

October 27, 2005

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Clint Olson
Date of Filing: April 12, 2005
Case Number: TBH-0027

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Clint Olson (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant is an employee of BWXT Pantex (BWXT), the Management and Operations Contractor at the DOE's Pantex Plant in Amarillo, Texas. From July 1999 until November 2004, he was employed as a counter-intelligence officer (CIO) at the plant. On March 15, 2004, he filed a complaint of retaliation against BWXT with the Manager of the Employee Concerns Program (Employee Concerns Manager) at the DOE's National Nuclear Security Administration Service Center (NNSASC). In his complaint, the individual contends that he made certain disclosures to officials of BWXT and the DOE, and that BWXT retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program,. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint, beginning with a discussion of the legal standards governing this case. With regard to the issues raised in this proceeding, I first find that the Complainant's filing of his Part 708 complaint was timely. I then find that the Complainant made at least two

protected disclosures that are proximate in time to BWXT's decision not to grant comparative salary increases to his working group (the adverse personnel action). I further find that the Complainant has shown by a preponderance of the evidence that BWXT's decision not to grant the comparative salary increases in March and April 2002 constitutes a retaliation against him under Part 708. Under these circumstances and in light of the DOE's strong commitment to defending whistleblowers against adverse personnel actions, Part 708 imposes the significant requirement that BWXT show by clear and convincing evidence that, in the absence of the Complainant's protected disclosures, it would have taken the same personnel action against the Complainant.

Ultimately, I find that BWXT failed to establish by clear and convincing evidence that it would not have granted the comparative salary increases in 2002 in the absence of the Complainant's protected disclosures. Accordingly, I find that BWXT should be required to take restitutionary action.

II. 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 such "whistleblowers" from adverse personnel actions 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 take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(1), (2). Employees of DOE contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the

DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing

The Complainant filed his Part 708 complaint with the Employee Concerns Manager at the NNSASC in March 2004.^{1/} On January 5, 2005, the Employee Concerns Program Manager forwarded the complaint and other filings tendered by BWXT to the OHA Director. The OHA Director appointed an Investigator on January 11, 2005, and on April 12, 2005, she issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the complainant's claims and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions that may have been retaliatory. Following my appointment as Hearing Officer in this matter on April 14, 2005, I directed the complainant and BWXT to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.^{2/} At a June 20, 2005 telephone conference call, the complainant's counsel indicated that

^{1/} On June 22, 2004, the Employee Concerns Manager dismissed the complaint on the grounds that it failed to meet the requirements of the Contractor Employee Protection Program. The Complainant appealed this dismissal to the OHA, and in an August 2004 decision, the OHA granted his appeal and remanded his Part 708 complaint to the Employee Concerns Program Manager for further processing. *Clint Olson (Case No. TBU-0027)*, 29 DOE ¶ 87,002 (2004).

^{2/} In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. April 14, 2005 letter to the parties at 2.

he did not intend to pursue some of the alleged protected disclosures and alleged retaliations discussed in the ROI and agreed to their dismissal. In light of the agreements reached during that conference call, I issued a June 22, 2005 letter to the parties indicating that the Hearing in this matter would address the following protected disclosures:

The complainant's alleged disclosures concerning the security incident that occurred at Pantex in 2002 with regard to a missing classified hard drive (referred to in the ROI as the 2002 Incident). Specifically, the complainant's first alleged protected disclosure occurred on or about February 28, 2002 when he allegedly conveyed his belief to his supervisor at that time (the former Senior CIO) that BWXT personnel were grossly negligent in the handling of a classified hard drive and that BWXT's [Security Incident Report] contained false statements regarding the destruction of the classified hard drive. The complainant's second alleged protected disclosure occurred on or about March 4, 2002 when he allegedly told BWXT's Safety, Security & Planning Manager at that time (the former SS&P Manager) that contrary to BWXT's [Incident] Report, no evidence existed which confirmed the destruction of the classified hard drive and explained to her that providing a false report regarding the destruction of the hard drive would violate federal law.

In my letter, I dismissed the other alleged disclosures.

Hereinafter, the February 28, 2002 and the March 4, 2002 alleged disclosures will be referred to collectively as the February 2002 disclosures. With regard to alleged retaliations, I stated that the Hearing would address only the complainant's allegation that BWXT retaliated him by taking no action on a pending request made by the former Senior CIO for comparative salary increases for employees in BWXT's Counterintelligence Unit (CIU).^{3/}

^{3/} Testimony at the Hearing also addressed the timeliness of the individual's filing of his Part 708 Complaint. In its Reply brief, BWXT contended that the complaint was not timely filed because the individual should have known no later than the summer of 2002 that the former Senior CIO's request for a comparative salary increases for the CIU had been rejected by
(continued...)

III. Hearing Testimony

At the Hearing, testimony was received from twelve witnesses. The complainant testified and presented the testimony of BWXT's former Senior CIO Curtis Broaddus (the complainant's supervisor), the DOE's former SS&P Manager at Pantex, a Special Agent with the Federal Bureau of Investigation (FBI), the Chief of the Office of Defense Nuclear Counterintelligence (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, the DOE's Assistant Site Manager, Safeguards & Security, for the Pantex Site Office (the DOE Assistant Site Manager), BWXT's Division Manager for Safeguards & Security Alexander Sowa (BWXT's current S&S Manager), BWXT's former General Manager Dennis Ruddy, and BWXT's current General Manager Michael Mallory. The Hearing testimony summarized below concerns the complainant's alleged disclosures and the alleged retaliation. Testimony concerning the issue of timeliness of the individual's filing of his Part 708 Complaint is discussed in the section of my analysis dealing with that issue.

A. The Complainant's Witnesses

1. The Complainant

The complainant testified that he started working at Pantex as a security police officer in 1992. From July 1999 until November 2004, he worked at the Pantex facility in the CIU and completed his CIO training in 2001. TR at 276-277, 291.4/ He testified that the CIU regularly received incident reports prepared by BWXT Security concerning security infractions at the Pantex facility. The CIOs reviewed these reports to see if they raised any counterintelligence issues. TR at 283.

3/ (...continued)

BWXT management. Counsel for the complainant responded that he intended to present evidence that the individual did not learn that the request for comparative salary increases had been rejected until 2004. In a June 24, 2005 email to the parties, I permitted testimony at the Hearing on this issue.

4/ The complainant testified that he now works in BWXT's Classification Department at the Pantex facility. TR at 290.

a. The February 2002 Protected Disclosures

The complainant stated that in February 2002, he and another CIO reviewed a Security Incident Report that discussed a missing classified hard drive (hereinafter the "Incident Report").^{5/}

The Incident Report contains a one page "Inquiry Summary Report" that provides a description of the security incident and the investigation by BWXT Security, and presents BWXT Security's conclusions concerning the security incident (the Incident Report Conclusion). The Incident Report Conclusion states that an "Accountable Secret RD hard drive containing Sigmas 1 and 15 was destroyed without proper documentation or witness." The Incident Report Conclusion states that in early February 2002, BWXT Security officials conducted an inquiry to confirm the location of the hard drive. The Security officials were told by the user of the hard drive that he gave it to his supervisor for destruction several months earlier. The subsequent investigation and the conclusions of BWXT Security are described as follows:

Repositories were re-checked to confirm that the hard drive had not been misplaced or overlooked. Signed statements were received, stating that although [the hard drive user] was aware of [Secret Accountability System] handling and destruction procedures for accountable matter, it had simply slipped his mind and the hard drive had been included with others for destruction. Some time after August 2001, several classified hard drives had been picked up by Electronics for disassembly; then taken to the Data Center for degaussing.

During the investigation, records were retrieved to support the degaussing and to confirm proper destruction methods for classified information had been applied. It was determined that no compromise of classified information had occurred.

Incident Report Conclusion, included in complainant's June 14, 2005 submission of documents at p. 00006.

At the Hearing, the complainant testified that when he and the other CIO reviewed the Incident Report in February 2002, they

^{5/} A copy of this report was submitted by the complainant's counsel.

concluded that the facts in the Incident Report did not support the report's conclusion that the missing classified hard drive had been destroyed. They immediately decided to bring their concern that the Incident Report Conclusion was inaccurate to the attention of their supervisor. The complainant testified

At first I was kind of timid to go in [to the complainant's supervisor's office], because we had two Headquarters people there. But myself and [another CIO] looked at this Security Incident Report and thought that there was some anomalies with it, so we took it to [the complainant's supervisor] and said "we've got some anomalies with this incident. It's closed out already by [BWXT] Security, but to me there looks like there's some misleading statements involved with this incident."

TR at 279-280.^{6/} Specifically, the complainant reported to his supervisor that "there's no proof that his hard drive was destroyed. The numbers do not match." He stated that none of the identifying numbers on the missing hard drive matched any of the numbers on the list of hard drives that were listed in the Incident Report as having been destroyed. TR at 285.

The complainant also pointed out to his supervisor that any computer hard drive with Secret Accountability System data is required to have a "fluorescing yellow or other sticker about three inches-by-three inches placed on it" which is "very, very visible." TR at 286-287. The Incident Report stated that hard drive user's supervisor did not recall seeing any Secret Accountability System material in the batch of hard drives that he turned in for destruction. The complainant concluded that there's no way to know if the classified hard drive was destroyed. TR at 287.

The complainant also pointed out to his supervisor that the only piece of evidence that the missing hard drive was destroyed was an unconvincing statement made to BWXT Security by the hard drive user's supervisor. That supervisor had asserted that because the missing classified hard drive could not be located in the "two places that I keep these hard drives," that he felt "quite sure" that the hard drive was in the group that he sent to be destroyed.

^{6/} The complainant's supervisor testified that this meeting probably took place on Friday, February 22, 2002, the day that the Incident Report was issued, and a copy was sent to the CIU. TR at 231 and 242.

TR at 300-301 *citing* supervisor's statement in the Incident Report. Finally, the complainant pointed out to his supervisor that there was no evidence for the destruction of the classified hard drive because security procedures requiring media custodians to witness the degaussing of classified hard drives had not been followed by BWXT's Data Center. TR at 306-307.

The complainant testified that during the February 2002 meeting in which the disclosures were made, two DOE officials were present in the complainant's supervisor's office, and that they took part in the conversation. TR at 288-289. The complainant stated that his supervisor reviewed the Incident Report and agreed with the complainant's conclusion that there was insufficient evidence to support the Incident Report's conclusion that the classified hard drive had been destroyed. The complainant stated that the three CIOs developed a plan of action to conduct a preinquiry to ascertain if the missing classified hard drive raised any counterintelligence issues. TR at 280. Specifically, he testified that the CIU opened its preinquiry in order to look at the possibility of a foreign nexus concerning the missing classified hard drive. Opening a preliminary inquiry enabled the CIU to pull records and see if the user of the missing hard drive or his supervisor reported any foreign contacts or were involved with any joint-operation working groups with other countries under the Mutual Defense Agreement. TR at 295-296.

Shortly after opening this preinquiry, the complainant indicated that he and his supervisor met with the former SS&P Manager and talked to her about the matter. He stated that at this meeting, he told the former SS&P Manager that the Incident Report Conclusion's findings that the hard drive was destroyed and that there was no possible compromise of classified information were misleading. TR at 281 and 289. He stated that the SS&P Manager sent an email to him the following day, March 5, 2002. The former SS&P Manager's email reads in part:

A meeting was conducted Monday afternoon to discuss the hard drive situation which occurred during the Aug-Oct timeframe of last year. I briefed [former General Manager Ruddy] and [General Manager Mallory] after that meeting. The BWXT process as a whole is broken and this meeting is needed to follow up on corrective actions and determine if other actions are necessary.

March 5, 2002 Email from the SS&P Manager to the complainant, attached to complainant's June 14, 2005 submission at p. 00013.

b. The Alleged Retaliation

The complainant testified that prior to February 2002, he was expecting either comparative salary increases and/or promotions for persons working in the CIU at Pantex. He stated that the complainant's supervisor had informed members of the CIU of statements made by the former BWXT General Manager about increasing compensation levels for the CIU. The complainant's supervisor told the complainant that he met with BWXT's former General Manager Ruddy and with the former Defense Nuclear CI Chief during her visit to the Pantex facility in early January of 2002, and that he used the opportunity of this meeting to raise the issue of comparative salary increases for the CIU. TR at 309. The complainant was told that at this meeting, the former BWXT General Manager stated that he would work on providing raises or promotions for employees in the CIU. TR at 309.

The complainant also testified that he was aware of a follow up letter from the Defense Nuclear CI Chief to the former BWXT General Manager thanking him for the meeting and thanking him for working out the salary issues with the Pantex CIU. TR at 309.

I greatly appreciate your support for the [complainant's supervisor] and the Pantex Counterintelligence Program. And I also appreciate your support in rectifying the salary shortfalls we discussed. We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word.

January 13, 2002 letter from the Defense Nuclear CI Chief to the former BWXT General Manager, attached to the complainant's June 14, 2005 submission at p. 00003. The complainant indicated that in late 2001 and early 2002, the BWXT Office of Human Resources had asked the complainant's supervisor to go out and collect salary data from other DOE complexes to justify the comparative salary increases that he was requesting. He stated that they informed the complainant's supervisor that any raises for the CIU had to be deferred until the following year because the budget already was finalized. TR at 324-325. The complainant also stated that he was told that the BWXT official who was working on the CIU's comparative salary increases had been terminated, and the comparative salary increases were delayed until the new official could study the issue. TR at 315.

The complainant testified that he did not file a Part 708 Complaint prior to March 2004 because throughout this period the CIU

employees were told that the complainant's supervisor was still working on the raise issue. TR at 314. When he was asked what precipitating event caused him to file his Part 708 Complaint in March 2004, the complainant referred to a December 2003 meeting with General Manager Mallory and the complainant's supervisor that involved an issue that he is not currently pursuing as part of his Part 708 Complaint. TR at 318.

The complainant testified that during the period from 2002 through 2004, he received annual cost-of-living and merit pay increases, but that these raises did not address the CIU's compensation disparity with other DOE facilities. TR at 311-314. He stated that more than two years later, in the middle of 2004, BWXT's current Compensation Manager conducted a comparative analysis of CI salaries in different DOE facilities and identified an obvious disparity in the salaries being paid to employees of the Pantex CIU. TR at 310.

2. The Complainant's supervisor

a. The February 2002 Protected Disclosures

The complainant's supervisor testified that in February 2002, he was conducting a program review with two visitors from the DOE Office of Counterintelligence when the complainant and another CIO at the Pantex CIU came into the office. He stated that they told him that they had reviewed the Incident Report concerning the missing classified hard drive and that they had concerns about the destruction of the classified hard drive. TR at 224. The complainant's supervisor testified that the complainant detailed a couple of things.

He said, "they've lost complete control of that drive." He said, "And there's no evidence that the drive has been found at all." And he said, "Additionally, . . . the statements that are being made by Security relating to the destruction of that drive, aren't right. There's no way they could have made those assumptions."

TR at 227. He stated that the complainant and the other CIO pointed out to him that the facts in the Incident Report did not support the statement in the Incident Report Conclusion that "no compromise of classified information had occurred." TR at 227-228.

The complainant's supervisor testified that he shared the complainant's concerns. He stated that because the classified

hard drive contained Secret Accountability System material, it was labeled with a special sticker and required a special chain of custody and special destruction processes. TR at 232-234. He stated that both the user of the hard drive and his supervisor knew the rules

and yet they didn't follow the rules with some very highly classified data.

TR at 234. The complainant's supervisor stated the incident involving the missing hard drive indicated that the user of the classified hard drive and his supervisor had failed to follow security procedures. He also believed that the Incident Report Conclusion

would lead people to believe that there was direct evidence that the drive was destroyed, and that direct evidence has, to my knowledge, never been developed.

TR at 239. He said that he disclosed his beliefs about the actions of these BWXT employees to the two DOE officials who were present in his office on February 22, 2002. TR at 239-240. He also contacted DOE Headquarters and notified an official there that he was opening a Preliminary Inquiry regarding the incident. TR at 241. The complainant's supervisor stated that in the next several days he informed several BWXT officials, an official of the FBI, and the DOE's Assistant Manager for Safeguards & Security at the Pantex Site that he believed that BWXT employees had failed to protect the classified hard drive and that the finding in the Incident Report Conclusion that the classified hard drive had been destroyed was unsupported. TR at 244-246.

He testified that the complainant and he met with BWXT's former SS&P manager. He stated that she had been put in charge of doing a "lessons learned" review of what had happened in the breakdown of the system. He stated that they told the former SS&P manager that there was no evidence to support that the classified drive had ever been destroyed, that there was a failure to protect and account for the classified hard drive, and that the findings in the Incident Report Conclusion were unsupported. TR at 251-252.^{7/}

^{7/} The complainant's supervisor also indicated that on March 19, 2003, the CIU put its investigation of the 2002 incident in abeyance because it had determined that there was no evidence
(continued...)

b. The Alleged Retaliation

Regarding the issue of comparative salary increases for the CIU at the Pantex facility, the former BWXT Senior CIO stated that he attended a meeting in about November 2001 attended by the former BWXT General Manager and the Defense Nuclear CI Chief. He stated that at this meeting, the Defense Nuclear CI Chief told former General Manager Ruddy that the CI program at Pantex was direct-funded and that she would provide the funding to bring the salaries of the four BWXT CIU employees up to a comparable level with CIUs at other DOE facilities. He stated that the General Manager then said to her:

It's direct-funded. This is a no-brainer. I'll have one of my people get with you.

TR at 252.

The complainant's supervisor testified that after he disclosed his concerns about the 2002 incident and the Incident Report, it became "harder and harder to get things done." He indicated that his ongoing project to increase salaries for the CIU suddenly stalled. He said that he had been asked by BWXT's former HR Compensation Manager to get points of contact at different DOE sites so that HR could make salary comparisons. At some point after the disclosures were made, he was informed by the HR Compensation Manager that there would be no raises for the CIU at that time, and that he did not believe that such raises would be made in the future. TR at 259.

3. The DOE's former SS&P Manager at Pantex

The DOE's former SS&P Manager at Pantex testified that she does not recall whether she met with the complainant and the complainant's supervisor concerning the 2002 Incident.

I went back and looked and saw an appointment, but I do not remember physically meeting with them. . . .

7/ (...continued)

of a foreign nexus in the loss of the classified hard drive. TR at 257. He stated that he put the CIU case in abeyance in order to allow BWXT Security to continue to do its job, and because "at that time [the CIU] did not know what their final conclusion was going to be." TR at 254.

There was a meeting on the hard drive and there were lots of people there, and it very well could be that [the complainant and the complainant's supervisor] were in that meeting, and that may be the meeting in question. But I just don't remember who all was in that meeting.

TR at 593. She stated that other individuals involved with the 2002 Incident were aware of the concerns expressed by the complainant and the complainant's supervisor, and repeated these concerns to her. She testified that she was aware in March 2002 that the complainant and the complainant's supervisor were concerned that there was no evidence of destruction of the classified hard drive, but that

I don't know that they personally told me whether they had that question.

TR at 594.

The DOE's former SS&P Manager testified that she recalled briefing former BWXT General Manager Ruddy and current General Manager Mallory about the 2002 Incident, but that she did not mention the specific concerns of the complainant and the complainant's supervisor to them. TR at 595.

4. The FBI Special Agent

The FBI Special Agent testified that he has been with the FBI for seven years and has been assigned to the Pantex facility since October 2003. TR at 153-154. He stated that when he arrived at the FBI's office in Amarillo, Texas, he reviewed a copy of the Incident Report that had been sent there by the DOE's Assistant Security Manager at Pantex. He stated that when he reviewed the report, he had "some concerns as to the accountability of the classified hard drive." TR at 155. He stated that his FBI office opened an investigation of the matter to determine if classified material had been mishandled, whether there was a possibility of espionage, and whether there would be any criminal prosecution under 18 U.S.C. § 793. TR at 157.

He stated that the decision to open an investigation after reviewing the Incident Report was based on his determination that "there's no document that shows definitively that this hard drive was one of the hard drives that was destroyed." TR at 158.

He testified that the FBI's investigation focused on whether the hard drive was accounted for and whether there was negligence in handling it. He stated that the FBI issued a declassified conclusion that he described as follows:

The investigation yielded no evidence that proved or disproved the destruction of the Number 492 hard drive, nor could it definitively eliminate all of the possibilities that might explain the inability to account for the Number 492 hard drive.

So basically what this says here is we found no evidence to confirm the destruction of the hard drive, nor did we uncover evidence to the contrary, that it had not been destroyed. Therefore, we have no reason to conclude anything other than the Inquiry Report, other than that it was destroyed.

TR at 160. He stated that the FBI's finding differed from the finding in the Incident Report Conclusion because it acknowledged the possibility that "something else" could have happened to the classified hard drive. TR at 161.

The FBI Special Agent testified that the FBI routinely looks at incidents of security concern involving classified information to see if there has been a violation of law. TR at 167-168. In this instance, he stated that the FBI did not make any referrals for prosecution based on allegations of willful misconduct committed by those who were involved with the loss of the hard drive. TR at 168. He also indicated that the FBI found no evidence of a foreign nexus or gross negligence in the matter. TR at 168-169.

5. The Defense Nuclear CI Chief

The Defense Nuclear CI Chief testified that she has held her current position for four years, and that previously she served as the Deputy for CI at the DOE. She stated that the Office of Defense Nuclear CI has under its purview a number of field sites, which includes the CI program at Pantex. She stated that she knows both the complainant's supervisor and the complainant. TR at 180.

a. The February 2002 Protected Disclosures

The Defense Nuclear CI Chief stated that on February 22, 2002, at the request of the complainant's supervisor, Defense Nuclear CI headquarters opened a pre-inquiry into the hard drive matter.

Because it was a missing piece of classified material, we wanted to determine if there was a foreign nexus. The foreign nexus is what we need to understand or discover in order to open a counterintelligence investigation. So, working closely with my deck officer, . . . [the complainant's supervisor] was instructed to go ahead and look and see if there was a foreign nexus. And he reviewed it to see if there was. Discovering nothing, we closed the case on March 19, 2002, or closed the preliminary look, not a full case.

TR at 187. She stated that because she was aware that the FBI had been informed of the hard drive matter, she wrote a letter to the head of counterintelligence at the FBI informing them that "we see no foreign nexus on this matter; no further actions." TR at 188.8/

She said that initially, the chief issue raised about the hard drive matter was the manner in which it was reported directly to the DOE by the Pantex CIU and Defense Nuclear CI.

. . . it caused some concern [to BWXT] about [the Pantex CIU] reporting it up through the chain, through me to Headquarters. There seemed to be some concern on [the former BWXT General Manager's] part of why they had to do that

TR at 191. She stated that she believed that it was appropriate for the complainant's supervisor to report to her his concerns about a missing classified hard drive.

Whenever you have missing, unaccounted-for classified information, you want to make sure that it didn't go out the door because you had a foreign visitor in last week . . . [or that] the pool of employees who may have had some contact with this thing haven't come across our screen, or the other CI concerns.

8/ She testified that when the FBI opened a preliminary investigation of the hard drive incident in 2003, Defense Nuclear CI opened a case just to track it. This case was closed when the FBI ended its preliminary investigation. TR at 202.

TR at 208. She stated that the complainant's supervisor may have mentioned the complainant as someone who was working on this matter, but "I don't have any recall of it." TR at 209.

The Defense Nuclear CI Chief indicated that she learned "several months later" that the complainant's supervisor had concerns about the [BWXT] review of the 2002 Incident. TR at 191. She stated that he had concerns about the findings presented in the Incident Report Conclusion and that he advised BWXT Security to have it changed.

They had an emphatic statement that there was no compromise of classified information, and I think they changed it to the probability that compromise occurred is remote.

TR at 210-211.

b. The Alleged Retaliation

She stated that in November 2001, she met with BWXT's former General Manager Ruddy and at that meeting she discussed with him the need for comparative salary increases for employees of BWXT's CIU.

I told him we were anticipating a counterintelligence inspection in the next year, and there were some concerns about salary parity on a couple of the employees. I told him that if he would look into the matter, I would be willing to provide additional funds if we determined that they were not paid to a level that was comparable or appropriate.

TR at 182. She stated that BWXT's former General Manager Ruddy responded positively.

And he said he would be willing to look into it, but it would make it easy if I was willing to come forward with the money. And that was the end of the conversation on that matter.

TR at 183.

The Defense Nuclear CI Chief stated that in January 2002, she sent a letter to former General Manager Ruddy discussing comparative salary increases for the CIU employees that the DOE would fund. TR at 185, citing "the January 13, 2002 Letter." She testified that she was later notified by the DOE that her proposal to raise the salaries was not appropriate. TR at 185.

6. The Former BWXT HR Compensation Manager

BWXT's former HR compensation manager testified that he held that position from April 2001 until April 21, 2003. He stated that part of his job was to review salary analyses. He stated that the complainant's supervisor contacted him in about May or June of 2001 and said that he felt that levels of compensation in the CIU were below standard. TR at 344. The HR compensation manager stated that he replied that he would have to do some investigation of the CIU's comparative standing, and that currently there was no money available for comparative salary increases. TR at 344. He stated that in the next four or five months, he and the complainant's supervisor looked at compensation for CIUs at Hanford, Savannah River, Los Alamos, and Sandia. TR at 345. He testified that

My determination when looking at these numbers that my compensation people put in front of me was that there was room for a ten to fifteen percent adjustment for [the complainant's supervisor]. And I don't recall [for the complainant].

TR at 345. The former HR compensation manager stated that he was contacted by NNSA's Counterintelligence Headquarters officials three or four times by telephone encouraging him to provide more compensation for the Pantex CIU, although they were reluctant to share comparative salary data with him. TR at 346. He said that in the late Fall of 2001, he informed BWXT's Deputy for HR as well as BWXT's Manager and Deputy Manager that with regard to the Pantex CIU "there's room for increase [in salaries] to bring them more in line with the rest of these [DOE CIUs], based on our philosophy," but that the problem was, at that period of time there was no money available. TR at 351. Around the same time, he also remembers a visit from the Defense Nuclear CI Chief, who said that the DOE could provide the money for comparative salary increases for the CIU. TR at 346-347 and 356. He stated that the DOE loads the money for BWXT in the January timeframe, and that it "was [BWXT's] intention at the time to give those raises." TR at 356. He indicated that BWXT's former General Manager Ruddy initially supported the comparative salary increases for the Pantex CIU, but that he put a halt to any such increases for the CIU in early 2002. TR at 356-357. He stated that he was in General Manager Ruddy's office in early 2002 to inform him that HR was getting ready to "load some increases and some promotional monies."

And I remember bringing up the Counterintelligence Group, and [the former BWXT General Manager] was rather colorful

in his response. And I won't go into any details as to the kinds of vernacular, but he wanted it stopped dead in the water because of a hard-drive issue, a hard-drive investigation.

TR at 358. He further testified that General Manager Ruddy

made the comment that he thought it, the [hard drive] investigation was getting - Careful with my words here. - out of control with regards to how he perceived things, and as a result, he was going to work to ruin [the former Senior CIO].

He recalled that the former BWXT General Manager stated on a couple of occasions that increased compensation for the CIU was "not going to happen". TR at 358. He stated that in the March-April 2002 timeframe, General Manager Ruddy asked him if he was required to accept the offer of the Defense Nuclear CI Chief to provide additional monies for the salaries of the Pantex CIU. The former HR compensation manager stated that he told him that it was highly unusual for the DOE

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.

TR at 366. Nevertheless, he testified that he told the former BWXT General Manager that "it is probably politically astute to make payment and move forward." TR at 366. The former HR compensation manager also stated that General Manager Ruddy told him at about that time that "he wanted [the complainant's supervisor] gone" and that it was the job of the HR manager to get rid of him. TR at 359. The former HR compensation manager replied that he would be willing to search for other positions for the complainant's supervisor across the DOE complex. TR at 359.

7. BWXT's Compensation Manager

BWXT's Compensation Manager testified that he first worked at the Pantex facility in March 2004 when he was hired for his current position. He stated that almost immediately he was asked by the BWXT's current General Manager Mallory to do a comparative salary analysis for the Pantex CIU. TR at 394, 409 and 425. He stated that it took him about two months to conduct this analysis. TR at

426. He indicated that after conducting the analysis, he concluded that the complainant's salary and the other CIU employee salaries were "behind market of the ones that we looked at." TR at 410. He explained that

When you do a salary band . . . for a certain grade level, you have a range that you can pay within that. And that range is considered to be within market, so the market midpoint is sitting in the middle of that. And typically 20 percent either side of that is deemed acceptable or normal. So you can pay within that salary range or that salary band at that point.

TR at 410-411. He testified that the complainant's salary was 22.8 percent behind the market average in the survey that he conducted. TR at 413. The market average for the complainant's position was \$6,965 per month. TR at 585. He stated that he did a complete survey for the three different positions in the Pantex CIU, and that all three were below market. TR at 418-419.

The Compensation Manager testified that in May 2004, he presented the results of the survey to the General Manager Mallory along with the recommendation "to go forward with [comparative salary] increases for the Counterintelligence group." TR at 427. General Manager Mallory approved the implementation of this plan, which was to provide initial comparative salary increases and promotions for the three individuals in the CIU in May 2004, and to continue to provide incremental comparative salary increases on an annual basis for the next three years. TR at 429. Pursuant to this plan, the complainant received an initial comparative salary increase of seven percent on May 24, 2004. TR at 430. The Compensation Manager stated that this seven percent increase "was based on the market adjustment from the information that we provided [from the comparative salary analysis]." TR at 422. The complainant's supervisor received an initial comparative salary increase of three percent on May 24, 2004. TR at 430. Because both the complainant and the complainant's supervisor left their positions at the CIU prior to January 2005, they did not receive the next scheduled comparative salary increase for CIU employees that took place in that month. TR at 431-432.

The Compensation Manager testified that it was not common for this office to conduct an equity analysis for job classifications to the level of detail of his analysis for the CIU positions because "we have market surveys that we rely on for all the information." TR at 587. He also stated that there were no DOE site procedures or

other requirements that compelled BWXT to provide an equity analysis for a particular job at the Pantex facility. TR at 588.

The Compensation Manager stated that he reviewed the complainant's records to see if he received his annual merit pay increases in recent years. He found that in 2000, the complainant received a 7.4 percent increase, in 2001 he received 6.1 percent, in 2002 he received 4.37 percent, in 2003 he received 4 percent. TR at 422. He stated that with respect to these increases, the complainant received at least the average increase for the Pantex site. TR at 423.

B. BWXT's Witnesses

1. BWXT's Current Senior CIO

BWXT's current Senior CIO testified that she has had more than twenty years of experience in intelligence work, and has served as the Senior CIO at Pantex since November 2004. TR at 441-442. She stated that she recently reviewed the CIU's file on the 2002 classified hard drive incident, and described it as follows:

It was a security incident where a security inquiry was conducted because there was a hard drive that did not have the appropriate documentation that it was or was not destroyed.

TR at 442-443. She stated that in February 2002, the CIU made an initial review of the incident, and after about five weeks this preliminary inquiry was closed when the complainant's supervisor determined that there was no foreign national involvement. TR at 443. She states that the CIU file indicates that the complainant's supervisor briefed the FBI's Supervisory Special Agent in Amarillo about the matter. *Id.* She stated that when the FBI later opened an inquiry into the incident, the CIU followed standard procedure "to monitor and assist [the FBI] in their investigation." TR at 444-445. She testified that the CIU file's only reference to a foreign nexus was "that we were looking into it," and that the file contained no information of theft or other criminal violations. TR at 447. She stated that incidents investigated by the CIU involve either "typically minor" security issues, slightly more serious security infractions, or security violations, where there is a reasonable expectation that classified information may have been compromised. She stated that "beyond that would be criminal behavior [under the] Espionage Act." TR at 448-449. With regard

to the 2002 classified hard drive incident, she stated that the incident involved security infractions.

Well, my opinion it was a paperwork issue. There was a problem with paperwork; that as far as I have been able to determine, it is not something that was consistently wrong at, at that location. . . . but [the classified hard drive] was unaccounted for. So, infractions were issued to the people who were supposed to have logged in whatever happened to the hard drive.

TR at 450. She concluded that there was nothing in the CIU file to lead someone with counterintelligence training to believe that a criminal act had occurred with respect to the missing hard drive. TR at 453. She also stated that there was no evidence that the two individuals who received security infractions were guilty of gross negligence. TR at 471.

Gross negligence is something that tends to be a lot more willful. For instance, the hard drive that was missing from Los Alamos, we know that it held very high-level, top-secret information . . . and somebody clearly took it home. . . . That was something that they did on purpose. This appears to be an administrative error, like leaving your safe drawer open.

TR at 486-487.

However, she stated that the possibility exists that the classified hard drive was lost and not destroyed.

Anything is possible. The probability is that these are a couple of people who forgot to fill out paperwork. However, I don't have the hard drive in front of me. I cannot say definitively that it was not lost.

TR at 457. She therefore agreed that it was reasonable to conclude at the time that the Pantex CIU opened its review that a criminal act *may* have occurred. *Id.* She also stated that the Incident Report Conclusion was inaccurate when it stated that the incident involved no loss or compromise of classified data, because there is no documentation indicating that the hard drive was destroyed. TR at 459.

I disagree completely with the statement that no loss occurred, or whatever she said in there, to say

definitively [the hard drive] was destroyed. I mean, there is no way to prove that. You have the testimony of the people given the infractions.

TR at 484. She also stated that the Incident Report Conclusion was inaccurate because under "Determination of Inquiry", it checked a box for "Loss compromise did not occur" when it should have checked "Probability of compromise is remote." TR at 474-475. However, she did not believe that these inaccuracies rose to the level of willful false statements under the Intelligence Act. TR at 476. She also did not believe that either the complainant or the complainant's supervisor, given their CI training and experience, would have reasonably believed that a security violation occurred. TR at 479.

The current Senior CIO testified that the CIU file on the 2002 Incident indicated that the complainant's supervisor made notes of several meetings that he had with BWXT officials concerning issues raised by the Incident Report. Notations on March 1, 2002 indicated that former General Manager Ruddy and current General Manager Mallory were unavailable, and that the complainant's supervisor briefed a BWXT Division Manager and told him that the Incident Report provided no evidence of destruction of the classified hard drive, and that the CIU would treat it as a missing classified document. She stated that later, that day, the file indicates that the complainant's supervisor briefed General Manager Mallory and informed him that the Office of Defense Nuclear Counterintelligence and the FBI would be notified of the incident. TR at 461. She further indicated that the DOE's Assistant Site Manager for Safeguards & Security at Pantex was briefed and agreed to work the case from the security side. TR at 461. She testified that the CIU file indicates that on March 4, 2002, the complainant's supervisor first met with former General Manager Ruddy and informed him that the CIU had concluded from the Incident Report that there was no evidence of destruction of the hard drive. TR at 463. Later that day, the complainant's supervisor met again with former General Manager Ruddy as well as General Manager Mallory, and the former head of BWXT Security and briefed them "on the entire case to date." 462-463.

The current Senior CIO testified that the complainant's supervisor followed procedures in reporting the hard drive incident. However, she stated that she would have urged BWXT Security or DOE Security to make the report to the FBI.

This was a security incident, and would appropriately have been referred to the FBI from the security apparatus at this facility as opposed to Counterintelligence.

TR at 464. She added that if she had been in the complainant's supervisor's position and security had refused to inform the FBI, then "I would have done it anyway." TR at 464-65.

2. The DOE's Assistant Site Manager for S&S at Pantex

The DOE's Assistant Site Manager for S&S at Pantex testified that he had thirty years of experience in safeguards and security at various DOE sites. He stated that in early 2002, during a BWXT self assessment, a classified hard drive was found to be missing. BWXT notified the DOE immediately and proceeded to investigate the incident. He indicated that about 30 to 45 days later, BWXT Security sent him the Incident Report, which he sent to DOE Headquarters. He also provided notification to the FBI. The Assistant Site Manager stated that he evaluated the Incident Report and thought that the finding that the classified hard drive was destroyed was overstated. TR at 495. He stated that

The bottom line was that BWXT personnel failed to follow proper procedure in the destruction of the hard drive. As we reviewed that independently, we came to the same conclusion, as did the FBI in their review of the case.

There is a procedure that requires individuals very prescriptively to follow a destruction path for a classified matter, in this case the hard drive. That path, that set of procedures was not followed. The [user of the hard drive] turned his hard drive over to [his supervisor] for destruction. There was no paperwork or change of accountability from that individual to the second individual.

[The supervisor] then, along with a number of other drives, had those drives destroyed by a technician, and there were violations of procedures on both individuals' parts. They failed to follow procedures, and both were assessed by BWXT security infractions for their failure to follow procedures.

TR at 496-497. The Assistant Site Manager stated that he thought that the issuance of security infractions was the appropriate response in this case, and that he saw no information in the

Incident Report to suggest that either of these individuals raised a concern about a foreign nexus or committed gross negligence. TR at 498.

The Assistant Site Manager stated that the DOE "took some issue" with the Incident Report Conclusion's finding that there was no potential for the disclosure of classified information in this incident. TR at 499. He stated that the DOE questioned BWXT Security on the findings in the Incident Report Conclusion. TR at 500.

He stated that it was appropriate for BWXT, the DOE and the FBI to conclude that the drive had been destroyed because there was no evidence of "anything else occurring."

It was that they just had no evidence; that there isn't noticed evidence that indicates something else happened with this hard drive other than it was destroyed, the procedures were violated and [it] was destroyed.

TR at 513.

The Assistant Site Manager stated that the only evidence for the destruction of the classified hard drive were the statements of the hard drive's user and his supervisor. TR at 538. He testified that the serial number of the missing classified hard drive did not show up either on the list maintained by the supervisor or on any of the degaussing documents. TR at 537. He stated that BWXT attempted without success to connect the degaussed computer platters in their possession to the missing classified hard drive.

The manufacturer of the cases of the hard drives was contacted in an attempt to associate the platters with the case parts. Additionally, the platters were sent to the cyber forensic laboratory to determine if there was any readable material left on the platters.

TR at 530.

3. BWXT's current S&S Manager

BWXT's current S&S Manager testified that he has worked in security at the Pantex site since 1992 and was the Deputy Manager for Safeguards and Security at the time of the 2002 Incident. TR at 543-545. With regard to the missing classified hard drive, he stated that the problem arose when the user of the hard drive turned

it over to his supervisor without the proper paperwork and without identifying it as "accountable" media. TR at 547.

BWXT's current S&S Manager stated that in 2004, General Manager Mallory asked him to perform an independent review of the Incident Report and to give him the results. TR at 551. He stated that after reviewing the report, he recommended that the conclusion "Loss/Compromise did not occur" be changed to "Probability of compromise is remote." TR at 551-552. He stated that this change was appropriate because it was not possible to "conclusively prove" that the disks that had been degaussed by BWXT in the Fall of 2001 included the missing hard drive.

Because it was degaussed, and no technology exists to read those disks, while [I am] 99.5 percent certain it occurred, as inquiry officials felt it occurred, we couldn't prove it one hundred percent because we can't read the degaussed disk and say, "Here's [the missing] disk."

TR at 552.9/ He stated that although he recommended changing the conclusion of the Incident Report Conclusion, he did not believe that the Incident Report and the Incident Report Conclusion contained any willful false statements. TR at 552-553. He testified that he did not re-interview the hard drive user or his supervisor because "they were retired, gone, and the FBI was working the case." TR at 558. He stated that he relied completely on the signed statements of these individuals that were in the report. TR at 560. The statement of the supervisor contains the following assertions:

This being a special marked hard drive, I should have noticed the [Secret Accountability System] marking and handled it as directed in the disposal of [Secret Accountability System] controlled material. I DO NOT REMEMBER seeing this special marking. If [the hard drive user] gave it to me, and I am sure that he did, it was handled as described above. Toward the end of 2001, I had some 40 to 50 hard drives destroyed. I feel quite sure it was in this group.

9/ When asked to clarify what he meant by 99.5 percent certain, he stated "I'm comfortable that the drive was destroyed. That probably is a good way to put it." TR at 568.

Statement of Hard Drive User's Supervisor contained in Incident Report (emphasis in the original).

Finally, he stated that in January 2005, after the FBI concluded its investigation of the matter, he directed that the conclusion of Incident Report Conclusion be changed to fit his recommendation. TR at 578.

4. BWXT's former General Manager Ruddy

Former General Manager Ruddy testified that from February 1, 2001 until January 31, 2003, he was the president and general manager of BWXT, the managing contractor for the Pantex site. TR at 31-34. He stated that during his entire tenure on the site, the complainant's supervisor was his chief counterintelligence officer. TR at 34.

a. The February 2002 Protected Disclosures

With regard to the 2002 Incident, he testified that the missing hard drive raised an issue of accountability for classified information rather than the compromise of classified information.

And there were quite a few corrective actions put in place to increase the rigor and the accountability of the process, but I think all the evidence, when it was put together, concluded that the issue was an accountability issue and not a compromise issue.

TR at 62. Former General Manager Ruddy recalls that he met with the complainant's supervisor in early March 2002 regarding the hard drive issue, but that his recollection of the meeting "is very vague." TR at 47. He stated that he had been told by "the Government" that a CI investigation of the incident had been opened, and he remembers that he gave the complainant's supervisor some feedback about his expectation that he be notified of CI investigations. TR at 48-49. Former General Manager Ruddy testified that he is certain that the complainant's supervisor explained to him why he felt it was important to open the investigation, but that "really wasn't the important issue."

I never questioned whether or not a CI investigation should be opened, but just the fact that it had been opened and I wasn't aware of it.

TR at 105. He stated that if he had been absent from Pantex, then the complainant's supervisor should have informed BWXT's assistant general manager on the day that he opened the investigation. TR at 110.

b. The Alleged Retaliation

With regard to the issue of comparative salary increases for the CIU, former General Manager Ruddy recalled meeting with the Defense Nuclear CI Chief in about November 2001 and that during that meeting she made a qualitative statement that the salaries of the CI employees at Pantex were not in sync with the rest of the counterintelligence community. TR at 71. He stated that

If I had been convinced by information that she provided me that they were seriously out of line, then we would have gone back and, looked at our process by which we slotted those positions to make sure that they were slotted correctly.

TR at 83-84. He stated that any adjustment in salaries would have been incremental, and that he could not recall any instance where an employee of BWXT received more than a fifteen percent raise at one time. TR at 84-85.

He stated that BWXT did not have a general standard of how it wanted the salaries of its employees to compare to what was paid elsewhere. He stated that BWXT performed analyses based on how competitive it was in getting people in various positions and that this standard varied "according to our success in hiring folks and retaining folks." TR at 75.

He testified that when in March 2002 the Defense Nuclear CI Chief 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.

5. BWXT's current General Manager Mallory

BWXT's General Manager Mallory testified that he started working at Pantex in February 2001 as BWXT's Deputy General Manager, and has been the General Manager since February 1, 2003. TR at 112-113. He stated that he could not recall whether he met with the complainant's supervisor in March 2002 concerning the hard drive incident. TR at 137. He stated that during the time that he was Deputy General Manager, the complainant's supervisor did not report to him, although he would occasionally attend the Deputy General Manager's staff meetings. TR at 136.

a. The February 2002 Protected Disclosures

He stated that when the classified hard drive incident occurred in February and March 2002, he was not informed directly.

I don't remember anybody coming to me directly. And I wouldn't have expected them to come to me, because Security, Counterintelligence, none of that reported to me. But certainly as Deputy General Manager, I wanted to know what was going on. And to the best of my recollection, when we heard that there were hard drives unaccounted for, that certainly got my attention.

TR at 121. He stated that the problem was reported in a timely manner to DOE Headquarters, and that BWXT Security completed its evaluation "in a relatively short period of time, less than a week." TR at 132. He stated that the evaluation concluded that it was an administrative issue and that there had been no loss of information.

That's the reason we filled the report out the way we did, that there had been no loss of information; that we had a situation where they did not follow procedures, and took the drives apart before they could match the specific disks up to a drive. But they had all the different pieces. They's all added up to the right total, and that's why they were coming to that conclusion. And that was the way it sat for several years.

TR at 132. General Manager Mallory testified that he had no recollection of the complainant's supervisor meeting with him on this issue in late February or early March of 2002. TR at 136, 137.

General Manager Mallory stated that he recalled meeting with the complainant's supervisor about concerns over the hard drive incident in late 2003 or 2004. He indicated that at that time the complainant's supervisor expressed the concern that the Incident Report Conclusion

may have stated too strongly that there had been positively no loss of information.

TR at 116. He described the complainant's supervisor's concern as follows:

Because the hard drives had been in a vault, but theoretically accessible to someone for a period of time, and since we could no longer take the specific disks and connect them to a specific hard drive because they had been taken apart before the serial numbers had been written down, as best I can remember, [the complainant's supervisor] felt that we had come to too strong a conclusion, and that there was another box on the form that could have been checked that would have said - I'm going to paraphrase here - that it was improbable that there was a loss of information, but it wasn't impossible.

TR at 116. He stated that at that meeting he directed BWXT's S&S Manager to review the matter and that BWXT Security later acted to change the Incident Report's conclusion.

Since we couldn't match hard-drive case and disks up because they'd been taken apart improperly, to state that there was no compromise of classified information was too strong. And that's why we changed the outcome of the report.

TR at 145.

b. The Alleged Retaliation

On the issue of comparative salary increases for BWXT's CIU, General Manager Mallory stated that he was aware that in 2002 the DOE's site manager at Pantex had taken issue with the efforts of the Defense

Nuclear CI Chief to raise the salaries of the Pantex CIU, and that the site manager sent an e-mail to DOE Headquarters stating that her efforts were inappropriate. TR at 127. He then stated that

The issue just kind of went away. I don't remember anything after that.

TR at 127. He testified that at a meeting with the complainant's supervisor in 2004, the complainant's supervisor stated that the employees in the CIU were underpaid. TR at 128-129. He stated that at that meeting he directed his HR Manager to look into the matter, and that they conducted "a very thorough study and inquiry." TR at 129. He said that the result indicated that the employees of the CIU were

probably not underpaid from a salary bracket standpoint, but they are certainly low in the salary bracket compared to places in other parts of the United States.

Id. He stated that the HR Manager told him that

"We don't have to give them a raise, but it wouldn't be unwarranted to get them higher in their salary bracket."

TR at 129-130. Based on this recommendation, General Manager Mallory testified that he authorized raises for the four employees of the CIU. TR at 130.

IV. Legal Standards Governing This Case

A. The Complainant's Burden

Once it is determined that the complainant has met the procedural requirements for submitting a Part 708 complaint, he must then establish by sufficient evidence that relief is warranted. Specifically, it is the burden of the complainant under Part 708 to establish

by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once 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, participation, or refusal.

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and by BWXT. "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).

B. The Contractor's Burden

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. BWXT must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding the complainant absent the protected disclosures. "Clear and convincing" evidence is a 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 the complainant has established that it is more likely than not that he made protected disclosures that were a contributing factor to an adverse personnel action taken by BWXT, the contractor must convince me that it clearly would have taken this adverse action had the complainant never made this protected disclosure.

V. Analysis

A. The Complaint Was Timely Filed

In its submissions, BWXT contends that the individual's complaint of retaliation was not timely filed. It notes that the Part 708 regulation provides that

You must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation.

10 C.F.R. § 708.14(a). As noted above, the complainant filed a complaint of retaliation against BWXT with the Employee Concerns Manager at the NNSASC on March 15, 2004. In his original complaint,

the complainant described efforts by his supervisor and the Defense Nuclear CI Chief to get BWXT's former General Manager Ruddy to agree to comparative salary increases for BWXT's CIU. He stated that BWXT management was "very unhappy" when in February 2002 the BWXT CIU reported its concerns about the 2002 Incident to Headquarters CI and to the FBI. Following the 2002 disclosures, BWXT's management changed its position and acted negatively on the pending issue of comparative salary increases for the BWXT CIU. Complaint at 2.

In its Reply Brief in this proceeding, BWXT contends that the complainant knew as early as the summer of 2002 that his supervisor's efforts to secure comparative salary increases for the CIU (including the salary of Complainant) had failed. It therefore contends that there is no reasonable basis for the complainant to wait until March of 2004 to submit a Part 708 Complaint concerning this alleged retaliation. BWXT Reply Brief at 1.

I reject this argument. In a 2003 decision, a Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances actions more than ninety days old can be considered as retaliations under Part 708. He found that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. See *Steven F. Collier (Case No. VBH-0084)*, 28 DOE ¶ 87,036 at 89,257 (2003); see also *Gary S. Vander Boegh*, 28 DOE ¶ 87,040 at 89,283-84 (2003) (*Vander Boegh*) (certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person "should have known" that they were Part 708 retaliations at the time that they took place). This is because employees often are not familiar with the way that personnel decisions are made and find it difficult to determine whether a negative action concerning a request is retaliatory and when a lengthy delay in providing a promised benefit becomes a determination to deny that benefit.

In the present case, the personnel action raised by the complainant - no comparative salary increases provided by BWXT to its CIU employees in 2002 and 2003 - was not so overtly punitive towards the complainant that a reasonable person "should have known" immediately that it was a Part 708 retaliation. Additional analysis is therefore necessary. Section 708.14(a) of the regulation requires me to consider the evidence in the record, especially evidence as to the complainant's state of mind, in order to determine when he knew or should have known that a Part 708 retaliation had taken

place, and to measure the ninety day filing requirement from that time.

Contrary to BWXT's contention, the complainant's May 24, 2005 Response to the ROI makes no assertion concerning when the complainant realized that BWXT management had decided to take no action on the raises. See Complainant's May 24, 2005 Response at 5. In his testimony at the Hearing, the complainant stated that throughout 2002 and 2003 he was told by his supervisor that he was still working with BWXT's Office of Human Resources on the raise issue. He testified that the BWXT Office of Human Resources offered his supervisor a number of reasons for its delay in acting on the requested raises, including the need to collect comparative salary data to justify the increases, the need to defer any raises until the next fiscal year for budgetary reasons, and administrative confusion caused by BWXT's dismissal of the former HR Compensation Manager. TR at 314-315.

The complainant's supervisor testified that following the disclosures concerning the 2002 Incident, he was told by the former HR Compensation Manager that the CIU would receive no comparative salary increases at that time, and that he did not believe that there would be such salary adjustments in the future. TR at 259. However, he did not testify that he shared this information with the complainant. The complainant's testimony indicates that until early 2004 he was told by his supervisor that he was still working on obtaining comparative salary increases for the CIU, and that the process had been delayed by the departure of the former HR Compensation Manager. TR at 314. This departure occurred in April 2003. TR at 342.

The former HR compensation manager testified that in the March-April 2002 timeframe, the former BWXT General Manager stated that he wanted efforts to increase salaries for the CIU "stopped dead in the water." TR at 358. Nevertheless, the former HR compensation manager stated that he continued to push the issue of comparative salary increases for the CIU with BWXT's General Manager and Deputy General Manager until they responded in very direct terms and said, "The issue is dead." TR at 375. However, even after this happened, he told the complainant's supervisor that he would continue "pushing the issue, and try to take a logical approach," but that "some of these decisions are just above my pay rate." TR at 375-376. He stated that "after the mid-February/mid-March time frame," he believed that the complainant's supervisor knew that the former HR compensation manager was powerless to do anything about increasing salaries for the CIU. TR at 376. He stated that he may have had

some conversations with the complainant's supervisor in 2003 regarding comparative salary increases for the CIU, but that his response was that the complainant's supervisor needed "to take this matter up with your boss." TR at 381.

The former HR compensation manager stated that it was not until early 2004, after he had left his position at BWXT's HR and before he returned to BWXT in another capacity, that he disclosed to the complainant's supervisor how former General Manager Ruddy had refused to approve comparative salary increases for the CIU. TR at 371, 387-388.

Based on this testimony, there is no indication that the individual should have realized that his failure to receive a comparative salary increase was a retaliatory act more than ninety days prior to the filing of his Part 708 Complaint. I find that it was reasonable for the complainant to accept the explanations offered to him by his supervisor in 2002 and 2003 that BWXT's Office of Human Resources was still considering comparative salary increases for the CIU and that the increases had been delayed for legitimate administrative reasons. The testimony of the complainant's supervisor and the former HR Compensation Manager indicates that although the supervisor was aware that the process had stalled in early 2002, he continued to receive some assurances that it remained in consideration after that time, and that he did not learn of former General Manager Ruddy's 2002 decision to deny consideration of comparative salary increases for the CIU until early 2004.

Moreover, BWXT has failed to bring forward convincing evidence for its position on this issue. It has not provided evidence that the complainant or his supervisor were told that BWXT had definitively rejected comparability raises for employees in the CIU. In his testimony, former General Manager Ruddy stated only that he thought it was inappropriate for the Defense Nuclear CI Chief to suggest specific raises for employees in BWXT's CIU. TR at 36-37 and 108. He indicated that any comparative salary increases should be based on BWXT's own analyses. TR at 44. He further stated that at no time did he direct the former HR Compensation Manager to cease looking at a salary review for the CIU. TR at 45.

Accordingly, I find that the individual's March 2004 filing of his Part 708 Complaint was timely filed in accordance with the provisions of 10 C.F.R. § 708.14(a).

B. The Complainant Made Protected Disclosures

As noted above, in order for the information that the complainant disclosed to his supervisor and to DOE officials to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

- (1) A substantial violation of a law, rule, or regulation;
- (2) A substantial and specific danger to employees or to public health or safety; or
- (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . .

10 C.F.R. § 708.5(a)(1), (2) and (3). Throughout this proceeding, the complainant has contended that his disclosures regarding the 2002 Incident were protected because they revealed substantial violations of law under 10 C.F.R. § 708.5(a)(1). Specifically, he asserted that the BWXT employees who handled the classified computer hard drive were grossly negligent when they ignored required procedures for recording the hard drive for collection and destruction. He also asserted that the BWXT's Inquiry Official committed gross negligence or made false statements when she concluded in the Incident Report Conclusion that the classified hard drive had been accounted for and that no compromise of classified information had occurred.

After reviewing the testimony and other evidence in the record of this proceeding, I find that it is not necessary to examine the motives and intent of the Inquiry Official and the BWXT employees who handled the classified hard drive in order to find that the complainant's disclosures are protected under Part 708. As discussed below, I find that the missing classified hard drive contained highly restricted classified nuclear information. The complainant disclosed on two occasions that the findings contained in the Incident Report Conclusion were inaccurate, and that this hard drive and its information could not definitely be identified as having been destroyed. His disclosure that BWXT had failed to properly account for this information was the disclosure of "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

1. The Complainant Made Disclosures Concerning the Classified Hard Drive on Two Occasions

The complainant testified that after he and another CIO reviewed the Incident Report in February 2002, he shared his concerns with his supervisor and two DOE counterintelligence officers. Specifically, he told them that he believed that there was insufficient evidence to support the Incident Report Conclusion's findings that the classified hard drive had been destroyed and that there was no compromise of classified data. The complainant also indicated that on March 4, 2002, he and his supervisor met with the former SS&P Manager to discuss the Incident Report, and he shared the same concerns with her. TR at 281 and 289.

The complainant's supervisor testified that both of these meetings took place as the complainant described them. He stated that at the March 4, 2002 meeting, both he and the complainant told the former SS&P manager that there was no documentation confirming that the classified hard drive had been destroyed. TR at 251-252. The former SS&P Manager testified that she cannot recall meeting with the complainant and his supervisor about the 2002 Incident. However, she acknowledges her records indicated that she had an appointment with them. She does recall that she was aware that both the complainant and his supervisor were concerned that there was no evidence confirming the destruction of the classified hard drive. She also stated that other individuals involved with the 2002 Incident were aware of the concerns expressed by the complainant and his supervisor, and that they repeated these concerns to her. TR at 593-594.

Based on this testimony, I conclude that the complainant reported his concerns about the missing classified hard drive to his supervisor and to two DOE counterintelligence officers in February 2002 and to the DOE's former SS&P Manager at Pantex in March 2002.

2. The Individual Accurately Disclosed that the Missing Classified Hard Drive Had Not Been Accounted for by BWXT Security

The testimony of several witnesses at the Hearing supports the accuracy of the complainant's contention that BWXT security had not accounted for the missing hard drive, and had inaccurately concluded that there was no possibility that classified data on the hard drive had been compromised. The complainant's supervisor testified that he shared the complainant's concern that the classified hard drive had not been accounted for by BWXT Security and opened a preliminary inquiry regarding the incident. TR at 251-252. The FBI Special

Agent stated that his decision to open an investigation after reviewing the Incident Report was based on his determination that there was no documentary evidence showing that the missing classified hard drive was one of the hard drives that was destroyed. TR at 158. BWXT's current Senior CIO at Pantex testified that she had recently reviewed the CIU's file on the 2002 Incident and agreed that there is no documentation verifying that the hard drive had been destroyed. TR at 459. The DOE's Assistant Site Manager also testified that there was no data or documentary evidence such as serial numbers to support the conclusion that the missing classified hard drive had been destroyed. He agreed that the only support for the Incident Report's Conclusion that the missing classified hard drive had been destroyed was the statement of the hard drive's user and the statement of his supervisor. TR at 537-538.

3. The Complainant's Disclosures Revealed a Substantial and Specific Danger to Public Health and Safety

At the Hearing, Counsel for BWXT argued that the 2002 Incident involved nothing more than "a failure to follow procedures on the destruction of this hard drive." TR at 606. He contended that as such it does not rise to the level of a protected disclosure under Part 708.

The fact that someone didn't lock out his safe; the fact that someone may have left an STU phone key in, or may not have signed the proper paperwork, which is the incident here, are not the sort of matters that were meant to be considered as protected disclosures under [Part] 708.

TR at 608-609. At the Hearing and in BWXT's June 15, 2005 Reply Brief, Counsel for BWXT asserted that one of the DOE's principal purposes for amending its regulations in 1999 to require "substantial" disclosures under Part 708 was to eliminate from consideration under Part 708 those complaints that dealt with minor, insubstantial or de minimus matters. TR at 608, BWXT Reply Brief at 7. He quoted the following portion of the January 1998 Notice of Proposed Rulemaking that discussed this issue:

[T]he Senate Report accompanying the Civil Service Reform Act of 1978 explained that general criticisms or complaints, or those of a non-substantial nature were not intended to be covered. The Report stated that 'the Committee intends that only disclosures of public health and safety dangers which are both substantial and

specific are to be protected.' Thus, for example, general criticism by an employee of the Environmental Protection Agency that the Agency is not doing enough to protect the environment would not be protected under this subsection. (S. Rep. No. 969, 95th Cong., 2nd Sess. 21 (1978). (emphasis added)

BWXT Reply Brief at 8 *citing* 63 Fed. Reg. 373 (January 3, 1998).

Some of the testimony at the Hearing supports a *de minimus* characterization of the 2002 Incident. Several of BWXT's witnesses characterized the issue of the missing hard drive as a "procedural" or "paperwork" issue, indicating that they believed it involved only the failure to properly document the destruction of the missing hard drive and not the actual compromise of classified information. See testimony of BWXT's current Senior CIO (TR at 450), the DOE's Assistant Site Manager for S&S at Pantex (TR at 496), BWXT's current S&S Manager (TR at 37), Former General Manager Ruddy (TR at 62), and BWXT's General Manager Mallory (TR at 132).

Nevertheless, BWXT's efforts to characterize the complainant's disclosures as raising only procedural issues are misplaced. The proper focus of my inquiry is whether the disclosures raise a substantial and specific danger to health and safety. While it may appear probable that the missing hard drive was destroyed by BWXT and that the files simply lack the required documentation to confirm that destruction, there also is a real possibility that the missing hard drive was not destroyed. This real possibility that the classified hard drive had been compromised was acknowledged by several witnesses at the Hearing, including the complainant's supervisor (TR at 232-234), the FBI Special Agent (TR at 161), the Defense Nuclear CI Chief (TR at 208), BWXT's current Senior CIO (TR at 457), and DOE's Assistant Site Manager for S&S (TR at 499). BWXT's current S&S Manager testified that BWXT could not "conclusively prove" that the missing hard drive had been destroyed, and that therefore he amended the findings in the Incident Report Conclusion from "Loss/Compromise did not occur" to "Probability of compromise is remote." TR at 551-552.

I therefore find that in his disclosures, the complainant identified the real possibility that the classified hard drive had not been destroyed and that its contents may have been compromised. I also find that evidence provided at the Hearing establishes that the dangers to public health and safety raised by the possible misappropriation of classified hard drive were both specific and

substantial. The Incident Report states that the hard drive contained Sigmas 1 and 15 classified material. The record supports the finding that this Sigma 15 material, in particular, was highly restricted and included classified nuclear information. In his testimony, BWXT's former General Manager Ruddy stated that he was familiar with Sigma 15 data and agreed that it was "very important or highly restricted classified data." TR at 59. The DOE Assistant Site Manager testified that Sigma 15 data "is secret restricted data, and as such, it is highly classified." TR at 518. The FBI Special Agent agreed that the Sigma 1 and 15 information should be considered potentially dangerous if it got into the wrong hands.

The fact that it's secret information; the fact that it contains nuclear information - without getting into specifics and a lot of that I don't know anyway - any time something like that would occur, we would be concerned . . . that secret information is potentially out there where it shouldn't be. . . . If it's got nuclear-related information, it's even more concerning.

TR at 177.

Testimony at the Hearing indicated that the Complainant's disclosures prompted additional actions to ensure the safety and security of the public that were necessary and appropriate. Both the Pantex CIU and the FBI conducted preliminary investigations to ensure that no foreign nexus existed with respect to the missing hard drive. The Defense Nuclear CI Chief indicated that she believed that it was appropriate for the Pantex CIU to investigate this issue [TR at 23], as did BWXT's current Senior CIO. TR at 457.

Finally, the fact that the missing classified hard drive raised a substantial issue of public safety and security is supported by BWXT's continuing efforts to resolve the issue and link the degaussed platters in its possession with the missing hard drive. The DOE's Assistant Site Manager for S&S at Pantex testified that BWXT contacted the manufacturer of the hard drive to see if additional means of identification existed, and that it sent the degaussed platters to a cyber forensic laboratory to determine if they contained any readable information that could be used for identification. TR at 37.

In light of this evidence, I reject BWXT's argument that its failure to document the destruction of the classified hard drive raised nothing more than a housekeeping issue of failing to complete the proper paperwork. TR at 608. In fact, the individual disclosed

significant information when he reported that BWXT Security was inaccurate in finding that the missing hard drive had been destroyed. The complainant's disclosures resulted in investigations by the Pantex CIU and the FBI to ensure that the missing hard drive had not been vulnerable to appropriation by foreign nationals, and in subsequent efforts by BWXT to locate and identify the hard drive. I find that the complainant's disclosures that highly restricted nuclear information remained unaccounted for at the Pantex facility revealed a substantial and specific danger both to Pantex employees and to general public's health, safety and security, and therefore are clearly the type of disclosures that are protected under Part 708.

C. The Complainant's Protected Disclosures Were a Contributing Factor to the Alleged Act of Retaliation

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. See *Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing* *McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). See also *Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliation he alleges. I base this conclusion on a finding that there are both constructive knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to constructive knowledge of the disclosures, the complainant made his disclosures to his supervisor in late February 2002, and to the DOE's former SS&P Manager at Pantex in early March 2002. The complainant's supervisor stated that he immediately conveyed these concerns to several BWXT officials, including former General Manager Ruddy. Clearly, the former BWXT General Manager can be presumed to have had actual or constructive knowledge of these disclosures in the absence of a clear and convincing evidentiary showing to the contrary.

With regard to timing, the disclosures took place in February and March 2002, and the alleged retaliation taken against the complainant, *i.e.* failing to grant him a comparative salary increase, began shortly thereafter in March or April 2002, and lasted at least until May 2004, when a comparative salary increase of seven percent was provided to the complainant. TR at 429-430. A reasonable person could conclude that the alleged retaliation was caused by the protected disclosures, because the alleged retaliation began shortly after the disclosures were made and continued for a considerable period. The disclosures were thus a contributing factor to an alleged ongoing retaliation. See *Jimmie L. Russell*, 28 DOE ¶ 87,002 at 89,014 and 89,025-26 (2000) (protected disclosure found to be contributing factor when it occurred proximate in time to the beginning of an ongoing retaliation).

Accordingly, with respect to the alleged retaliation, I will first determine whether the complainant has shown by a preponderance of the evidence that an adverse personnel action took place and meets the criteria for a Part 708 retaliation. If I make this finding in the affirmative, I will then determine whether BWXT has shown, by clear and convincing evidence, that the protected disclosures were not a contributing factor to the adverse personnel action or that they would have taken the same action in the absence of the protected disclosure.

D. BWXT's Failure to Provide a Comparative Salary Increase to the Complainant was a Retaliation

The complainant contends that in March or April 2002, BWXT reversed its previous position and refused to accept an offer from the DOE to provide funds for comparative salary increases to BWXT's CIU. At the Hearing, he testified that his supervisor had told him that at BWXT General Manager previously had stated that he would work on providing raises for the CIU. TR at 309.

1. BWXT's Jurisdictional Objections to the Complainant's Alleged Retaliation

In its filings in this proceeding and at the Hearing, BWXT argues that the failure to provide comparative salary increases to the CIU in 2002 and 2003 is not a retaliation under Part 708. It makes both legal arguments and a factual argument in this regard. In its Pre-Hearing Brief in this proceeding, BWXT contends that comparability salary adjustments constitute terms and conditions of the complainant's employment. BWXT cites 10 C.F.R. § 708.4(e), which

provides that complaints dealing with "'terms and conditions of employment' within the meaning of the National Labor Relations Act" are not covered by Part 708, "except as provided in Section 708,5." It argued that

the Complainant has been unable to establish any cognizable act of retaliation that would bring this complaint within the scope of 708.5. Therefore, Complainant may not address any matter that deals with the "terms and conditions of his employment." Since the matter of salary structure for CI officers is asserted in his complaint, we contend that this constitutes part of the classic "terms and conditions of employment" addressed in 708.4(e). Accordingly, OHA lacks jurisdiction to hear this complaint.

I reject BWXT's argument. Section 708.5 addresses what constitutes a *disclosure* under Part 708, and it does not define the scope of potential *retaliations* from which a complainant may seek redress. Section 708.4's reference to "terms and conditions of employment" in the context of Section 708 means that a *disclosure* involving the employee's terms and conditions of employment does not invoke protections under Part 708 unless it simultaneously involves matters listed under Section 708.5, such as a substantial and specific danger to employees or to public health or safety. In the present case, I have found that the Complainant has made disclosures protected under Section 708.5, and therefore may be protected from subsequent adverse personnel actions that are found to be retaliatory. Accordingly, I find that the fact that the Complainant's alleged retaliation deals with a "term or condition of employment" does not exclude that alleged retaliation from coverage under Part 708.

Next, BWXT argues that the complainant has received merit pay increases from 2002 until the present that were similar to those received by other BWXT employees at Pantex. In this regard, BWXT's Compensation Manager testified that in 2000, the complainant received a 7.4 percent increase, in 2001 he received 6.1 percent, in 2002 he received 4.37 percent, and in 2003 he received 4 percent. TR at 422. He stated that with respect to these increases, the complainant received at least the average increase for the Pantex site. TR at 423. At the Hearing, Counsel for BWXT further contended that the comparative salary increases for employees of BWXT's CIU are discretionary and cannot be considered the basis for a retaliation under Part 708. TR at 609-610. In this regard,

BWXT's Compensation Manager testified that it was not common for his office to conduct an equity analysis for job classifications to the level of detail of his analysis for the CIU positions because "we have market surveys that we rely on for all the information." TR at 587. He also stated that there were no DOE site procedures or other requirements that compelled BWXT to provide an equity analysis for a particular job at the Pantex facility. TR at 588. BWXT therefore contends that because comparative salary increases are discretionary and not generally provided to employees, the failure to provide such increases cannot form the basis for an alleged retaliation.

I reject this argument. Discretionary benefits provided to an employee by his employer can provide the basis for a retaliation under Part 708 if the benefit is withheld or withdrawn because of the employee's protected disclosure. Retaliation is broadly defined under Part 708 to include any negative actions taken against an employee's "compensation, terms, conditions or privileges of employment." 10 C.F.R. § 708.2. If an employer makes a commitment to provide a benefit to an employee, and then fails to provide the benefit because of the employee's protected disclosure, the employee can seek relief from that action under Part 708. See *Vander Boegh*, 28 DOE at 89,287 (failure to implement an approved plan to improve an employee's working conditions found to be an adverse personnel action under Part 708). Accordingly, if the complainant has established by a preponderance of the evidence that BWXT was preparing to provide him with a comparative salary increase in early 2002, and that it changed its position as a result of his protected disclosure, the complainant is entitled to relief for that adverse action under Part 708.

2. The Record Supports the Complainant's Contention that BWXT Had Committed to Provide a Comparative Salary Increase to the CIU and Later Reversed that Position

There is considerable evidence in the record to support the complainant's contention that BWXT reversed its decision to provide his group with comparative salary increases following his protected disclosures. At the Hearing, the complainant's supervisor testified that at a November 2001 meeting, the Defense Nuclear CI Chief had told former General Manager Ruddy that the CI program at Pantex was direct-funded and that she would provide the funding to bring the salaries at the Pantex CIU up to a comparable level with CIUs at other DOE facilities. He stated that the General Manager then said to her:

It's direct-funded. This is a no-brainer. I'll have one of my people get with you.

TR at 252. The complainant's supervisor testified that after he disclosed his concerns about the 2002 incident and the Incident Report, it became "harder and harder to get things done." He indicated that his ongoing project to increase salaries for the CIU suddenly stalled. He said that he had been asked by BWXT's former HR Compensation Manager to get points of contact at different DOE sites so that HR could make salary comparisons. At some point after the disclosures were made, he was informed by the HR Compensation Manager that there would be no raises for the CIU at that time, and that he did not believe that such raises would be made in the future. TR at 259.

In her testimony, the Defense Nuclear CI Chief confirmed the complainant's supervisor's account of the November 2001 meeting, and stated that BWXT's former General Manager Ruddy had responded positively to her offer to provide additional funds for comparative salary increases for BWXT's CIU.

And he said he would be willing to look into it, but it would make it easy if I was willing to come forward with the money. And that was the end of the conversation on that matter.

She stated that in January 2002, she sent a letter to former General Manager Ruddy concerning the offer to fund comparative salary increases. This letter stated in part:

I greatly appreciate your support for the [complainant's supervisor] and the Pantex Counterintelligence Program. And I also appreciate your support in rectifying the salary shortfalls we discussed. We at Headquarters are prepared to provide the dollars to support increases just as soon as we get the word.

January 13, 2002 letter from the Defense Nuclear CI Chief to the former BWXT General Manager, attached to the complainant's June 14, 2005 submission at p. 00003. The record also indicates that in a March 27, 2002 letter to the Contracting Officer, Office of Amarillo Site Operations, she asked that immediate action be taken to raise the salaries of members of BWXT's CIU, including the complainant. That letter provides, in part

It has come to my attention that ODNCI [Office of Defense Nuclear CI] personnel under BWXT at the Pantex Plant are under-compensated in comparison with others doing like work within ODNCI. Per recommendation made in the referenced discussion, I am writing to ask for your assistance in correcting that.

. . . I have made a comparison between [compensation provided for job categories in BWXT's CIU] and that provided other ODNCI personnel in those same categories, at other NNSA sites (factoring in reasonable variations mentioned previously). Based on that comparison, and with the knowledge that our Pantex people have benefitted from recent Pantex initiated increases, I ask that you take action to immediately effect the following adjustments to their current pay:

. . . CIO [the complainant's position] - increase by fifteen percent

. . . I trust that BWXT Pantex shares my interest in external equitability for compensation provided to ODNCI program personnel. My office directly funds the ODNCI program at Pantex, including salaries, and we will ensure the availability of funds to sustain these changes.

March 27, 2002 letter from the Defense Nuclear CI Chief to the Contracting Officer, Office of Amarillo Site Operations, attached to the complainant's June 14, 2005 submission at p. 00018.

BWXT's former HR compensation manager testified that beginning in May or June 2001, he began looking at the salaries for BWXT's CIU, and that over the next four or five months, he and the complainant's supervisor looked at compensation for CIUs at Hanford, Savannah River, Los Alamos, and Sandia. TR at 345. He testified that

My determination when looking at these numbers that my compensation people put in front of me was that there was room for a ten to fifteen percent adjustment for [the complainant's supervisor]. And I don't recall for [the complainant].

TR at 345. He said that in the late Fall of 2001, he informed BWXT's Deputy for HR as well as BWXT's Manager and Deputy Manager that with regard to the Pantex CIU "there's room for increase [in salaries] to bring them more in line with the rest of these [DOE

CIUs], based on our philosophy," but that the problem was, at that period of time there was no money available. TR at 351. Around the same time, he also remembers a visit from the Defense Nuclear CI Chief who said that the DOE could provide the money for comparative salary increases for the CIU. TR at 346-347 and 356. He stated that the DOE loads the money for BWXT in the January timeframe, and that it "was [BWXT's] intention at the time to give those raises." TR at 356. He indicated that the former BWXT Manager initially supported comparative salary increases for the Pantex CIU, but that he put a halt to any such increases for the CIU in early 2002. TR at 356-357. He stated that he was in former General Manager Ruddy's office in early 2002 to inform him that HR was getting ready to "load some increases and some promotional monies."

And I remember bringing up the Counterintelligence Group, and [the former BWXT General Manager] was rather colorful in his response. And I won't go into any details as to the kinds of vernacular, but he wanted it stopped dead in the water because of a hard-drive issue, a hard-drive investigation.

TR at 358. He further testified that the former BWXT General Manager

made the comment that he thought it, the [hard drive] investigation was getting - Careful with my words here. - out of control with regards to how he perceived things, and as a result, he was going to work to ruin [the former Senior CIO].

He also recalled that the former BWXT General Manager stated on a couple of occasions that increased compensation for the CIU was "not going to happen". TR at 358. He stated that in the March-April 2002 timeframe, the former BWXT Manager asked him if he was required to accept the offer of the Defense Nuclear CI Chief to provide additional monies for the salaries of the Pantex CIU. The former HR compensation manager stated that he told him that it was highly unusual for the DOE

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.

TR at 366. Nevertheless, he testified that he told the former BWXT Manager that "it is probably politically astute to make payment and move forward." TR at 366.10/

Finally, BWXT's current Compensation Manager testified that almost immediately after he arrived at the Pantex facility in March 2004, he was asked by the current BWXT General Manager to do a comparative salary analysis for the Pantex CIU. TR at 394, 409 and 425. He stated that it took him about two months to conduct this analysis. TR at 426. He indicated that after conducting the analysis, he concluded that the complainant's salary and the other CIU employee salaries were "behind market of the ones that we looked at." TR at 410. He testified that the complainant's salary was 22.8 percent behind the market average in the survey that he conducted. TR at 413.

The Compensation Manager testified that in May 2004, he presented the results of the survey to the current BWXT General Manager along with the recommendation "to go forward with increases for the Counterintelligence group." TR at 427. The BWXT General Manager approved the implementation of this plan, which was to provide initial comparative salary increases and promotions for the three individuals in the CIU in May 2004, and to continue to provide incremental comparative salary increases on an annual basis for the next three years. TR at 429. Pursuant to this plan, the complainant received an initial comparative salary increase of seven percent on May 24, 2004. TR at 430. The Compensation Manager stated that this seven percent increase "was based on the market adjustment from the information that we provided [from the comparative salary analysis]." TR at 422. Because the complainant left his position at the CIU prior to January 2005, he did not receive the next scheduled comparative salary increase for CIU employees that took place in that month. TR at 431-432.

I find that the Complainant has met his evidentiary burden of showing by a preponderance of the evidence that BWXT management took adverse action against him when it reversed its previous commitment and rejected the proposals for comparative salary increases for BWXT's CIU in 2002. The evidence indicates that the issue of comparative salary increases for BWXT's CIU had been considered by

10/ At the Hearing, the Defense Nuclear CI Chief 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. TR at 185.

BWXT during the latter half of 2001, and that BWXT intended to raise those salaries in 2002 provided that funding was available. According to the former HR compensation manager, the plans to raise those salaries were halted in March 2002 at the specific directive of Former General Manager Ruddy because of the CIU's investigation of the missing classified hard drive. The evidence also indicates that former General Manager Ruddy ignored the advice of the former HR compensation manager when he later rejected the specific proposal by the Defense Nuclear CI Chief for DOE-funded comparative salary increases for BWXT's CIU. Accordingly, I conclude that the decision of former General Manager Ruddy to cancel plans for comparative salary increases for BWXT's CIU and later to reject the proposal for comparative salary increases offered by the Defense Nuclear CI Chief clearly are adverse personnel actions as defined in Part 708.

E. BWXT has not Shown by Clear and Convincing Evidence that it would have taken these Actions in the Absence of the Complainant's Protected Disclosures

Accordingly, the burden shifts to BWXT to show by clear and convincing evidence that it would have acted in March and April 2002 to cancel plans for comparative salary increases for BWXT's CIU and to reject a similar salary proposal from the Defense Nuclear CI Chief in the absence of the complainant's protected disclosures.

At the Hearing, BWXT's former General Manager Ruddy testified that he recalled a 2001 conversation with the Defense Nuclear CI Chief in which she stated that salaries being paid to BWXT's CIU were seriously out of line, and that he asked her to provide information on this issue. TR at 83-84. He identified the former HR Compensation Manager as the individual who "was pivotal in the administration of our performance evaluation and salary administration programs." TR at 43. However, he could recall no conversations with the former HR Compensation Manager on the subject of comparability raises for employees in BWXT's CIU. TR at 44-45. He 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. 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.

He also stated that any comparability adjustment in salaries for BWXT's CIU approved by him would have been incremental, and that he

could not recall any instance where an employee of BWXT received more than a fifteen percent raise at one time. TR at 84-85.

The testimony of BWXT's former General Manager Ruddy does not convince me that BWXT would have failed to provide comparative salary increases to its CIU employees in the absence of the complainant's protected disclosures. While he 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 the former HR Compensation Manager. As noted above, that individual testified that former General Manager Ruddy initially supported increasing salaries for 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. The former HR Compensation Manager also stated that Former General Manager Ruddy rejected his advice when he later rejected the Defense Nuclear CI Chief's proposal. Former General Manager Ruddy cannot recall these conversations with the former HR Compensation Manager, although he acknowledged that he was "pivotal" in administering salaries at BWXT. Accordingly, under the standards of proof set forth in Part 708, I conclude that BWXT has not demonstrated by clear and convincing evidence that the decision by its former General Manager Ruddy to reject proposals for comparative salary increases for BWXT's CIU employees would have occurred in the absence of the Complainant's protected disclosures.

F. The Complainant is entitled to Relief under Part 708

I therefore will provide relief to the complainant for this retaliation. I will direct BWXT to provide the complainant with the fifteen percent comparative salary increase that he would have received if the Defense Nuclear CI Chief's proposal had been accepted. This comparative salary increase will be retroactive to May 1, 2002 and continue until the complainant's departure from his CIO position in November 2004. However, it will be offset by the seven percent comparative salary increase that he received on May 24, 2004. I also will direct BWXT to provide the complainant with interest on this retroactive salary increase and to reimburse the complainant for his reasonable litigation expenses.

VI. Conclusion

Based on the analysis presented above, I find that the complainant made two disclosures protected under Part 708, and that one or more of these protected disclosures were contributing factors to adverse

personnel actions taken by BWXT against him. Furthermore, I find that BWXT has not shown by clear and convincing evidence that it would have rejected proposals in 2002 to provide a comparative salary increase to the complainant in the absence of his protected activity.

Accordingly, the complainant is entitled to the remedial action ordered below.

It Is Therefore Ordered That:

(1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) BWXT shall make payment to the complainant 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. This increase will be calculated on a monthly basis for the period from May 1, 2002 until the complainant's departure from his CIO position in November 2004. However, this comparative salary increase will be offset by the seven percent comparative salary increase that he received in the months following May 24, 2004. BWXT also shall pay interest on this monthly salary adjustment at the rate of one percent simple interest per month from the date that the money would have been received until the date that the money is actually paid to the complainant.

(3) The complainant shall produce a report that provides information on his litigation expenses. BWXT shall produce a report that provides information on the salary adjustment and interest calculation ordered in paragraph (2) above. These reports shall be completed in accordance with the Appendix.

(4) BWXT shall pay the complainant's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant

relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: October 27, 2005

APPENDIX

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reimbursement of reasonable costs and expenses; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

As discussed in my initial agency decision in this matter, the complainant is entitled to remedial action from BWXT in the form of a retroactive salary adjustment with accrued interest. A portion of this remedial action consists of reimbursing the complainant for litigation expenses that he incurred. Accordingly, in order to implement this remedy, I am directing the complainant and BWXT to make certain calculations and to serve them on each other within 30 days of the date of this order. I then have provided for a negotiation period between the parties and for the filing of final reports on remedial calculations. In the event of an appeal, the parties shall follow the negotiating and reporting steps set forth below unless those requirements are specifically stayed by an appropriate official.

A. The Complainant's Calculations

Within 30 days of this order the complainant shall provide BWXT with a calculation of attorney fees and out of pocket litigation expenses incurred by the complainant with respect to this Part 708 complaint. The complainant and his legal counsel shall provide reasonable information supporting their claims for fees and out of pocket litigation expenses.

B. BWXT's Calculations

Within 30 days of this order, BWXT shall provide the complainant with a calculation of the monthly salary adjustment [May 2002 through November 2004]. It also shall calculate the simple interest that has accrued using a rate of one percent a month.

C. Negotiation Period

The parties will have ample time up to sixty days from the date of this order to discuss and negotiate any disputes regarding these calculations. During that period I expect that both parties will

provide reasonable information to facilitate the other party's understanding of the calculations.

D. Final Report

Seventy days from the date of this order the complainant and BWXT shall provide reports containing a summary calculation to each other and to the Office of Hearings and Appeals. The complainant and BWXT shall describe in detail any matters that remain in dispute. The parties will have 15 days from the date of that report to submit responses to these final reports.

