted, this Appeal Decision will not address the other issues identified by BWXT in its Statement.

A. BWXT Has Proven, By Clear And Convincing Evidence, That It Would Have Taken the Same Action In Not Granting The Salary Increase Proposed By DOE's Defense Nuclear CI Chief, Without Mr. Olson's Protected Disclosures, Because DOE Determined That Its Defense Nuclear CI Chief Lacked The Authority To Propose And Fund That Salary Increase.

It was the Defense Nuclear CI Chief in DOE's NNSA, Catherine Sheppard, who proposed the comparative salary increase for Mr. Olson's working group. The IAD was correct in finding that at a November 2001 meeting, Ms. Sheppard first made her proposal to BWXT by telling BWXT's General Manager, Dennis Ruddy, that "she would provide the funding to bring the salaries at the Pantex CIU [Counterintelligence Unit] up to a comparable level with CIU's at other DOE facilities" (IAD, 29 DOE at 89,039); that Mr. Ruddy "responded positively to her offer to provide additional funds for comparative salary increases for BWXT's CIU" (*id.*); that in a January 13, 2002 letter from Ms. Sheppard to Mr. Ruddy, she stated, "We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word" (*id.* at 89,039-40); and that in a March 27, 2002 letter from Ms. Sheppard to the DOE Contracting Officer, Office of Amarillo Site Operations, Ms. Sheppard requested, "I ask that you take action to immediately effect the following adjustments to their current pay" at BWXT's CIU, which was Mr. Olson's work unit, including an "increase by fifteen percent" for Mr. Olson's position (*id.* at 89,040).

The IAD was also correct in finding, based on uncontested portions of the record, that "[a]t the Hearing, the Defense Nuclear CI Chief [Ms. Sheppard] stated that she was notified by the DOE that her March 2002 proposal to raise salaries for BWXT's CIU was inappropriate and had been rejected" (IAD, 29 DOE at 89,041 n.10) (emphasis added); and that "[s]he testified that she was later notified

by the DOE that her proposal to raise the salaries was not appropriate” (id. at 89,027) (emphasis added).

Ms. Sheppard’s testimony that it was the DOE that rejected her salary increase proposal was confirmed by the testimony of BWXT’s Mr. Ruddy, which the IAD accurately described as follows:

[Mr. Ruddy] testified that when in March 2002 the Defense Nuclear CI Chief [Ms. Sheppard] sent a letter to Pantex indicating that the DOE would support specific raises for BWXT employees in the Pantex CIU, he referred it to the DOE’s site office manager who “took immediate action to have the letter withdrawn.”

. . . he thought it was highly inappropriate, a conclusion that I shared, and it was not the purview of that office or any other office to direct individual salaries.

TR at 36-37. He stated that managing and operating contractors had a responsibility for conducting a process that insured fair compensation to their employees, and that accepting guidance from the Government would undermine that process and could lead to other groups “petitioning their customer for some special consideration.” TR at 108.

IAD, 29 DOE at 89,032 (emphasis added).

Ms. Sheppard’s and Mr. Ruddy’s testimony that it was the DOE that rejected her salary increase proposal is further confirmed by the Affidavit of Daniel E. Glenn, DOE’s site manager at the Pantex Site Office in Amarillo, Texas. That affidavit was submitted by BWXT during its appeal of the IAD. In his affidavit, Mr. Glenn explained that DOE rejected Ms. Sheppard’s salary increase proposal, and the reasons for DOE’s rejection:

In April of 2002, it came to my attention that Catherine Sheppard, Chief of the Office of Defense Nuclear Counterintelligence, (previously known as Catherine Eberwein) had made certain representations to the Contractor concerning funding counterintelligence unit salary increases. These representations were made during the time she was conducting a review of the Pantex Counterintelligence operations. In response, I communicated to Ms. Sheppard my concerns in several areas, including the fact that it was inappropriate for her review to have included any discussion on wages and salaries. During our discussion, I further advised Ms. Sheppard that management and operating employee salaries were to be based on the Contractor’s internal processes, consistent with the M&O contract, and that her report would not set a precedent to change the policy since she had no contractual authority over the matter of compensation for BWXT Pantex employees.

Further, I discussed this matter with Mr. Dennis Ruddy, then the General Manager of BWXT Pantex and the supervisor of the Chief Counterintelligence Officer, and told him that it was inappropriate for the representations from Ms. Sheppard to have included any

discussion on wages and salaries. Ms. Sheppard did not have any authority to direct the Contractor on wages and salaries of its employees. M&O employee salaries were to be based on their internal company processes, consistent with the contract, and this review did not set a precedent that was to change that policy. I made it clear to Mr. Ruddy that he was not to consider any salary statement in the report as directive in nature, and that all salary actions should be consistent with existing internal corporate practices and contract requirements. My instructions to Mr. Ruddy were consistent with communications on this subject from the highest level of the Procurement Directorate in the Department of Energy.

Affidavit of Daniel E. Glenn (Glenn Affidavit) at 1-2 (emphases added).

The Glenn Affidavit, together with the above-quoted testimony of Ms. Sheppard and Mr. Ruddy, thus provides clear and convincing evidence that it was DOE – not Mr. Ruddy or BWXT – that rejected Ms. Sheppard’s proposal for a salary increase for contractor employees. Mr. Glenn, as the DOE site manager with authority over the Pantex Plant where Mr. Olson was employed, confirms that the non-retaliatory reason that BWXT did not grant the salary increases proposed by Ms. Sheppard was that DOE determined that her proposal was ultra vires: “Ms. Sheppard did not have any authority to direct [BWXT] on wages and salaries of its employees,” and her “representations to [BWXT] concerning funding counterintelligence unit salary increases” were inappropriate “since she had no contractual authority over the matter of compensation for BWXT Pantex employees.” Glenn Affidavit at 1.

In finding that BWXT had not met its burden of proof, the IAD paraphrased the testimony of BWXT’s Mr. Ruddy in a manner that created the impression that Mr. Ruddy – and not DOE – had rejected Ms. Sheppard’s proposed salary increases as “inappropriate.” The IAD paraphrased, “[Mr. Ruddy] testified that he rejected the proposal of the Defense Nuclear CI Chief to fund specific comparative salary increases for BWXT’s CIU on the grounds that it was inappropriate.” IAD, 29 DOE at 89,041. However, Mr. Ruddy’s complete testimony, as cited elsewhere in the IAD, included his statement that the DOE’s “Site Office Manager, Dan Glenn (phonetic), he took immediate action to have the letter withdrawn,” and that “what Mr. Glenn ex-, expressed to me, that he thought it was highly inappropriate, a conclusion that I shared, and, and that it, it was not the purview of that office or, in fact, any other office to direct individual salaries.” TR at 36-37, cited in IAD, 29 DOE at 89,032. Thus, Mr. Ruddy testified that the rejection was by DOE, on the ground that Ms. Sheppard’s proposal was inappropriate (because it was beyond her office’s purview, or authority, as confirmed in the Glenn Affidavit). Mr. Ruddy testified that he shared DOE’s conclusion.

The IAD also stated that “[w]hile [Mr. Ruddy] provides a plausible explanation for rejecting the offer of the Defense Nuclear CI Chief to raise those salaries, it is not convincing in light of the testimony provided by” John Merwin, BWXT’s former Human Relations Compensation Manager. IAD, 29 DOE at 89, 042. The IAD then paraphrased Mr. Merwin’s testimony as stating that “Ruddy initially supported increasing salaries of BWXT’s CIU employees, but that he later emphatically rejected an internal BWXT proposal for increasing those salaries because he was upset about the CIU’s activities concerning the classified hard drive,” which had been the subject of Mr. Olson’s

disclosures;<sup>1</sup> and as stating that “Ruddy rejected his [Merwin’s] advice when he [Ruddy] later rejected the Defense Nuclear CI Chief’s proposal.” 29 DOE at 89,042. However, Mr. Merwin’s complete testimony, as cited elsewhere in the IAD, included his statement that when Mr. Ruddy had sought his guidance on whether Ms. Sheppard could solicit a pay increase for the Pantex CIU, Mr. Merwin had answered that “it is highly unusual for the Department of Energy to look at a contractor and to determine what those salary determinations should be, because we make those salary determinations based on salary studies, and [they] are determinations based across the [DOE] complex;” but that Mr. Merwin had nevertheless told Mr. Ruddy that “[i]t is probably politically astute to make payment and move forward.” TR at 365-66, cited in IAD, 29 DOE at 89,040-41. Mr. Merwin thus confirmed to Mr. Ruddy that it was “highly unusual” for a DOE employee in Ms. Sheppard’s position to make the proposal that she had made. Mr. Ruddy – instead of doing what Mr. Merwin described as “probably politically astute” – referred, to DOE’s Mr. Glenn, the letter from Ms. Sheppard in which she made her “highly unusual” proposal. It was then DOE’s Mr. Glenn who rejected Ms. Sheppard’s salary increase proposal as beyond her authority.

The Glenn Affidavit, and the testimony of Ms. Sheppard, Mr. Ruddy, and Mr. Merwin cited above, thus make it clear that there were three distinct, consecutive actions after Ms. Sheppard made her proposal: (1) Mr. Ruddy’s referral, to DOE’s Mr. Glenn, of Ms. Sheppard’s letter containing her “highly unusual” proposal to increase the salaries of Mr. Olson’s work group and provide DOE funding for that increase; (2) DOE’s rejection of Ms. Sheppard’s proposal on the ground that she had

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<sup>1</sup> Specifically, the IAD found that Mr. Olson made two disclosures, in February and March 2002, in which he told other BWXT employees that he believed that there was insufficient evidence to support the findings in a BWXT Incident Report that a missing classified computer hard drive had been destroyed and there was no compromise of classified data. After Mr. Olson’s disclosures, the Incident Report’s findings were amended from “Loss/Compromise did not occur” to “Probability of Compromise is remote.” IAD, 29 DOE at 89,035-37. Although Mr. Olson had contended throughout the proceeding that his disclosures were protected because they revealed substantial violations of law under 10 C.F.R. § 708.5(a)(1), the IAD instead found that his disclosures were protected for a different reason, i.e., because they revealed a substantial and specific danger to employees and to public health and safety under 10 C.F.R. § 708.5(a)(2). Id. However, in a closely-related Part 708 case involving the identical disclosures made by Mr. Olson’s supervisor, Curtis Broaddus, a different OHA hearing examiner issued an IAD that found that the disclosures were not protected under Part 708 because Mr. Broaddus had not met his burden of establishing that he reasonably believed that the disclosures revealed a substantial violation of law under section 708.5; and that IAD did not find that the disclosures were protected for any other reason. Curtis Broaddus, Case No. TBH-0030, slip op. at 12-14 (Nov. 7, 2006). Therefore, the Broaddus IAD denied the request for relief filed by Mr. Broaddus (id.); and did not consider actions taken by BWXT allegedly in retaliation for a protected disclosure (id. at 6). With regard to the Olson IAD, this Appeal Decision will not address the Broaddus issue of whether the complainant Mr. Olson met his burden of proof, because the fundamental ground on which this Appeal is granted is that BWXT has met its own burden of proof, as explained above.

no authority to make the proposal; and (3) BWXT's action in not granting Ms. Sheppard's salary increase proposal that DOE had determined was beyond her authority.

Therefore, BWXT has done more than provide a plausible explanation for its not granting Ms. Sheppard's salary increase proposal. BWXT has also provided substantiation to support its explanation. The Glenn Affidavit helps to establish that DOE itself rejected Ms. Sheppard's proposal because it was ultra vires, and confirms the testimony on that issue by Ms. Sheppard and Mr. Ruddy. It even confirms the testimony of Mr. Merwin, on whom the IAD relied, that Ms. Sheppard's proposal was "highly unusual." It has now been established that her proposal was so highly unusual because, as determined by DOE, "she had no authority over the matter of compensation for BWXT employees." Glenn Affidavit at 1.

In Complainant's Response to BWXT's Statement and Supplemental Statement, at 9-10, Complainant (1) argues that the OHA Director should not afford weight to the Glenn Affidavit as newly discovered evidence; and (2) responds to the Glenn Affidavit by alleging that "it is unclear whether NNSA would not have funded the salary increase but rather Mr. Glenn, DOE Pantex Site Office, objected to Ms. Sheppard's determination of what the compensation level should be for the Pantex counterintelligence salaries." Id. at 10. First, the Glenn Affidavit is indeed newly discovered evidence. It was not created until after the date on which the IAD was issued. The OHA Director's consideration of the Glenn Affidavit will not prejudice the Complainant, because the Affidavit does not introduce a new issue into the case, but confirms the testimony of Ms. Sheppard, Mr. Ruddy, and Mr. Merwin; and because the Complainant has had the opportunity, in his Response, to respond to the Glenn Affidavit. Second, the Complainant's above-quoted response to the Glenn Affidavit is not persuasive. In his Affidavit, Mr. Glenn does not personally "object[] to Ms. Sheppard's determination of what the compensation level should be for the Pantex counterintelligence salaries," as the Complainant alleges. On the contrary, Mr. Glenn states that "Ms. Sheppard did not have any authority to direct [BWXT] on wages and salaries of its employees," and her "representations to [BWXT] concerning funding counterintelligence unit salary increases" were inappropriate "since she had no contractual authority over the matter of compensation for BWXT Pantex employees." Glenn Affidavit at 1. He concludes by stating that his instructions "were consistent with communications on this subject from the highest level of the Procurement Directorate in the Department of Energy." Id. at 2.

In addition, a recent OHA decision, that was issued after the hearing officer issued the IAD in the present Appeal, provides further support for BWXT's position in this case. On September 19, 2006, OHA issued its decision in John Merwin, 29 DOE ¶ 87,012 (2006), in which Mr. Merwin had filed his own Part 708 complaint against BWXT. Mr. Merwin claimed in that case that BWXT retaliated against him because he had appeared as a witness in the hearing in the present case involving Mr. Olson. Mr. Merwin alleged that BWXT retaliated against him by refusing to certify him under DOE's Human Reliability Program (HRP), 10 C.F.R. Part 712. OHA held that "if Merwin can establish that BWXT has not followed its normal procedures in determining whether to submit his name to the DOE for HRP status, this could fall within the realm of a Part 708 retaliation;" and that "[i]n such a case, we could, if otherwise appropriate . . . , direct BWXT to follow its normal

procedures and submit Mr. Merwin for HRP consideration.” Merwin, 29 DOE at 89,052 (emphases added). OHA then found that the record did not suggest that BWXT had not followed its normal procedures. OHA therefore sustained the determination regarding Mr. Merwin’s HRP status, and denied Mr. Merwin’s appeal of the dismissal of his complaint. Id.

In the present Appeal, the record has established that BWXT followed normal procedures, as it did in the Merwin case, in not granting the comparative salary increase that had been proposed by Ms. Sheppard. As explained above, the affidavit of DOE’s Mr. Glenn confirmed that “management and operating employee salaries were to be based on the Contractor’s internal processes, consistent with the M&O contract, and that her report would not set a precedent to change the policy since she had no contractual authority over the matter of compensation for BWXT Pantex employees.” Glenn Affidavit at 1 (emphasis added). By following the “policy” that its employee salaries were to be based on its internal processes consistent with its contract with DOE, and not setting “a precedent to change the policy,” BWXT was following normal procedures in the present case, as in the Merwin case.

BWXT has thus shown that it was DOE that determined that Ms. Sheppard lacked the authority to propose and provide DOE funding for the salary increase for BWXT’s employees. That left BWXT in the same position that it had been in before Ms. Sheppard’s ultra vires proposal, when BWXT lacked the funds to pay for the comparative salary increase for its employees. Mr. Merwin – BWXT’s former Compensation Manager, on whom the IAD relied – testified that “[t]he problem was, at that period of time there was no money available;” and that “they knew from when I first came in and did my analysis and sat down with Mr. Broaddus [Mr. Olson’s supervisor] and Mr. Mallory [BWXT’s General Manager at the time of the hearing] that we were near to being broke with regards to the compensation fund.” TR at 350-51 (emphases added), cited in 29 DOE at 89,040.

In this regard, OHA has held in another case that “the remedies available under Part 708 are aimed at restoring employees to the employment position and situation that they occupied before Part 708 retaliations took place;” and “that Part 708 did not provide a remedy for longstanding salary differences that predated an individual’s protected disclosures.” Gary S. Vander Boegh, 28 DOE ¶ 87,040 at 89,296 (2003). Similarly, in the present case, after BWXT’s action in not granting the comparative salary increase that Ms. Sheppard had proposed (without authority) for DOE to fund, Mr. Olson had the same longstanding salary difference, compared to other employees at other DOE sites, that predated his protected disclosures. Moreover, Mr. Olson later received merit pay increases after BWXT’s action in not granting him Ms. Sheppard’s proposed comparative salary increase in 2002. Indeed, he received at least the average merit pay increase for the Pantex site. IAD, 29 DOE at 89,039 (citing TR at 422-23).<sup>2</sup>

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<sup>2</sup> Those facts may explain why Mr. Olson waited for two years, after BWXT’s action in not granting him the comparative salary increase proposed by Ms. Sheppard, to file his Part 708  
(continued...)

In sum, I find that BWXT has proven, by clear and convincing evidence, that it would have taken the same action, in not granting the proposed comparative salary increase to Mr. Olson's working group, without Mr. Olson's protected disclosures, for the non-retaliatory reason that DOE determined that its Defense Nuclear CI Chief lacked the authority to propose and fund that salary increase.

#### IV. CONCLUSION

For the reasons set forth above, I find that BWXT's Appeal of the IAD should be granted, and that the complainant Mr. Olson's request for relief should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by BWXT Pantex on November 18, 2005 (Case No. TBA-0027), of the Initial Agency Decision issued on October 27, 2005, is hereby granted.
- (2) The Request for Relief filed by the complainant Clint Olson under 10 C.F.R. Part 708 is hereby denied.
- (3) 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.

Fred L. Brown  
Acting Director  
Office of Hearings and Appeals

Date: May 9, 2007

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<sup>2</sup>(...continued)

complaint, instead of filing his complaint within 90 days, as provided in 10 C.F.R. § 708.14. Although BWXT has objected to the IAD's finding that Mr. Olson's complaint was timely filed, despite the passage of two years. This Appeal Decision will not address that issue because the fundamental ground on which the Appeal is granted is that BWXT has met its burden of proof, as explained above.