

November 7, 2006

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Initial Agency Decision*

Name of Petitioner: Curtis Broaddus

Date of Filing: April 29, 2005

Case Number: TBH-0030

This Decision concerns a whistleblower complaint that Mr. Curtis Broaddus (the complainant) filed under the Department of Energy's 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. The complainant contends that he made a number of disclosures that are protected under Part 708, and that BWXT retaliated against him for making those disclosures. According to the complainant, BWXT reprisals against him included the withholding of salary increases, disparaging remarks, verbal threats, unwarranted reprimands, improper releases of personal information, reassignment of some of the responsibilities associated with his position, and reassignment of line of management reporting, that is, changing his status from a direct report to the manager to one who reports to the deputy manager. As relief from these alleged retaliations, the complainant seeks back pay, reinstatement to his former position or, in the alternative, preference to transfer to another suitable position, and reimbursement of all reasonable costs and expenses, including attorney fees. After considering all the submissions by the parties and all the testimony received at the hearing held on this matter, I have concluded that the complainant has not made a disclosure protected under Part 708 and, therefore, is not entitled to relief.

**I. Background**

**A. The Contractor Employee Protection Program**

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information that

they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those “whistleblowers” from consequential reprisals by their employers.

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

## **B. Procedural History**

### **1. The Report of Investigation**

On August 13, 2004, the complainant filed a whistleblower complaint with the Office of Employee Concerns at the National Nuclear Security Administration (NNSA) Service Center in Albuquerque, New Mexico. After receiving comments from BWXT in response to the complaint, that office transmitted the complaint to the OHA, together with the complainant’s request that the OHA Director appoint an investigator to examine his allegations, and a hearing officer to conduct an administrative hearing regarding the complaint.<sup>1</sup>

After interviewing numerous witnesses, including attorneys representing the complainant and BWXT, and reviewing documents submitted by both parties, the investigator issued her Report of Investigation on April 29, 2005.<sup>2</sup> In that Report, the investigator addressed each of 14 protected disclosures the complainant alleged he had made and each of ten acts of retaliation he alleged BWXT had perpetrated. She declined to investigate a number of the issues the complainant raised, explaining that, in her opinion, they were not actionable under Part 708.

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<sup>1</sup> The OHA Director assigned this case and a companion case, regarding a Part 708 complaint filed by the complainant’s subordinate, Clint Olson, to the same investigator. While recognizing that some of the issues were common, the investigator issued discrete Reports of Investigation for Mr. Broaddus and Mr. Olson.

<sup>2</sup> In making his or her findings in an initial agency decision, the hearing officer may rely upon, but is not bound by, the report of investigation. 10 C.F.R. § 708.30(c).

As for those concerns that she did investigate, the investigator found that the disclosures that the complainant alleged he made fell into three groups. The first group concerned BWXT's handling of the discovery that a computer hard drive that may have contained classified information was not accounted for (the 2002 Incident). The investigator concluded that the complainant had indeed made disclosures about his concerns regarding the 2002 Incident, but he had not established by a preponderance of evidence that he reasonably believed that his disclosures revealed a substantial violation of law, rule, or regulation. The second group of alleged protected disclosures concerned claims that BWXT was abusing or misusing the Personnel Assurance Program (PAP) when it temporarily suspended the complainant's PAP certification. The investigator determined that none of the complainant's disclosures in this area were "protected disclosures," some because they lacked sufficient specificity to have been interpreted by the listener as disclosures, and others because the facts in the record did not support his claims of impropriety and retaliation. As for the third area of alleged protected disclosures, which consisted of a letter from the complainant's attorney to the president and chief executive officer of BWXT's parent company, the investigator found that the information contained in the letter was too general and too vague to constitute a protected disclosure for the purposes of this proceeding.

The investigator then assessed each of BWXT's alleged actions that the complainant contended were retaliations against him for making disclosures protected under Part 708. Because I have concluded that Mr. Broaddus has not made a disclosure protected under Part 708, her determinations regarding his allegations of retaliations are not relevant to my decision here, and I will not address that portion of the Report of Investigation.

## **2. Motion to Dismiss**

I asked the parties to brief two jurisdictional matters in advance of the hearing: whether the complaint was filed beyond the 90-day deadline established in 10 C.F.R. § 708.14, and whether the Department of Labor has addressed the same issues as Mr. Broaddus has raised in this complaint in such a manner that the complaint should be dismissed, as provided in 10 C.F.R. § 708.15. In its prehearing brief, BWXT argued that both matters were appropriate grounds for dismissing Mr. Broaddus's complaint.

It is well settled that a Motion to Dismiss in a 10 C.F.R. Part 708 proceeding is appropriately granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Sandia Corp.*, 27 DOE ¶ 87,533 (1999); *Lockheed Martin Energy Systems, Inc.*, 27 DOE ¶ 87,510 (1999) (*Lockheed*); *EG&G Rocky Flats*, 26 DOE ¶ 82,502 (1997) (*EG&G*). The OHA considers dismissal "the most severe sanction that we may apply," and we have rarely ordered it. *Boeing Petroleum Services*, 24 DOE ¶ 87,501 at 89,005 (1994). To be successful, the movant, in this case BWXT, must show that the "complaint is untimely" or that the complainant filed a complaint under Part 708 and also pursued a remedy "under State or other applicable law with respect to the same set of facts." 10 C.F.R. § 708.17(c)(1),(3). Under the circumstances presented to me before the hearing, BWXT did not meet that burden. I could not find clear and

convincing grounds for dismissal. Both bases for dismissal depended on facts that were not sufficiently developed to support granting the motion for dismissal.<sup>3</sup>

Moreover, even after considering the additional, conflicting evidence produced at the hearing concerning the timeliness of Mr. Broaddus's complaint, I cannot find that there are clear and convincing grounds for dismissing his complaint for lack of timeliness. I therefore deny BWXT's motion to dismiss Mr. Broaddus's complaint. Without deciding whether his complaint was in fact filed in a timely manner, I will assume so for the sole purpose of permitting the analysis of the elements of the complaint set forth below.

### **3. Scope of the Hearing**

At the prehearing conference, counsel for Mr. Broaddus stated that he would be focusing his efforts on only one group of protected disclosures that had been alleged in the complaint: those that the complainant made regarding the allegedly improper handling of, and investigation into, the destruction of a classified hard drive in 2002. He further stated that he would not be addressing the other alleged protected disclosures enumerated in the complaint. I permitted the complainant to address a second set of alleged protected disclosures, those related to alleged misuse of the Personnel Assurance Program, at the hearing. Tr. at 16. Such testimony was not received. I will therefore not address any allegations of protected disclosures, other than those that the complainant made regarding the allegedly improper handling of, and investigation into, the destruction of a classified hard drive in 2002.

At the start of the hearing, I dismissed all allegations of retaliation except for the following six: (a) BWXT's withholding of salary increases from Mr. Broaddus; (b) verbal threats that Dennis Ruddy, BWXT General Manager, made to the complainant; (c) a formal reprimand for an on-site traffic violation; (d) improper disclosure of private information during a Potentially Disqualifying Information meeting; (e) reassignment of the complainant's responsibilities under the Human Reliability Program; and (f) a change in line of reporting such that the complainant no longer reported directly to the General Manager but rather to the Deputy General Manager. Tr. at 16.

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<sup>3</sup> BWXT also argued that dismissal was appropriate because the complainant had failed, in its estimation, to establish *prima facie* (i) that he made a protected disclosure, BWXT Prehearing Brief at 9-11, (ii) that he reasonably believed his disclosure related to a substantial violation of a law, rule, or regulation, *id.* at 11-15, and (iii) that BWXT's alleged actions constituted retaliations cognizable under Part 708. *Id.* at 15-18. These arguments for dismissal fail as well for the same reason. A Part 708 hearing is the appropriate vehicle for full development of facts that may have been only partly unearthed during the investigation stage.

#### **4. Witnesses at the Hearing**

The following witnesses appeared at the hearing on behalf of the complainant:

Curtis Broaddus, the Complainant, Senior Counterintelligence Officer for BWXT from 1998 to November 2004

Bradley Beman, a Special Agent of the FBI, assigned to the Pantex site from October 2003 through the date of the hearing

Catherine Sheppard, Chief of the NNSA's Office of Defense Nuclear Counterintelligence in Washington, D.C.

Don Clinton Olson, a subordinate of Mr. Broaddus who worked in the BWXT Office of Counterintelligence from July 1999 to November 2004

John Merwin, Compensation Benefits and Employment Manager for BWXT from April 2001 to April 2003

Richard Frye, Compensation Manager for BWXT from March 2004 through the date of the hearing

Darlene Holseth, Senior Counterintelligence Officer for BWXT from November 2004 through the date of the hearing

Roxanne Steward, Former Manager of BWXT's Safety, Security and Planning Department

Sharon Armontrout, Personnel Assurance Program (later Human Reliability Program) Coordinator for BWXT

The following witnesses appeared at the hearing on behalf of BWXT:

Dennis Ruddy, General Manager of BWXT from February 2001 to January 2003

Mike Mallory, Deputy General Manager of BWXT from February 2001 to January 2003 and General Manager from February 2003 through the date of the hearing

Gary Wisdom, DOE Assistant Site Manager for Safeguards and Security at Pantex

Alexander Paul Sowa, Deputy Manager of BWXT's Safeguards and Security Division from February 2001 through the spring of 2003, and Manager of that division from the spring of 2003 through the date of the hearing

## II. Findings of Fact

In this section, I will lay out the evidence received in this proceeding that has permitted me to determine facts, events and circumstances surrounding Mr. Broaddus's alleged disclosures. Although I also received evidence concerning BWXT's alleged acts of retaliation, I will not address this evidence. Because I find that Mr. Broaddus did not make a disclosure that was protected under Part 708, I need not consider actions taken allegedly in retaliation for a protected disclosure.

### A. The Disclosures to BWXT and DOE Officials

Mr. Broaddus testified at the hearing that he made a series of disclosures to BWXT managers regarding the 2002 Incident, that is, BWXT's discovery and subsequent investigation of the unaccountability of a classified hard drive. According to his testimony, he first notified NNSA's Defense Nuclear Counterintelligence Office in Washington, D.C., that he was opening a preliminary inquiry. Tr. at 241. Unable to reach BWXT General Manager Dennis Ruddy after he had reviewed the incident and the ensuing security infraction report, dated February 22, 2002, Mr. Broaddus spoke with Gary Wisdom of DOE Security, an FBI contact, and Carl Durham, the manager of the BWXT Engineering Department. Tr. at 244-45. He expressed his concerns to them, specifically that he had reached the following conclusions: (1) that there had been gross negligence in failing to protect the hard drive, (2) that BWXT Security had made certain statements in the report that were not factually accurate, in that they indicated that the hard drive had been destroyed when it was not clear that it had in fact been destroyed, and (3) that the gross negligence and the factual inaccuracies were violations of law. Tr. at 245-46, 249.<sup>4</sup> On the day Mr. Ruddy returned to the office, according to Mr. Broaddus's testimony, he met first with Mr. Ruddy alone to brief him. Later the same day Mr. Broaddus met with Mr. Ruddy, Mr. Mallory, and John Noon, the Manager of BWXT's Safeguards and Security Division, and set forth his concerns. Tr. at 248-50. A few days later, Mr. Broaddus also met with Roxanne Steward, and expressed his concern that there could be a violation of law arising from the same matters he raised with the other managers. Tr. at 251-52.

Mr. Broaddus stated, both during his investigation and at the hearing, that the law that he believed was being violated was 18 U.S.C. § 793(f), which reads, "Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or

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<sup>4</sup> The Report of Security Incident/Infraction states in pertinent parts: "Nature of incident: Accountable Secret RD hard drive containing Sigmas 1 and 15 was destroyed without proper documentation or witness." and "Details of incident: . . . . 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." Exhibit W.

destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer shall be fined under this title or imprisoned not more than ten years, or both.” *See, e.g.*, Tr. at 236-37.

Mr. Olson testified that summaries of Mr. Broaddus’s meetings with Mr. Ruddy, Mr. Mallory, Mr. Noon, and Ms. Steward appeared in the BWXT Counterintelligence Office’s file concerning this matter. Tr. at 333-40. He also testified that he was present at the meeting between Mr. Broaddus and Ms. Steward, during which he told Ms. Steward that they were concerned that the security incident report’s conclusion that there was no compromise of classified information constituted “false and misleading statements . . . that could be [a] violation of law.” Tr. at 281, 290.

Mr. Ruddy testified at the hearing that he first learned that BWXT’s Counterintelligence Office had opened an investigation into the 2002 Incident from a source in the federal government. Tr. at 42. He stated that he was dissatisfied with the communication he was receiving from the Counterintelligence Office, because he had expected that he would first learn of such an investigation from that office, rather than from an outside source. Tr. at 42-43, 91, 105, 109, 110. He also stated that he made that expectation known to Mr. Broaddus. Tr. at 43. He recalled meeting with Mr. Broaddus only once regarding this matter. While he did not recall the content of the discussion at that meeting nor whether others were in attendance, he did recall that Mr. Broaddus “communicated to me, in my mind a little belatedly, that he had opened a CI investigation in the matter. . . . The issue was not whether he had opened an investigation. The issue in my mind at that point was that he had not communicated that to me.” Tr. at 48-49.

Ms. Steward could not recall meeting with Mr. Broaddus and Mr. Olson regarding their concerns over the 2002 Incident. Tr. at 592. She did, however, state that in March of 2002 she was aware of their concerns, but she was unsure whether she learned of them from Mr. Broaddus and Mr. Olson directly, or from others. Tr. at 594.

At the hearing, Mr. Mallory testified that he first met with Mr. Broaddus regarding the 2002 Incident in late 2003 or 2004. Tr. at 115. By that point, he had become the General Manager of BWXT at Pantex, the 2002 Incident had been considered by a number of agencies including the FBI and, on the basis of internal recommendation, BWXT had determined it would change the conclusion of its own incident investigation from one that stated that no information had been lost to one that stated that any loss of information was highly improbable. Tr. at 116-17. He had no recollection of meeting with Mr. Broaddus in February or early March of 2002. Tr. at 136. He recalls first becoming aware of Mr. Broaddus’s concerns regarding the 2002 Incident in August or September of 2002. Tr. at 114.

Catherine Sheppard testified that Mr. Broaddus had notified NNSA’s Defense Nuclear Counterintelligence Office that “there had been a report of a missing hard drive.” Tr. at 187. As a result, that office opened a file on the matter on February 22, 2002, the date

the report was issued. Ms. Sheppard's office conducted a preliminary inquiry into the facts surrounding the destruction of the hard drive "to determine if there was a reason to truly open a Counterintelligence investigation in this matter." Tr. at 187. She explained that, in order to open such an investigation, an inquiry must be conducted to determine whether there was a loss of classified information, and whether there was a foreign nexus. Tr. at 189. After reviewing the facts, her office determined that there did not appear to be a loss of classified information, but rather an accountability problem. *Id.* Furthermore, it found that no foreign nexus existed, and closed the preliminary inquiry on March 19, 2002. Tr. at 188. In her interview with the investigator, Ms. Sheppard confirmed that Mr. Broaddus had complained to her that BWXT had failed to protect classified information in connection with the 2002 Incident. Report of Investigation at 8.

It is clear from the summary of this evidence that there are factual inconsistencies regarding the circumstances in which Mr. Broaddus disclosed his concerns about the possible mishandling of a classified hard drive and possible misstatements contained in a BWXT security incident report. Nevertheless, there is sufficient evidence to support a finding that Mr. Broaddus disclosed those concerns to his superiors at BWXT (Mr. Ruddy) and at the NNSA (Ms. Sheppard). I will next address whether he reasonably believed the concerns he disclosed to these individuals revealed a "substantial violation of law, rule or regulation," a requisite condition for the disclosures to be considered protected under 10 C.F.R. § 708.5(a)(1).

### **B. Reasonable Belief that Disclosures Revealed a Substantial Violation of Law, Rule or Regulation**

In many documents and at many points during the hearing, Mr. Broaddus has asserted his belief that his disclosures to BWXT managers and to the NNSA revealed violations of law. He has maintained throughout the proceeding that BWXT's "failure to protect classified information" and "failure to accurately report the compromise of classified information" represent substantial violations of law, rule, or regulation. *E.g.*, Complaint at Paragraph 33(D). He testified that he believed gross negligence was the cause for the mishandling of the hard drive's destruction. Tr. at 245. He further testified that there was no factual basis for the conclusion in BWXT's security incident report that the hard drive had in fact been destroyed rather than lost. Tr. at 236-38. Mr. Broaddus testified that the mishandling of the hard drive and the incorrect conclusion in the report are violations of 18 U.S.C. § 793(f)(1) and (2). Tr. at 235-36. He maintained this position even though both the NNSA Defense Nuclear Counterintelligence Office and the FBI closed their investigations, concluding that no violations of law occurred. Tr. at 268, 271. As an explanation for arriving at a different conclusion than the FBI, Mr. Broaddus stated, "The FBI actually was able to look into the, the situation at more depth than I did. They had more authority to go look deeper than what I did. My conclusion was based on what I knew at that time, and what I know to date." Tr. at 272.

Other witnesses at the hearing testified regarding whether those actions constituted violations of that statutory provision. Darlene Holseth, who succeeded Mr. Broaddus as BWXT's senior counterintelligence officer at Pantex, provided background on the scope



of concerns of a counterintelligence office. She testified that counterintelligence's concerns are espionage, sabotage, assassination, and international terrorist activities. Tr. at 468. If, in investigating an incident, the counterintelligence staff believes there is foreign nexus or a criminal act has occurred, then it is referred to the FBI or other investigatory agencies. *Id.* Ms. Holseth stated that the counterintelligence file on the 2002 Incident made no reference to foreign nexus other than that they were "looking into it," and no reference to a criminal violation. Tr. at 447. After reviewing that file, she concluded that a person in her capacity could not reasonably believe that a criminal act or violation of the federal espionage act had occurred. Tr. at 470. She stated that she had seen no evidence of gross negligence on the part of the individuals who were cited for security infractions as a result of the 2002 Incident. Tr. at 471. It appeared to her instead that the hard drive was in fact destroyed, but that the paperwork documenting the destruction had not been completed. Tr. at 455. Ms. Holseth was also asked to comment on the conclusions the responsible official reached in the Inquiry Summary Report concerning this incident. Specifically, she was referred to portions of the report and summary, in which the official concluded that no compromise of classified information had occurred and that no violation of law appeared to have occurred. Tr. at 472-74. When asked whether there could be a reasonable argument that those statements of the official constituted willful false statements from a counterintelligence perspective, Ms. Holseth responded that they could not, because those statements were opinions. Tr. at 475-76. She also pointed out that the 2002 Incident was determined to have been caused by security infractions rather than by security violations, and stated she was unaware of any infractions leading to criminal cases in her five-year experience with the DOE. Tr. at 478. In light of her training and experience as a counterintelligence officer, and the fact that Mr. Broaddus never mentioned any violation of a statute in his numerous entries in the counterintelligence file regarding the 2002 Incident, her opinion was that Mr. Broaddus could not reasonably have believed that a violation of law occurred. Tr. at 479-80.

Bradley Beman, an FBI employee assigned to the Pantex site in October 2003, testified that his office looked into the facts concerning the 2002 Incident to determine whether any criminal prosecution should follow the mishandling of the hard drive, under the Espionage Statutes at 18 U.S.C. § 793. Tr. at 154-57. The FBI's concern was that the responsible official concluded that the hard drive's destruction was confirmed, but that there was no supporting documentation definitively showing that the hard drive had been destroyed. Tr. at 158. The FBI ultimately concluded that, while there was no documentation that the hard drive had been destroyed, there was no evidence to the contrary, and "[t]herefore, we have no reason to conclude anything other than the Inquiry Report, other than that it was destroyed." Tr. at 161. The FBI made no referral for prosecution, not finding any evidence of foreign nexus or gross negligence. Tr. at 168-69, 171.

Catherine Sheppard testified, as discussed above, that the Defense Nuclear Counterintelligence Office opened a preliminary inquiry of the 2002 Incident. Finding no evidence of loss of classified material, no gross negligence and no foreign nexus, the

office closed its inquiry, ascribing the cause of the problem to lack of proper accountability measures.

Alexander Paul Sowa testified that he has extensive experience in security matters, including many years as the manager of Pantex's security force, following a military career that included infantry, military police and counter-terrorism experience. After he became manager of BWXT's Safeguards and Security Division in the spring of 2003, he held a meeting with Mr. Broaddus and Mr. Mallory regarding the 2002 Incident. Tr. at 551. Mr. Mallory, as general manager, asked Mr. Sowa to conduct an independent review of the February 2002 inquiry into that incident. In his interview with the OHA investigator, Mr. Sowa stated that Mr. Broaddus did not express any concern that BWXT had violated any law, including any espionage law codified in Title 18 of the United States Code. Report of Investigation at 10. After completing his review of the inquiry and the ensuing security incident report, Mr. Sowa recommended to Mr. Mallory that the report's conclusion that "Loss/Compromise did not occur" be changed to "Probability of compromise is remote." Tr. at 551. He made this recommendation because BWXT could not establish with 100% certainty that the particular hard drive at issue had in fact been degaussed, though he was "99.5% certain it occurred." Tr. at 553. When questioned by counsel at the hearing, Mr. Sowa stated that there was nothing he found in his review of the incident that would indicate the existence of foreign nexus or involvement in the matter or gross negligence in the handling of the hard drive destruction. Tr. at 564. He also stated that he found no indication that the BWXT security incident report contained willful false statements. *Id.* When asked, based on his experience in counterintelligence, whether he could reasonably believe that a trained counterintelligence professional would have interpreted any of the actions associated with the 2002 Incident as criminal violations, Mr. Sowa responded, "No." Tr. at 563.

Gary Wisdom testified that he has 30 years of experience in safeguards and security matters, including counterintelligence. Tr. at 493. His office, the DOE Office of Safeguards and Security at the Pantex site, received and evaluated BWXT's security incident report concerning the 2002 incident. Tr. at 494-95. Its review of the report, which was independent of BWXT or any other agency, led it to conclude that the content and the analysis of the report was good, but the conclusion was overstated in stating that there was no possibility that disclosure of classified information had occurred. Tr. at 495, 499. His office concluded that "BWXT personnel failed to follow proper procedure in the destruction of the hard drive." Tr. at 495. Mr. Wisdom testified that he felt BWXT had properly identified the severity of the security concern as an incident of security infraction rather than security violation. Tr. at 497. He further testified that he did not find any evidence of foreign nexus or gross negligence involved in the 2002 Incident. Tr. at 503. Defining "gross negligence" as requiring willful disregard, he believed that the individuals charged with security infractions failed to follow procedures, but did not act in a manner that demonstrated willful disregard or negligence. Tr. at 510. He stated that the report's overstated conclusions did not constitute willful false statements on the part of the responsible official. Tr. at 504. The following exchange then took place:

Q. Would someone with a background in security or counterintelligence matters, in your opinion, have reasonably arrived at a conclusion that a violation of law had occurred?

A. There's no violation of law. I cannot understand why anyone would, would think that.

*Id.* Finally, when asked whether, during his oversight of handling of the 2002 Incident between February 2002 and the day he was testifying, anyone at Pantex had described the matter as involving a "serious potential violation of law," Mr. Wisdom answered, "No." Tr. at 527-28.

### **III. Analysis**

#### **A. Legal Standards Governing This Case**

The obligations on each of the parties to this proceeding are established in the governing regulations. First, the employee who files the complaint has the burden of establishing by a preponderance of the evidence (1) that he or she made a disclosure, participated in a proceeding, or refused to participate, as described in § 708.5 of the regulations, and (2) that that action was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. If the employee meets this burden, the burden then 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. *Id.* Accordingly, in the present case, if Mr. Broaddus establishes that he made a protected disclosure, and that disclosure was a factor that contributed to any of the retaliations he alleges BWXT has made, he is entitled to relief unless BWXT convinces me that it would have taken the same actions even if he had not engaged in any activity protected under Part 708.

It is therefore my task, as the hearing officer, to weigh the sufficiency of the evidence presented by Mr. Broaddus and BWXT in this proceeding. Preponderance of the evidence, the burden applied to Mr. Broaddus's evidence, has been defined as proof sufficient to persuade the finder of fact that a proposition is more likely true than not. McCormick on Evidence, § 339 at 439 (4<sup>th</sup> Ed. 1992). Clear and convincing evidence, which BWXT must provide in order to prevail against those claims for which Mr. Broaddus has met his burden, has been described as that evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." *Id.*, § 340 at 442. This latter burden is clearly more stringent than the former.

Some additional terms contained in § 708.29 require amplification. Section 708.5, referred to above, defines what constitutes employee conduct that is protected from retaliation by an employer. The portions of that provision that are pertinent to Mr. Broaddus's complaint require that an employee file a complaint that alleges that he has been subject to retaliation for disclosing, to a DOE official or his employer, information that he reasonably believes reveals a substantial violation of a law, rule, or regulation.

10 C.F.R. § 708.5(a)(1). We have found, in earlier cases, that a complainant's reasonable belief should be assessed objectively. *See, e.g., Frank E. Isbill, 27 DOE ¶ 87,529 at 89,152 (1999)*. The complainant must show that his disclosure described a matter that a reasonable person in his position with his level of experience could believe revealed a substantial violation of law, rule, or regulation. *Id.*

## **B. The Disclosures**

10 C.F.R. § 708.5 defines the type of employee activity that is protected from retaliation by an employer. In pertinent part, it provides that “you may file a complaint alleging that you have been subject to retaliation for (a) disclosing to a DOE official . . . [or] your employer . . . information that that you reasonably believe reveals (1) a substantial violation of a law . . .” In addition, 10 C.F.R. § 708.29 states that the complainant has the burden of establishing, by the preponderance of the evidence, that his disclosures meet the requirements established in 10 C.F.R. § 708.5. Therefore, if Mr. Broaddus has shown that his disclosures regarding the 2002 Incident meet those requirements, he will have established that he should be protected from any resulting retaliation taken against him by BWXT.

Mr. Broaddus has clearly shown by a preponderance of the evidence that he made disclosures concerning the 2002 Incident to a DOE official or to his employer. Both Mr. Broaddus and Ms. Sheppard, a DOE official, testified that Mr. Broaddus disclosed his concerns to her. Mr. Broaddus testified that he disclosed his concerns to Mr. Ruddy, Mr. Mallory, Mr. Durham, Mr. Noon and Ms. Steward, all members of BWXT management, and to Mr. Wisdom of DOE. Mr. Olson testified that he was present at a meeting in which Mr. Broaddus related his concerns to Ms. Steward. Mr. Ruddy, Mr. Mallory, and Ms. Steward could not recall whether Mr. Broaddus had communicated his concerns directly to them, but each acknowledged that he or she was aware of those concerns. In any event, Mr. Broaddus has established that he made a disclosure regarding the 2002 Incident to Ms. Sheppard.

A great deal of testimony at the hearing reflected the opinions of security and counterintelligence professionals about whether the 2002 Incident involved a substantial violation of 18 U.S.C. § 793(f).<sup>5</sup> In his complaint, Mr. Broaddus alleged that that statute

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<sup>5</sup> In his complaint, Mr. Broaddus also claimed that he disclosed to “his employer that compliance with [its] expectation to notify [it] of investigations prior to outside agencies violated . . . § 811 [of the] Intelligence Authorization Act” of 1995. Complaint at Paragraph 33(A). He contended that in February 2004 he refused to brief Mr. Mallory, then BWXT General Manager, about an FBI investigation arising from the 2002 Incident because he believed that he might be subjected to criminal prosecution if he did. Complaint at Paragraph 33(L). Interviews conducted during the investigative stage of this proceeding yielded inconclusive evidence regarding whether Mr. Broaddus could have reasonably believed that compliance with BWXT management's request for information constituted a violation of § 811. ROI at 11-12. Mr. Broaddus did not develop any additional evidence at the hearing or in his submissions to me that supported this claim. I find that Mr. Broaddus has not met his burden of establishing by a preponderance of the evidence that he reasonably believed his disclosures relating to the 2002 Incident revealed a substantial violation of § 811 of the Intelligence Authorization Act of 1995.

was violated because there was gross negligence in the potential loss of classified information when the classified hard drive's destruction was not properly documented, and because the ensuing security incident report willfully concealed that a potential loss of classified information may have occurred. The issue before me at this juncture is whether Mr. Broaddus reasonably believed his disclosures revealed a substantial violation of law.

Mr. Broaddus testified that he believed gross negligence was the cause for the mishandling of the hard drive's destruction, in violation of 18 U.S.C. § 793(f)(1). He also testified that there was no factual basis for the conclusion in BWXT's security incident report that the hard drive had in fact been destroyed rather than lost, and that that conclusion constituted a violation of 18 U.S.C. § 793(f)(2). Although Mr. Broaddus has consistently asserted these beliefs since he filed his complaint in August 2004, he has not offered any convincing support. When questioned how he maintained that belief even after he learned that the FBI had determined that no violations had occurred, he responded that the FBI may have had access to more information than he did. He did not dispute the FBI's conclusion in any way. His failure to articulate a rationale for personally believing that violations of law occurred raises doubt in my mind as to the credibility of his belief. Moreover, there is evidence that Mr. Broaddus's contemporaneous notes to the counterintelligence file concerning the 2002 Incident contain no mention of violation of law. The absence of reference to violation of law in contemporaneous notes that otherwise appear to be detailed and complete leads me to question whether Mr. Broaddus truly held such a belief at the time he created those notes. Indeed, he may well have imposed that belief onto his disclosures at a later stage of this proceeding.

Additional evidence gathered at the hearing supports a conclusion that Mr. Broaddus's alleged belief that violations of law had occurred was not reasonable. The NNSA Defense Nuclear Counterintelligence Office closed its preliminary inquiry into the matter without opening an investigation, because it found neither foreign involvement nor the gross negligence necessary to support a criminal violation. The FBI investigation into the matter was closed for similar reasons. Finally, Ms. Holseth, Mr. Sowa, and Mr. Wisdom testified they did not believe there was a substantial violation of 18 U.S.C. § 793(f) involved in the 2002 Incident. Each of these individuals has a solid background in counterintelligence, and Ms. Holseth succeeded Mr. Broaddus as senior counterintelligence officer. Each of them further expressed his or her opinion that under the circumstances of the 2002 Incident, a trained counterintelligence professional could not reasonably have believed that a criminal violation had taken place.<sup>6</sup>

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<sup>6</sup> Mr. Broaddus focuses on the fact that the conclusion of the security incident report was ultimately changed from "Loss/Compromise did not occur" to "Probability of compromise is remote." Although this modification demonstrates that BWXT later acknowledged a possibility, however remote, that the security of the classified information may have been compromised, this modification of the report is not evidence either that gross negligence may have occurred or that false or misleading statements were made, within the purview of 18 U.S.C. § 793(f).

As discussed above, hearing officers have applied an objective standard when considering the reasonableness of a complainant's belief. The *Isbill* case stated that the complainant must show that his disclosure described a matter that a reasonable person in his position with his level of experience could believe revealed a substantial violation of law, rule, or regulation. *Frank E. Isbill*, 27 DOE ¶ 87,529 at 89,152 (1999). While Mr. Broaddus testified to his reasonable belief, other persons with similar experience, particularly Ms. Holseth, testified that such a belief would not be reasonable. Applying the preponderance-of-the-evidence standard of 10 C.F.R. § 708.29 to the evidence received on this matter, I find that Mr. Broaddus has not met his burden. He was right to insist that the Security Infraction Report concerning the missing hard drive was incorrect as originally filed. That matter received additional attention and the report was ultimately modified. Nevertheless, Mr. Broaddus has not demonstrated that it is more likely than not that he reasonably believed that his disclosures revealed a substantial violation of law.

Because Mr. Broaddus has not met his burden of establishing that he reasonably believed his disclosures revealed a substantial violation of law, his disclosures do not comport with the description of protected activity under 10 C.F.R. § 708.5. Therefore, I find that Mr. Broaddus has not engaged in activity protected from retaliation under that provision of the Part 708 regulations.

#### **IV. Conclusion**

As set forth above, I have concluded that the complainant has not met his burden of establishing by a preponderance of the evidence that he engaged in an activity protected under 10 C.F.R. Part 708. After a thorough review of the evidence offered in this proceeding, I find that although Mr. Broaddus made disclosures to at least one DOE official and to his employer, he did not reasonably believe that his disclosures revealed a substantial violation of law, rule, or regulation. Consequently, he has failed to establish the existence of any violations of the DOE's Contractor Employment Protection Program for which relief is warranted. Accordingly, I have determined that Mr. Broaddus is not entitled to the relief he has requested in his complaint.

It Is Therefore Ordered That:

(1) The request for relief filed by Curtis Broaddus under 10 C.F.R. Part 708 on April 29, 2005, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the 15<sup>th</sup> day after receipt of the decision in accordance with 10 C.F.R. § 708.32.

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date November 7, 2006