

November 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Joshua Lucero

Date of Filing: June 30, 2006

Case Number: TBH-0039

This Initial Agency Decision concerns a whistleblower complaint filed by Joshua Lucero (Lucero) against his former employer, Wackenhut Services, Inc. (WSI), under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. WSI is a contractor that provides services to the DOE's Office of Secure Transportation (OST). Lucero alleges that he engaged in activity protected by Part 708 and, as a result, was retaliated against by WSI.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The regulations governing the DOE's Contractor Employee Protection Program (CEPP) are set forth at Title 10, Part 708 of the Code of Federal Regulations. The CEPP 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 they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. Upon acceptance of jurisdiction over the complaint by the local DOE Field Office, the Complainant is entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), followed by a hearing and an Initial Agency Decision by an OHA Hearing Officer. If dissatisfied with the decision, a party may appeal the Hearing Officer's Decision to the Director of the Office of Hearings and Appeals (the OHA Director). 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Lucero filed a whistleblower complaint with the DOE's National Nuclear Security Administration (NNSA) Service Center on July 6, 2005. After conducting a preliminary analysis of the allegations contained in this complaint, the NNSA Service Center forwarded it to the OHA. OHA received the complaint on January 9, 2006, and the OHA Director appointed an

investigator who conducted an investigation of the allegations in the complaint and issued a Report of Investigation (the ROI). Immediately following the issuance of the ROI, the OHA Director appointed me as Hearing Officer. I conducted a three-day hearing on January 9, 10, and 11, 2007, in Albuquerque, New Mexico. The transcript of the hearing will be cited as "Tr." The hearing was followed by an exchange of Post Hearing Briefs.

C. Factual Background

Lucero began working as a part-time van (escort vehicle) driver for the OST's Contractor Transportation Utilization Program (CTUP) program on October 27, 2003. The CTUP was formed to support the OST's nuclear courier program, which is responsible for transporting nuclear weapons and special nuclear materials. The CTUP was created to conserve resources by allowing contractors to operate transport and escort vehicles when the vehicles were not transporting nuclear weapons or special nuclear materials. Most of the CTUP employees, including all of its first tier managers, were former federal agents who had operated these vehicles in the past. All CTUP drivers were employed on an on-call basis and paid only for time spent on transport missions or training. Transport missions generally lasted from a few days to several weeks.

On December 6, 2004, Lucero filed a whistleblower complaint against WSI, under 10 C.F.R. Part 708, with the NNSA Service Center.¹ Exhibit 18. On April 28, 2005, WSI and Lucero entered into a settlement agreement in resolution of the December 6, 2004 complaint. Exhibit 24. The April 28, 2005 settlement agreement precludes relief for any preceding adverse personnel actions.

On May 18, 2005, Lucero's supervisor, Douglas Turner, held a verbal counseling session with Lucero. Exhibit 27; Exhibit H6. Turner told Lucero that he had observed Lucero's work on the last trip and that Lucero "had done a good job." Exhibit 27 at 1. However, Turner advised Lucero of some problems with his performance, specifically, it noted that Lucero had been sleeping in his vehicle at a time when he was expected to be awake and alert and that Lucero had used a government vehicle for his personal use. Exhibit 27 at 1. Turner further advised Lucero that "he needed to be a team member and work with others to get the job done." Exhibit 27 at 1.

On June 13, 2005, Lucero was part of a convoy returning a number of tractor-trailers and vans to a storage facility. Lucero was driving one of the vans. As the tractor trailers and vans were

¹ The December 6, 2004 whistleblower complaint was based upon Lucero's assertion that he was retaliated against for an August 20, 2004, incident. On that date, Lucero reported that a coworker, Martin Abeita, intended to transport both alcohol and a firearm on an upcoming flight of an NNSA Aircraft. Exhibit 14. Approximately, one month prior to this incident, the DOE Office of Inspector General had issued an Inspection Report in which it found that two WSI employees transported handguns through the NNSA aviation facility in violation of DOE and FAA policies. Office of Inspector General Inspection Report: Unauthorized Handguns on National Nuclear Security Administration Aircraft at <http://www.ig.energy.gov/documents/CalendarYear2004/ig-0654.pdf>. Lucero was suspended, without pay, as a result of this incident. Tr. at 424. The December 6, 2004 complaint asserted that both Lucero's suspension and a Letter of Reprimand issued to him on October 1, 2004 occurred in retaliation for Lucero's reporting the firearm incident.

being parked, Lucero drove past the front of a tractor-trailer operated by Abeita. Abeita's vehicle was moving forward at the time. Abeita slammed on the brakes. After Abeita finished parking the tractor-trailer, he proceeded to the debriefing room where he verbally accosted Lucero.

On July 6, 2005, WSI issued a Letter of Counseling to Lucero. Exhibit 36; Exhibit A. The July 6, 2005, Letter of Counseling states, in pertinent part:

On Monday June 13 at 1615 in the afternoon, you were involved in an unsafe driving act. Five other CTUP drivers witnessed the incident, which occurred at the Agent Operations Western Command parking lot. As Mr. Martine Abeita was pulling forward in a tractor/trailer so as to position it for parking in a designated spot, you drove through the narrow gap between the truck he was pulling forward in and a van driven by Laura Legacy. Your maneuver caused Mr. Abeita to slam on his brakes in order to keep from hitting your vehicle. The witnesses stated you were driving too fast for the parking area and showed no regard for the safety of others in the area.

Exhibit 36 at 1. Later that day, Lucero filed the present whistleblower complaint with the NNSA Service Center. Exhibit E.

On November 1, 2005, NNSA's Office of Business Services issued a letter to WSI officially requesting "WSI to stand down and discontinue over-the-road operations in support of the CTUP . . . effective . . . November 7, 2005." Exhibit 50 at 1. This stand down continued until January 25, 2006. During the stand down, OST made a number of changes to the CTUP's Standard Operating Procedures (SOP). Among the changes mandated by the OST were requirements that each of CTUP's drivers have (1) a Commercial Driver's License (CDL) with a Hazardous Material (HazMat) endorsement, and (2) a DOE "Q" Clearance. Exhibit 62. Lucero has been an insulin dependant diabetic since the age of four. Tr. at 27. The Federal agency that established the standards for the CDL, the Federal Motor Carrier Safety Administration, prohibits insulin dependant diabetics from obtaining or maintaining a CDL. 49 C.F.R. § 391.41(b)(3) Accordingly, Lucero has not driven for CTUP since the implementation of the revised SOP.

II. ANALYSIS

A. The Parties' Respective Burdens Under Part 708

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 in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The term "preponderance of the evidence" means 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*). Once the complainant has met this burden, the burden shifts to the

contractor, which then must show, by clear and convincing evidence, that it would have taken the alleged act of retaliation in the absence of the complainant's protected conduct. It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. Specifically, the Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) citing *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006).

B. Complainant's Burden

The Part 708 regulations specifically protect employees of DOE who participate in "an administrative proceeding conducted under this regulation." 10 C.F.R. Section 708.5(b).

1) Lucero's Protected Conduct

In the present case, it is self-evident that Lucero engaged in protected conduct when he filed whistleblower complaints under Part 708 in December 2004 and July 2005. See 10 C.F.R. Sections 708.5(a)(1) and (2); 708.5(b).

2) Adverse Personnel Actions

Lucero asserts that the following adverse personnel actions were taken against him by WSI employees during his tenure as a CTUP driver: (1) the issuance of the July 6, 2005, Letter of Counseling; (2) WSI's alleged failure to discipline Abeita for his conduct in the debriefing room on June 13, 2005; (3) WSI's verbal counseling of Lucero in May 2005; (4) Lucero being called up for a trip only to be sent home when he arrived for the trip; (5) WSI's alleged failure to fulfill all terms of the April 28, 2005, settlement agreement; (6) Lucero receiving fewer work assignments after he filed his Part 708 complaints; (7) a pattern of hostility towards Lucero, and (8) WSI's implementation of a DOE-mandated requirement that all CTUP vehicles be operated by drivers possessing a Commercial Driver's License (CDL).

(a) July 6, 2005 Letter of Counseling

The July 6, 2005, Letter of Counseling clearly constitutes an adverse personnel action under 10 C.F.R. Section 708. Citing *Spears v. Missouri Dep't of Corrections & Human Resources*, 210 F.3d 850, 852 (8th Cir. 2000) (*Spears*), and similar cases from the eighth circuit, WSI contends that Letters of Counseling or Reprimand do not constitute adverse personnel actions under Part 708. WSI's reliance upon these cases is clearly misplaced. *Spears* and the other cases cited by WSI involve civil rights actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* See *Spears*, 210 F.3d at 850. The present action is governed by the regulations set forth at 10 C.F.R. Part 708. Part 708 does not specifically define the term

“adverse personnel action.” Instead, OHA looks to see if a given personnel action on the part of a DOE contractor falls with the scope of Section 708.2. Section 708.2 states, in pertinent part:

Retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) . . .

10 C.F.R. Section 708.2. Clearly, the issuance of a Letter of Counseling is “an action . . . taken by a contractor with respect to employment.” OHA Hearing Officers have consistently treated counseling, in both verbal and written form, as adverse personnel actions. *Gary S. Vander Boegh*, OHA Case No. TBH-0007, <http://www.oha.doe.gov/cases/whistle/tbh0007.pdf> (July 11, 2003) at 17 (finding contractor’s contention that a letter of reprimand was not a adverse personnel determination to be without merit), *appeal dismissed*, Case No. TBA-0007, <http://www.oha.doe.gov/cases/whistle/tba0007.pdf> (OHA Director, February 22, 2007); *see also*, *e.g. Franklin Tucker*, Case No. TBH-0023, <http://www.oha.doe.gov/cases/whistle/tbh0023.pdf> (April 9, 2007); *aff’d*, Case No. TBA-0023, <http://www.oha.doe.gov/cases/whistle/tba0023.pdf> (OHA Director, July 2007) (treating counseling as an adverse personnel act); *John L. Gretencord*, Case No. VBZ-0033, <http://www.oha.doe.gov/cases/whistle/vwa0033.htm> (November 4, 1999), *aff’d*, Case No. VBA-0041, <http://www.oha.doe.gov/cases/whistle/vba0041.htm> (OHA Director, March 13, 2000), *petition for Secretarial review dismissed* (August 11, 2000). Moreover, Letters of Counseling are clearly considered to be adverse personnel determinations under the Federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled. *Greenspan v. Dep’t of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006) (Letter of Reprimand was an adverse personnel determination).

(b) WSI’s Alleged Failure to Discipline Abeita for His Conduct in the Debriefing Room on June 13, 2005

Lucero alleges that WSI failed to discipline Abeita for his verbal abuse of Lucero which occurred in the debriefing room minutes after the June 13, 2005, parking lot incident and that the alleged failure to discipline Abeita was an adverse personnel action. However, Turner verbally counseled Abeita about his behavior towards Lucero in the debriefing room and informed Abeita that he would not be allowed to work until “he comes in for further counseling.” Exhibit 33; Tr. at 331- 332. Because the record shows that Abeita was in fact disciplined for his conduct in the debriefing room, I find this contention is without merit.

(c) WSI’s Verbal Counseling of Lucero for Visiting His Aunt’s Home in Las Vegas, New Mexico, in a DOE Vehicle While on DOE Business

On May 18, 2005, Turner verbally counseled Lucero, for “sleeping in the vehicle when he should have been awake and alert” and for “the miss-use of a gov’t vehicle.” Exhibit 27. As I have discussed above, it is well settled that counseling constitutes an adverse personnel action.

(d) Lucero Being Called Up for a Trip Only to be Sent Home When He Arrived for the Trip

Lucero testified that Turner instructed him to report for duty on an unspecified date at 6:00 a.m. for a scheduled trip. Tr. at 69. Lucero testified that he did so and boarded a bus to the airport with his co-workers. Tr. at 69. Lucero testified that, at the airport, the WSI manager in charge of this trip, T.R. Sanchez, informed Lucero that no flight arrangements had been made for him. Tr. at 70. Lucero then contacted Turner, who told Lucero to go home. Tr. at 70. Turner testified:

I told Mr. Lucero that there was a trip coming up, but I did not call him and tell him he was on the trip. And the next thing I knew was, I believe it was Mr. Sanchez called me, and Lucero was on a bus and thought he was on a trip. Well I talked to Mr. Lucero and apologized to him immediately, and said no he was not on the trip. I was sorry if he thought he was.

Tr. at 363. Essentially, this issue pits Lucero's word against that of Turner. Since, as I discuss below, Lucero's credibility has been convincingly impeached, I find he has not shown, by a preponderance of evidence, that he was scheduled for this trip.

Exhibit 97 is a letter dated April 2, 2003 from Gilbert G. Gallegos, the Chief of Police for the Albuquerque Police Department (APD), to Lucero stating that the APD was terminating Lucero's Employment.² Exhibit 6 is a partial copy of a Questionnaire for National Security Positions (QNSP) Lucero submitted as part of the background investigation conducted by DOE in order to determine his eligibility for a DOE security clearance. Lucero's answers to Section 22 of the QNSP clearly intentionally omitted the fact that he had been terminated for cause by the APD. Moreover, on June 23, 2004, Lucero filed a lawsuit against the APD contesting his termination. On July 18, 2005, he was deposed by the APD. During this deposition, Lucero was asked if he had ever been disciplined by WSI. Lucero answered in the negative. Exhibit 40 at 7. Lucero denied having been disciplined by WSI even though he had previously received two letters of reprimand and had been suspended as a result of the firearm incident. This evidence strongly impeaches Lucero's credibility. As a result, I have given little or no evidentiary weight to Lucero's testimony throughout this proceeding. Accordingly, I find that Lucero has not met his burden of producing a preponderance of evidence showing that he was scheduled and then removed from this trip.

² During the present proceeding, the Contractor submitted a number of documents related to a lawsuit filed by Lucero against the APD alleging that Lucero had been wrongfully terminated. Lucero objected to the inclusion of these documents in the record, arguing that they are "irrelevant and prejudicial." Certain of these documents indicate that Lucero lied during a deposition and provided false or misleading information to DOE officials investigating his eligibility to obtain or maintain a "Q" level access authorization. Those documents are relevant because they unambiguously show Lucero's willingness to provide false or misleading information under oath. The documents that I am admitting into evidence contain evidence which reflects on Lucero's credibility and they appear in the record as Exhibits 6, 12, 40, 84, 85, 86, 87, 92, 93, 94, 95, 96, 97, and 98. Those documents that WSI has submitted as Exhibits 78, 79, 80, 81, 82, 83, 88, 89, 90, 91, and 99, do not reflect on Lucero's credibility, and I have not relied upon them in reaching any of my conclusions or findings. I am, however, including them in the record, in order to provide a more complete record for consideration on any appeal.

(e) WSI's Alleged Failure to Fulfill All Terms of the April 28, 2005 Settlement Agreement

Lucero claims that the settlement of his December 6, 2004, whistleblower complaint required WSI to hold an all-hands meeting to insist that all WSI employee's stop harassing Lucero. Tr. at 33. However, enforcement of a settlement agreement is beyond the scope and jurisdiction of Part 708. Therefore, I will not consider this contention.

(f) WSI's Implementation of a DOE Mandated Requirement that all CTUP Vehicles Be Operated by Drivers Possessing a Commercial Driver's License

The record shows that OST changed the task order³ to require that all drivers in the CTUP maintain a CDL. Lucero asserts that WSI convinced DOE to change the task order in order to render Lucero ineligible to receive future work assignments. In support of this contention, Lucero notes that Sanchez's son was the OST official responsible for oversight of the CTUP. Tom Kreider, a member of WSI's management team, testified that Sanchez frequently lobbied his son to adopt more stringent safety standards for the CTUP and that some of Sanchez's suggestions were ultimately adopted by OST. Tr. at 957.

Part 708 does not allow for a complaint to be filed against the DOE. *Ronald E. Timm*, Case No. VBU-0077, <http://www.oha.doe.gov/cases/whistle/vbu0077.htm> (October 25, 2001) (only acts of retaliation by entities in the contractor chain, not the DOE, are covered under Part 708). Accordingly, I have no jurisdiction to consider any allegations of retaliation by DOE or DOE officials. We need not rule on the issue of whether a contractor could be found to have retaliated against a whistleblower by convincing DOE to take a specific regulatory action that negatively affected the whistleblower, since Lucero has presented nothing other than suspicion on this issue, and thus failed to meet his burden of showing, by a preponderance of evidence, that WSI actually convinced DOE to change the task order.

(g) Lucero's Allegations that He Received Fewer Work Assignments

Lucero was paid on an hourly basis. Lucero worked only when he was called in to drive a van during sporadic transfers of DOE equipment. Lucero testified that, prior to filing his whistleblower complaints, he was being assigned to one or two trips per month. Tr. at 98-99. Lucero further testified that, after he had filed his whistleblower complaints, he was assigned to fewer trips. Tr. at 99. The only evidence in the record that Lucero received fewer work assignments after he made his protected disclosures is Lucero's testimony. Since, as I have discussed above, Lucero's credibility has been strongly impeached, I find that Lucero has not met his burden of proof on this issue.

(h) Lucero's Allegations of A Pattern of Hostility

The evidence in the record indicates a pattern of hostility towards Lucero on the part of WSI

³ Under the Federal Acquisition Regulations, the term "'task order' means an order for services placed against an established contract or with Government sources." 48 C.F.R. Section 2.101.

managers and employees. A number of Lucero's coworkers testified that certain members of WSI management appeared to harbor a bias towards, or "have it out for," Lucero. Tr. at 224-225, 227, 234, 236 (George Martinez), 711-712, 714-15, 724 (Alan Payne), 857 (Bill Fuller) 959, 975 (Tom Kreider). Tom Kreider testified that Lucero was always the topic of conversation and was picked on. Tr. at 943, 959. Ken Kreider testified that Lucero was a frequent topic of conversation among the drivers and was often the subject of jokes. Tr. at 992. Ken Kreider testified that Lucero got written up for things other drivers did not get written up for. Tr. at 1005. Several drivers refused to travel with Lucero because they claimed he was an unsafe or inconsiderate driver. The testimonial evidence suggests that Lucero was the subject of social ostracization and was subject to an unusual level of management scrutiny which could be construed as rising to a level of intimidation proscribed by Part 708.

3) Lucero's Protected Conduct Was a Contributing Factor to Adverse Personnel Actions

Having established, by a preponderance of evidence, that he (1) had engaged in protected conduct under 10 C.F.R. § 708.5, (*i.e.* filing two Part 708 complaints) and (2) suffered adverse personnel actions (*i.e.* intimidation, written and verbal counseling), Lucero must also show, by a preponderance of evidence, that his protected conduct was a contributing factor to adverse personnel actions taken against him.

a) Temporal Proximity

In most whistleblower cases, it is difficult or impossible for a complainant to point to or find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that protected conduct may be a contributing factor in a 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 personal action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993), *citing McDaid v. Department of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (*County*). In addition, the courts have found that "temporal proximity" between protected conduct and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a *prima facie* case for retaliatory discharge." *County*, 886 F.2d at 148.

Since Lucero engaged in protected conduct by the filing of a whistleblower complaint in December 2004, there was temporal proximity between his protected conduct and the May 18, 2005, verbal counseling, the July 6, 2005, letter of counseling and the pattern of hostility. As noted above, the December 2004 complaint proceeding was not settled until April 2005. Moreover, since Lucero also filed a complaint on July 6, 2005, temporal proximity existed between that protected conduct and the hostility that he endured subsequent to July 6, 2005. It is clear that the WSI managers who decided to take these adverse personnel actions had actual knowledge of his protected conduct. Therefore, the temporal proximity between Lucero's protected conduct and the three adverse personnel actions taken against him is sufficient to establish, by a preponderance of the evidence, that his protected conduct was a contributing factor to the July 2005 Letter of Counseling, the May 18, 2005, verbal counseling, and the pattern of hostility.

C. Contractors Burden: Whether WSI Would Have Taken Adverse Personnel Actions Against Lucero in the Absence of His Protected Conduct

I have found that the Complainant has shown, by a preponderance of evidence, that (1) he engaged in protected conduct, and (2) this protected conduct was a contributing factor to the July, 2005, letter of counseling, the May, 2005, verbal counseling, and the pattern of hostility. Therefore, the burden has been shifted to WSI to prove by clear and convincing evidence that the company would have issued the July 2005 Letter of Counseling, conducted the May, 2005, verbal counseling session, and that a pattern of hostility against Lucero would have existed even if Lucero had not engaged in protected conduct. 10 C.F.R. § 708.29. Clear and convincing evidence 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. For the reasons set forth below, I find that WSI has shown that, by clear and convincing evidence, it would have conducted the May, 2005, verbal counseling session even if Lucero had not engaged in protected conduct. I also find that WSI has not carried its burden with regard to the July 2005 Letter of Counseling and pattern of hostility. I conclude, however, that there is no relief possible with regard to either of these personnel actions.

1. July 6, 2005, Letter of Counseling

On June 13, 2005, Lucero drove a van past the front of a tractor-trailer operated by Abeita that was moving forward at the time. Abeita suddenly applied the brakes of the tractor trailer he was operating. After the incident occurred, Turner gathered witness statements from five of the eight WSI employees present at the parking lot incident: Abeita, Sharp, Legacy, Schoonover, and Fuller. However, Turner did not contact the other three witnesses to the parking lot incident: Lucero, Tom Kreider and Ken Kreider. Lucero, and both Kreiders testified that Lucero had not operated his vehicle in an unsafe manner during the parking lot incident. Tr. at 945, 1022. On July 6, 2005, Lucero was called to a meeting in Turner’s office and presented with a previously prepared Letter of Counseling. Turner testified that he did not allow Lucero an opportunity to be heard before being issued the July 6, 2005, Letter of Counseling because Lucero “did not indicate that he had a side.” Tr. at 341, 344.

While Lucero likely operated a van in a less than safe manner during the parking lot incident, WSI’s decision to issue the Letter of Counseling is troubling. WSI issued the Letter of Counseling by relying on one witness, Abeita, who obviously had a highly antagonistic relationship with Lucero, and another witness, Bill Fuller, who later testified that he didn’t witness the incident for which Lucero was disciplined. Tr. at 843-44. Moreover, two of the other three eyewitnesses downplayed its significance. In a March 21, 2006, telephone conversation with the OHA Investigator, Schoonover indicated that while Lucero was going too fast and was not careful enough, he would not have filed an incident report because he did not believe that the incident was “that big a deal.” Memorandum of March 21, 2006 Telephone Interview of Olin Schoonover. Troy Sharp also testified that he would not have filed a statement if he had not been pushed into doing so by Sanchez and a Mr. Cisco. Tr. at 1075 -1077. During his testimony and a telephone interview with the OHA Investigator, Sharp played down the importance of the parking lot incident. Tr. at 1086-1087. Memorandum of March 30, 2006

Telephone Interview of Troy Sharp. The remaining witness to the parking lot incident was Legacy, whose testimony revealed that she had a low opinion of Lucero. Tr. at 1175-1177.

Moreover, evidence in the record indicates that other CTUP employees who had operated their vehicles in a reckless manner had not been as severely disciplined. Tom Kreider testified that a CTUP driver drove a vehicle into a building. Tr. at 971-972. There is no evidence in the record that the driver was disciplined for this incident.⁴ Sanchez and Martinez testified that Sanchez had tied empty wine barrels to the government vehicle he was operating. Because a wine barrel fell off while the vehicle was moving, the convoy in which the vehicle was traveling had to be stopped so that the wine barrels could be removed. Tr. at 237-238, 281. Sanchez testified that he was verbally counseled for this incident. Tr. at 282. Sanchez also testified that the incident eventually cost him a promotion.

WSI submitted evidence showing that it disciplined three other CTUP drivers for unsafe driving. Exhibit 7. However, the record shows that each of these employee's actions resulted in gross safety violations. The first employee was terminated for "operating a government vehicle around a safety barrier and into a swollen stream" and, in another incident, contributing to an accident which resulted in damage to a government vehicle. Exhibit 7 at 1. The second and third employees were suspended for one day without pay for concurring with the decision of the first employee to enter the swollen stream. Exhibit 7 at 3.

Accordingly, while I find that WSI has presented mitigating evidence, I am not persuaded that WSI has shown, by clear and convincing evidence, that it would have issued the July 6, 2005, Letter of Counseling if Lucero had not engaged in protected conduct. The clear and convincing evidence standard requires "a degree of persuasion much higher than 'mere preponderance of the evidence.'" *Collins Sec. Corp. v. Sec. & Exchg. Com'n*, 562 F.2d 820 (D.C. Cir. 1977). *See also, Hopkins V. Price Waterhouse*, 737 F. Supp. 1202, 1204 n.3 (D.D.C. 1990). Because WSI has not met the particularly heavy burden required by the clear and convincing evidence standard, I find that WSI's issuance of this letter constitutes retaliation under Part 708. However, the Letter of Counseling indicates that it would only be retained in Lucero's personnel file for a period of one year. Exhibit 36 at 1. Over two years have passed since the Letter of Counseling was issued. Accordingly, as Turner has testified, the Letter of Counseling has been removed from Lucero's personnel file. No further relief for this act of retaliation is available under Part 708.

2. The May 18, 2005, Verbal Counseling

In a verbal counseling meeting with Lucero, Turner noted that Lucero had done a good job and that Turner had observed Lucero "pitching in and helping on his last trip." Exhibit 27. Turner also noted that Lucero had driven a government vehicle to his aunt's home in Las Vegas, New Mexico, and had been observed sleeping in the passenger seat when he should have been alert and awake. Exhibit 27. Turner also informed Lucero that the "lead" in each vehicle could make driving hour assignment changes if he needed to for operational purposes. Finally, Lucero was

⁴ Tom Kreider did testify that in the debriefing that took place at the conclusion of that trip, WSI managers did not mention the accident, but rather focused on the fact that Lucero had been first in line to check in at a motel on that trip. Tr. at 971-972.

counseled “to be a team member and work with others to get the job done.” Exhibit 27.

Lucero admits that he drove a government vehicle to his aunt’s home. Tr. at 189-191. WSI would have been remiss had it not counseled Lucero on this matter. Moreover, sleeping in a government vehicle when he was supposed to be awake and alert also merited counseling. By informing Lucero that the lead in each vehicle could make driving hour assignment changes if he needed to for operational purposes, Turner was obviously clarifying a misunderstanding that had occurred between Lucero and Payne. Turner’s clarification was especially appropriate, because Lucero had been informed to the contrary by a lower level supervisor, Sanchez. Finally, there is ample evidence in the record that other employees, fairly or unfairly, perceived Lucero to be inconsiderate of his fellow employees. Turner’s apparently evenhanded approach, where he informed Lucero that he had observed him “pitching in and helping” but noted there was room for improvement was reasonable and prudent. Accordingly, I find that WSI has shown that the verbal counseling session would have taken place regardless of Lucero’s protected conduct.

3. Pattern of Hostility or Intimidation

The record shows that Lucero was less than an ideal employee. During his tenure at WSI, Lucero clearly conducted himself in an immature, selfish and emotionally volatile manner. Moreover, it is clear that Lucero, a much less experienced driver than most of the other CTUP drivers, often operated vehicles assigned to him in a rough and perhaps unsafe manner. These characteristics no doubt account for some of the conflict with some of his coworkers and management.⁵

While WSI has succeeded in showing that Lucero had earned some of the ill-will that existed between him and some of his coworkers and managers, it is also clear that Lucero’s protected conduct changed his relationship with his peers and direct supervisors. WSI’s Closing Argument Brief implicitly admits this to be true. It focuses on a number of incidents which WSI asserts illustrate that Lucero’s own behavior is responsible for his failure to get along with his coworkers and managers. Specifically, Lucero’s (1) abusive behavior towards Tom Seese, (2) reporting a firearm incident (*see note 1, supra*), (3) submission of a concern about a CTUP Manager being intoxicated on the job to DOE, (4) yelling at Sanchez, and (5) alleged treatment of a supervisor, Torres, in an inappropriate manner. WSI Closing Argument Brief at 6, 7, 14, 16. A discussion of each of these allegations is instructive.

WSI raises an incident in which Lucero charged Seese and screamed and yelled at him. However, there is no evidence that any disciplinary action was taken as a result of this incident, which occurred on June 20, 2005, two months prior to the firearm incident. WSI’s suspension of Lucero for expressing his concerns about the possibility of a firearm being carried on an NNSA

⁵ However, the evidence in the record also shows at least four of Lucero’s coworkers thought he was a qualified driver. Tr. at 722 (Payne), 959 (T. Kreider), 1069 (K. Kreider) and 1238-1239 (Manzanares). Moreover, some of Lucero’s coworkers vouched for him personally. Tr. at 244 (Martinez), 625, 632 (Cook). Torres testified that Lucero was not a problem employee. Tr. at 1230. Martinez noted Lucero responded well to suggestions and improved his driving. Tr. at 244.

aircraft is troubling. This incident does not reflect poorly upon Lucero, but rather reflects poorly on WSI management's attitude toward an employee who raised a reasonable safety concern. Similarly, WSI cites Lucero's reporting to a DOE Employee Concerns official that he had observed Donaldson in a state of intoxication in a hotel lobby while on a CTUP trip as a source of WSI employees' and manager's animosity towards Lucero. Once again, it is troubling that WSI would cite the reporting of a safety concern as evidence that Lucero gave his managers and coworkers good reason to dislike him. WSI also alleges that Lucero treated a WSI manager, Torres, in an inappropriate and disrespectful manner. However, Torres denied having words with Lucero when the alleged incident occurred. Tr. at 1218. In fact, Torres indicated that Lucero has always treated him with respect. Tr. at 1218.

Since the incident leading to the filing of the December 6, 2004 complaint, WSI management has subjected Lucero to an enhanced level of scrutiny and has done little or nothing to discourage Lucero's fellow employees from harassing Lucero. If motivated by intent to retaliate against, or to prevent future protected conduct, these actions would clearly violate Part 708, whose coverage explicitly includes "intimidation, threats, restraint, coercion, or other similar actions." While the ill will exhibited towards Lucero by WSI management and his coworkers no doubt resulted in some part from Lucero's own actions, the burden is upon WSI to show, *by clear and convincing evidence*, that this ill will would have occurred in the absence of Lucero's protected conduct. *See, e.g., Jagdush C. Laul*, 28 DOE ¶ 87,006 (2000), *aff'd*, 28 DOE ¶ 87,011 (2001). Since WSI has not met this particularly heavy burden, I find that WSI retaliated against Lucero for engaging in protected conduct.⁶

If Lucero were still employed by WSI, a remedy could be fashioned to abate the ongoing intimidation. However, since Lucero is no longer employed by WSI, such a remedy is unavailable. Moreover, since Lucero has failed to show that this retaliation resulted in any monetary loss on his part after April 28, 2005, the date on which WSI and Lucero entered into a settlement agreement resolving Lucero's December 6, 2004 whistleblower complaint, and because punitive damages are unavailable under Part 708, no relief can be awarded to Lucero for WSI's pattern of intimidation.

III. Conclusion

The Complainant Joshua Lucero has met his burden of proving that he engaged in protected conduct, and that this protected conduct was a contributing factor to adverse personnel actions taken against him by the Contractor. The Contractor has shown by clear and convincing evidence that it would have verbally counseled Lucero on May 18, 2005, even if he hadn't engaged in protected conduct. The Contractor has failed to meet its burden of showing that it would have issued the Letter of Counseling in the absence of the Complainant's protected conduct and failed to show that its unfavorable treatment of Lucero would have occurred in the absence of his protected conduct. Accordingly, I find in the Complainant's favor on these issues. However, while Lucero has shown that his protected conduct lead to retaliation and intimidation by WSI, he has not set forth a claim for which relief may be granted.

⁶ Had this finding been addressed under a preponderance of evidence standard, the outcome may have been different.

It Is Therefore Ordered That:

- (1) The complaint filed by Joshua Lucero under 10 C.F.R. Part 708, OHA Case No. TBH-0039, 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 fifteenth day after the party's receipt of the initial agency decision.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: November 19, 2007