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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: S.R. Davis
Date of Filing: August 7, 2003
Case Number: VBH-0083

S.R. Davis (the Employee) filed a complaint against her former employer, Fluor Fernald, Inc. (the Contractor) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The Employee alleges that she engaged in protected activity and that the Contractor retaliated by subjecting her to two disciplinary actions, a job transfer, and ultimately a separation pursuant to an involuntary separation program. The Employee seeks relief including reinstatement and back-pay. As the decision below indicates, I have concluded that the Contractor would have taken the same actions in the absence of the protected activity and, therefore, the Employee is not entitled to relief.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE Contractor Employee Protection Program is set forth at 10 C.F.R. Part 708. Part 708 prohibits contractors from retaliating against contractor employees who engage in protected activity. Protected activity includes disclosing information that an employee believes reveals a substantial violation of a law, rule, or regulation or gross fraud, waste, or abuse of authority. Protected activity also includes participating in a Part 708 proceeding. If a contractor retaliates against an employee for protected activity, the employee may file a complaint. The employee must establish, by a preponderance of the evidence, that the employee engaged in protected activity and that the activity was a contributing factor to an alleged retaliation. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it

would have taken the same action in the absence of the employee's protected activity. If the employee prevails, the OHA may order employment-related relief such as reinstatement and backpay.

B. Procedural History

In June 2001, the Employee filed her complaint. The complaint alleges that she made protected disclosures and that the Contractor retaliated with two disciplinary actions and a job transfer. In June 2002, the local employee concerns office referred the matter to OHA for an investigation and hearing, and the OHA Director appointed an investigator (the Investigator). In July 2003, as the Investigator was preparing his report, the Contractor terminated the Employee as part of an involuntary separation program. In August 2003, the Investigator issued his report, and the OHA Director appointed me to serve as the hearing officer. OHA provided a copy of the investigatory file to both parties.

During the pre-hearing phase, I required written submissions and conducted telephone conferences. Through a series of letters to the parties, 1/ I ruled on the scope of the proceeding, identified the disputed issues for the hearing, and discussed possible evidence on the issues.

The Employee requested that the alleged retaliations to be considered in this case include her July 2003 involuntary separation. I granted this request.

I tentatively determined that the Employee had alleged four Part 708 retaliations: the two disciplinary actions, the job transfer, and the involuntary separation. The Employee objected. She alleged that, over the course of her employment, she had made protected disclosures that resulted in the Contractor's failure to promote her and that the Contractor's current refusal to correct this situation was itself a retaliation. I ruled that these allegations were not part of the complaint and, in any event, were untimely.

I tentatively determined that the Employee had met her burden with respect to the two disciplinary actions and the job transfer. I identified two alleged protected disclosures, and I stated that it

1/ These letters were issued on August 14, 2003, September 9, 2003, September 24, 2003, November 12, 2003, and December 1, 2003.

appeared that the Contractor did not dispute that she made the disclosures or that they were protected. 2/ I also stated that under our precedent the circumstances permitted a reasonable inference that the disclosures contributed to the three actions. The Contractor did not object and, therefore, I determined that the Employee had met her burden with respect to the two disciplinary actions and the job transfer.

I also tentatively determined that the Employee had met her burden with respect to the involuntary separation. I noted that the Employee's participation in this proceeding is protected activity and that under our precedent the Employee's involuntary separation during the proceeding permits a reasonable inference that the participation contributed to the separation. The Contractor did not object and, therefore, I determined that the Employee had met her burden with respect to the involuntary separation.

Because the Employee met her burden with respect to the four alleged retaliations, I limited the hearing to the issue whether the Contractor would have taken the same actions in the absence of the protected activity. I stated that the clear and convincing standard applicable to contractors was a difficult standard to meet and that the Contractor should consider this high standard in determining what documents and witnesses to present. In order to permit the Employee a full opportunity to challenge the Contractor's evidence, I required that the Contractor produce the documents used to select who would be separated. I invited the Employee to review the documents and to identify any employee who she believed should have been separated in her place.

The hearing was held on four days in December of 2003. Both parties submitted exhibit books. The Contractor numbered his exhibits, and they are cited as "Ex. [number]." The Employee numbered the pages of her exhibits, and they are cited as "Ex. P-[page number]." The Contractor presented a wide range of witnesses, including the Employee's management chain, human resources (HR) and employee relations officials and staff, and several co-workers. The Employee's counsel cross-examined these witnesses extensively, and she presented witnesses, including a co-worker and a worker in another department, to testify about the

2/ The two disclosures related to business ethics rules concerning the acceptance of gratuities from vendors and the documentation of potential conflicts of interest.

Employee's performance and conduct. The Employee also testified. Post-hearing briefing was completed on February 23, 2004.

II. General Background

The Fernald site is scheduled to close. Because of the planned closure of the site, the Contractor has implemented a series of voluntary and involuntary separation programs. These are commonly referred to as VSPs and ISPs. The programs relevant to the instant case are a 2001 VSP, a Spring 2003 VSP, a July 2003 ISP, and an October 2003 ISP.

The Employee worked in the Contractor's Information Management (IM) department. Prior to the June 2003 ISP, the IM department consisted of five managers: the department head and four division managers. Two of the divisions were "network" divisions and two were "programmer" divisions. As part of the July 2003 involuntary separation program, the Contractor separated the IM head and a programmer division manager; the Contractor then promoted one of the programmer managers to be department head, leaving two divisions - a network division and a programmer division. The remaining network manager will be referred to as the Network Manager; the remaining programmer manager will be referred to as the Programmer Manager.

From 1998 to June 2001, the Employee reported to the Network Manager. In late June 2001, the IM department head reassigned the Employee to the Programmer Manager. The Employee reported to the Programmer Manager for the next two years, until she was separated in the July 2003 ISP.

During her tenure with the Network Manager, the Employee held the title of "Supervisor Information Management." Until approximately the beginning of May 2001, she was one of three team leaders. In August 2001, two months after she was reassigned to the Programmer Manager, the IM department eliminated the title "Supervisor Information Management." The seven employees who held that title, including the Employee, had their title downgraded to "Information Management Analyst III." Ex. 67. Another employee's title was downgraded from "Manager Information Management" to "Senior Information Management Analyst." *Id.*

III. The Disciplinary Actions and Job Transfer

A. Introduction

The two disciplinary actions and the job transfer occurred in the first six months of 2001, during the Employee's tenure with the Network Manager. The first disciplinary action was a March 21, 2001 written reminder, citing inconsistent work hours, failure to follow management direction, and unprofessional communication style. The second action was a May 31, 2001 "decision making leave," citing failure to establish and maintain backups and unprofessional communication style. In a "decision making leave," the Contractor places an employee on administrative leave for the rest of the day so that the employee can make a decision about whether or not the employee wishes to remain employed. The June 25, 2001 job transfer to the Programmer Manager cited, *inter alia*, the Programmer Manager's need for the Employee's skills.

As explained below, the Contractor has presented clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. The record indicates that, over the course of her tenure with the Network Manager, the Employee had a number of conflicts with subordinates, co-workers, and managers, in which the Employee made inflammatory and disrespectful statements to, and about, others. Although the Employee states that her conflicts were limited to those about whom she made protected disclosures, the record indicates that her conflicts were not so limited and instead involved a variety of people and a variety of topics. Some of them are discussed below.

B. The Employee's Conflicts with Subordinates, Co-Workers, and her Managers

1. The Period 1999 to 2000

In August 1999, the Employee objected to her supervisor's reversal of her decision to rescind a subordinate's computer access. The Employee e-mailed the Network Manager that she "was not happy" with his actions and that their impact "calls into question the true nature of our work relationship." She continued that they "are typical of your tendency to act on the word of those with less experience and other agendas." Ex. 11 at 2. As an example of the impact of his actions, she referred to another team leader as making "demeaning, condescending, off-handed remarks" about the Employee "usually in the presence of others." *Id.*

In August 2000, another subordinate complained to the Employee and the IM department head about the way she treated him. The subordinate cited the following e-mail exchange, which began after he recommended a software product.

[The Employee:] ... I find it very disappointing and disconcerting in what I perceive as your unwillingness to be flexible when there is something you want or don't want to do. I find this to be just one of a few negatives about your tenure here. This situation is an example, the other is/was your problem with . . . your desktop. Being paged when your systems go down is another example.

Another negative is your tendency to be highly opinionated on just about every subject. I'm not going to discard software or computers based on the opinion of someone who may not be around in a few months. . . .

[The Subordinate:] . . . I was doing nothing more than what you asked - further investigating the problem at hand I would have just as agreeably dropped the topic if that is what you had asked me to do.

[The Employee]: I guess you couldn't figure out that my last e-mail was rhetorical in nature. It would have been much better if you simply took it under advisement.

. . .

I think you need to realize that I am your supervisor and your customer - - you can't OFFEND and won't be offending me.

Ex. 13. The subordinate e-mailed the Employee and the IM department head, stating that he would be leaving and referred to the e-mail exchange as "why." 3/ *Id.* After the Employee received

3/ In a subsequent e-mail to his employer, the subordinate explained his feelings:

Unfortunately, after months of shrugging off statements that also appeared to be rude, I reached the point where I just wasn't going to take it any more, so I gave notice. . . .

. . . [She] has some issues with how she presents criticisms/comments/etc. that unfortunately offend people who like myself don't just confront her for fear of offending her/hurting her feelings. To that end, if I were to have stayed, I would have had to expect grating presentation of comments to continue. Although I like
(continued...)

the subordinate's complaint, she limited his computer access. Ex. 14. When the Network Manager overrode that decision, the Employee complained to the HR department head about the "Situation In Information Management:"

[N]either [the Network Manager or the IM department head] has any authority to tell me when or how to handle an irate or exiting employee's computer access.

Ex. P-21. The Employee further stated that people in the IM department did not like her, specifically another team leader and three of the team leader's subordinates. Ex. P-24. 4/ Over a week after her manager's instruction to restore the subordinate's access, the Employee's manager e-mailed her, stating that the subordinate still did not have access to certain systems and that the subordinate needed the access for tasks the manager had assigned to him. The Employee responded by objecting to the manager's assignment of tasks to her subordinate and stated that "it is my call about access to computers for those under my supervision." Ex. P-324.

3/(...continued)

[her] as a person (and I do), working for her has been difficult at times, and I think that [the Network Manager] needed to know that also. I truly hope my outburst won't hurt her career, or get her in any trouble. I just needed to end the series of what I perceived as snide verbal criticisms.

Ex. 14.

4/ The Employee offered the following example:

I corrected [one of the team leader's subordinates], who is also on my First Responder team, about an action he took during the last Tornado warning. During last week's Safety Meeting, he made a snide remark in reference to that correction.

Ex. P-24.

In September 2000, when the Employee learned from a third party that the IM department head had extended the subordinate's contract, she objected to her managers:

Gentlemen:

While this is news to me, although not unexpected, I have a new employee I am expecting on October 16, 2000. [The subordinate] will have to be out of the cubicle he now occupies, leaving all computer hardware in place, by that date.

Ex. 15. The Employee then forwarded her e-mail to the HR department head, stating that her managers' failure to tell her of the extension indicated that they "don't have to respond to me, as a manager or supervisor or anything else" and the "two of them have been 'sneaking' around for the past few weeks orchestrating this extension" and "didn't even have the decency to show me the courtesy of telling me that I was no longer to sign his timesheet." *Id.* The Network Manager responded that the subordinate would not be using his current cubicle and equipment, and he referred to the IM department head's inquiry about different equipment. *Id.* The Employee responded to him and the IM department head:

I figured as much, but neither of you could be honest about even that. It was merely a safety walk through and equipment we didn't want to get lost.

I'd prefer not to hear anything about Clinton, or any other politicians from either of you. You got nothing on them.

I hope [the subordinate] is naive enough, not to pick up any of these traits.

Id. The IM department head forwarded the message to the HR department head, stating:

Thought you might like to see this. I thought we were making progress with [the Employee] but old habits die hard. I will address her disrespect, but not through EMAIL. She is again making an assumption about something that is not true. Frankly I'm getting tired of this.

Id. In his notes of an October 4, 2000 conversation with the Employee, the IM department head stated that he told the Employee

that her e-mail was inaccurate. Ex. 16; see also Tr. at 331-332. His notes also stated that he objected to the e-mail's "inflammatory" tone and stated that this had happened in the past. Ex. 16.

In his notes of a November 6, 2000 meeting, the IM department head stated that the Employee (i) objected to her managers' evaluation of her on a Meyers-Briggs survey, and (ii) complained about the Network Manager. Ex. 16; see also Tr. at 332-334. The notes state that the IM department head told her that he attributed their differences to (i) her constant questioning of authority, (ii) her view of her own authority as higher than it is, and (iii) her inconsistent work habits and attendance - different hours. *Id.*

2. The First Six Months of 2001

From November 2000 to January 2001, the Employee, the Network Manager, and the HR department head spent considerable time addressing her objections to the process for, and the content of, her November 2000 performance appraisal. As a result of those discussions, the Employee's rating was raised. One of the Employee's objections concerned the Network Manager's negative view of some e-mails that she had written, see Ex. P-410-424.

In January 2001, the Employee e-mailed the HR department, stating that she did not want to work for the Network Manager:

You witnessed the ultimate reason I don't wish to work for [the Network Manager] in this meeting today. In a nutshell, I have screamed and hollered, ranted and raved to convince him we need what security we have and then he sits there and takes credit for my work, with no acknowledgment to me at all.

Ex. 19. The HR department head e-mailed the Employee, stating that he told the employee relations department head that he wanted a beneficial resolution of her concern. *Id.* Shortly thereafter, the IM department head and the employee relations department head discussed options for reassigning the Employee. Ex. P-64.

In the beginning of February 2001, the Employee objected to the IM department head's decision to terminate the contract for an employee on another team leader's staff. The Employee stated that the contract for a different member of that staff should be terminated:

After thinking about this over the weekend, I'm going to insist that it's [the second staff member] whose contract should be terminated.

You know the reason why, but if not, I refresh your memory. When I asked him to work on Internet monitoring, he devised a routine to usurp the monitoring, passed it around, then lied about it - he told you that it was a routine. For this reason, he is damaged goods, as far as I'm concerned, i.e., not enough integrity to work on the security of this site.

Of course, it's just my opinion, but if this were my IM Dept. I would not be protecting those who demonstrate a lack of integrity over someone who has not. . . .

Ex. 22. The IM department head replied, "I appreciate your input, but my decision stands." The Employee responded:

Fine, but I don't want [the second staff member] working on any aspect of this site's security, including internet monitoring.

Id. This message somehow arrived in the second staff member's inbox, and he showed it to his team leader. The team leader in turn wrote to the IM department head, defending the second staff member. On February 6, 2001, when the IM department head expressed his concern about the e-mail to the Employee, she stated that someone must have tampered with her machine and redirected the e-mail to the second staff member. Ex. 23. On the same date, the Employee sent a memorandum to the employee relations department head, explaining why she believed that someone had tampered with her computer. Ex. 24. Ten days later, she followed up with a second memorandum. Ex. 27.

On February 13, 2001, in the early afternoon, the Network Manager e-mailed the Employee, asking her to prepare a plan to train a specified staff member as a backup for the firewall and intrusion detection. Ex. 25. The Network Manager stated that he would like to discuss the matter at the next morning's cyber security meeting and to have a plan ready the day after that. *Id.* The Employee missed the meeting; in the late morning she e-mailed the Network Manager, objecting to the short notice:

Mandatory, last minutes meetings, arranged especially in an environment when people are on various schedules, and are seen

and taken as ways of excluding differenting, though more experienced opinions. Especially, since we all have pagers. As I was assisting another Fernald employee until well after 9 P.M. last night, something I didn't have to do, but I'm already four or five hours into this workday.

. . .

This autocratic style of management doesn't work for most intelligent experienced people - it certainly doesn't work for me - I'm working on several solutions to this problem, so please bear with me.

Ex. 26.

On March 27, 2001, the IM department head issued written reminders to the Network Manager and the Employee. The written reminder to the Network Manager cited "using poor judgment in difficult situations" and his "communication style." Ex. 79. The written reminder to the Employee cited "failing to maintain a regular work schedule, failing to follow management direction, and communicating unprofessionally with your management and peers." Ex. 28.

Later that day, the Employee e-mailed her supervisors that she would "no longer be available evenings or weekends." Ex. 30. In an April 17, 2001 memorandum to the HR department head, she confirmed that she had told her supervisors that she would "not be available after hours or on weekends." Ex. 32. The next day, the employee relations department head met with the IM department to consider options for moving the Employee to a position that did not require on-call duties. On April 20, 2001, the Employee e-mailed the employee relations department head, citing health and religious reasons as bases for relieving her of after hours duties.

On April 26, 2001, the employee relations department head responded to the Employee's April 20, 2001 e-mail. Ex. 36. The employee relations department head stated that the Employee's job required that she be available for after hours work and that this was not a new requirement. She stated that the Contractor had no record of any health issues that would preclude the Employee from working after hours and that the Employee could "swap out" her responsibilities during her Sabbath. The Employee did not accept that solution, and on May 1 and May 2, the IM department head and the employee relations department head considered alternative assignments within IM. Exs. 38, 39. They discussed the

possibility of moving the Employee from the Network Manager to the Programmer Manager to do Oracle database work, which would not require after hours work. At some point at the end of April or early May, the Employee's subordinates were reassigned. Ex. P-114-116.

On May 3, 2001, the Employee presented a VSP application to her supervisor, who signed it that day. Ex. 56 at 4. Under the terms of the VSP, an employee had to separate by June 29, 2001.

On May 22, 2001, the Employee complained to her managers that she was being required to suggest her replacement. The Employee stated:

For various reasons, technical and otherwise, which I will not specify here, there is no one currently working in the Systems Administration or Information Management who is qualified to take over responsibility for Internet Security at Fernald. . . .

It is my plan to get the Intrusion Detection, etc. up and running before my departure, if I depart.

Ex. 41. The Network Manager forwarded the e-mail to HR, stating:

This is the results of a very brief (1 min) meeting that I had with [the Employee] this afternoon. . . . I asked her to identify who would take over the work and to have that person involved in the next implementation of elron (internet monitoring). She said she would have to think about it. This is the same request I have made of her in the past and received the same response.

Id. The Network Manager and the Employee then had the following e-mail exchange:

[Network Manager]: I would like for you to start training [a specified employee] in Elron. . . . I am not aware of any pressing task that would prevent either of you from starting the training this afternoon. I would like the training completed in two weeks

After you have completed the training of [the employee] in Elron, I would like for you to begin training of [two other

employees] in how to maintain and update the firewall. . . .
I would like their training completed by June 29.

[Employee]: As neither you or [the IM department head] have ever had or shown any appreciation for my experience, it is not unexpected that you would believe that I can transfer twenty-four years experience to novices in less than two months.

. . .

Do we have any training dollars for this effort?

[Network Manager]: Are you saving (sic) can not or will not train these individuals?

[Employee]: Do you think you can allow me to be the Security Project Leader? You tend to manage (as opposed to lead) where you are not needed.

I am saying that beyond reading articles, etc. and pulling out and trying to use buzzwords, you lack the technical ability to know what you are asking and therefore are making an unreasonable request.

Ex. 42. The Employee then met with the IM department head and objected to the Network Manager's management style, specifically his instruction to train the employees. Ex. 44.

On May 23, 2001, the Employee objected to a co-worker's inquiry to the Network Manager on another project. Ex. 43. The Employee e-mailed her supervisors: "Who is running this project? You, [the co-worker], or me?" *Id.*

On May 24, 2001, the Employee e-mailed the Network Manager, stating that he had not answered her May 22 inquiry about

"how to proceed, i.e., how do I supply the background these people need to understand the training so that they are effective?"

Ex 46. He replied:

I would like for you to train backup personnel for network monitoring and the firewalls irregardless whether you take the

[VSP] or not. We have been discussing this for over two years.

I would like for you to train these personnel in how to operate the systems. I would like for the backup personnel to be able to operate the software and answer questions in your absence. We do not normally hire individuals who have prior knowledge of the applications and in the current downsizing environment we do not plan on hiring people with specialized skills. What this means is that we have to take individuals with other skills and transfer knowledge from our senior personnel. You are correct in that you can not transfer twenty five years of knowledge to these individuals. What I am asking you to do is transfer the knowledge that you have in running these two specific applications.

. . .

If any one of the individuals needs [access privileges or passwords] please set up the individuals and document it. The objective is to have each one of the individuals fully capable of maintaining the application. The individuals running the firewall need not be expected to be Solaris experts.

If you need additional help from [other named employees] to provide training in Solaris or NT I am sure they will oblige.

We will not be sending [the individuals designated for training] to formal training outside of the company.

The individuals named are aware that they do not possess all the skills required to run these applications but all of them feel that you have the ability to fill in the blanks. I would like for [a named employee] to be trained in Elron first with the firewall training to begin when [another named employee] finishes his portal work.

Thanks for your help.

Ex. 46 at 2. The Employee responded that she did have backups: for the firewall she cited an individual who had moved to another project; for internet monitoring she cited another individual although she indicated that that person could not analyze reports. Ex. 46 at 1. The Employee then questioned whether the Network Manager had identified the best individuals to be trained.

For the most part, there is more to these applications than just running them and that is where their backgrounds come into play. I have been very busy especially today but I plan to sit down and decide what background each of these people need prior to what training I give them. If [named employees] or whomever wants to teach those background courses they can. However, I don't think all of that can happen by the end of June. Somehow the people you identify to back me up have to get the background or they will not understand what I'm trying to explain to them.

Id. On May 24, 2001, the employee to be trained in internet monitoring e-mailed the Network Manager, stating that the Employee had "laid out her plans for training me:"

I spoke with [the Employee] yesterday afternoon and she laid out her plans for training me. She said she would give me my marching orders today so I could get started. She is going to give me a list of what she considers to be baseline knowledge requirements for installing and administering Elron. She made it clear that she expects me to acquire the knowledge in any areas in which I may be lacking. She said she will not bring me up to speed and that it is my responsibility to get myself up to speed. I may misquote her here, but I believe that she stated that if I don't demonstrate the baseline knowledge required, she is going to recommend that I not be trained. I told her that was fine with me.

Ex. 45. The Network Manager forwarded this e-mail to the IM department head, who forwarded it to HR, stating "Here's the latest on our attempt to get [the Employee] to train her backups. I'll have the Network Manager talk to [the named employee]."

On May 31, 2001, the Contractor issued the decision making leave to the Employee. Ex. 48. The document cited the Employee's failure to have backups and her "unacceptable communications style in recent e-mails" to the Network Manager.

In the morning of June 1, 2001, a meeting to followup on the decision making leave was convened. Ex. 51. The senior security official discussed the need for backups. The Network Manager presented the Employee with a transition schedule, changing the individuals to be trained on the firewall. The Employee questioned the suitability of those individuals.

On June 11, 2001, the Employee e-mailed the Network Manager, complaining about another team leader and one of her staff. She questioned the integrity of the staff member and then stated:

I am dismayed that I can NEVER ask [the team leader and staff member] generally for anything and have them comply.

Ex. 53. The Network Manager responded that the Employee's comments about the two individuals were "totally inappropriate, uncalled for and inaccurate." *Id.* At the hearing, the team leader described the Employee's relationship with her and some other employees as "confrontational." Tr. at 668-674.

On June 25, 2001, the Employee withdrew her VSP application. Ex. 56. On the same day, the IM department head transferred her to the Programmer Manager. Ex. 57.

3. The Summer of 2001

During the summer of 2001, the Employee continued to have conflicts with the network division. See Exs. 61-66; Ex. P-229-246. The network division requested that she turn in various materials associated with her former responsibilities; she maintained that the Network Manager had already removed some of these materials from her file cabinet. In addition, when a member of the network division staff sought access to information from a software provider, she refused the provider's request that she authorize such access, citing the ongoing investigation of her disclosures. Although these specific matters were resolved, the Employee continued to have conflicts with the network division staff over the next two years. See, e.g., Ex. P-246-265.

C. Findings of Fact and Analysis

As mentioned above, the Contractor has the burden of establishing, by clear and convincing evidence, that it would have taken the same actions in the absence of the protected activity. The Contractor has provided extensive documentary and testimonial support for the actions. Although the Employee attributes the actions to her protected activity, the Employee has not cast doubt on the Contractor's strong showing. I find that the Employee's testimony was not reliable. In some instances, her version of events conflicted with her contemporaneous e-mails of those events; in other instances, her testimony itself was contradictory. In still other instances, her version of events did not justify her conduct,

which included failure to take direction from her managers and communicate in a professional manner. Accordingly, after considering the entire record - all of the documents submitted, and testimony presented, in this case - I find that the Contractor has met its burden.

1. Whether there were non-retaliatory reasons for the actions
 - a. The March 27, 2001 written reminder

The written reminder to the Employee cited "failing to maintain a regular work schedule, failing to follow management direction, and communicating unprofessionally with your management and peers." Ex. 28.

The Employee agrees that she did not maintain a regular work schedule, but she contends that her schedule was nonetheless proper. Tr. at 870-874, 1060-63. She testified that staff members sometimes had to work after hours, either on a scheduled project or in response to an unexpected problem. Tr. at 873-874. She testified that the staff member could adjust his schedule so long as he notified his supervisor in advance. Tr. at 870-872, 1060-1062. See also Ex. 20. The Employee maintained that she always notified her supervisor, generally by voice mail or e-mail. Tr. at 871-875, 1062-1063. Finally, she testified that her manager's approval of her time sheet indicated approval of her schedule. Tr. at 871-872.

As an initial matter, the record supports the Employee's position that IM staff sometimes had to work after hours, that employees sometimes offset that time against their regularly scheduled hours, and that they were required to notify their supervisor if they wanted such an offset. The record also indicates, however, that the Employee abused this flexibility.

Although the Employee's testimony gives the impression that her managers never objected to her late arrivals, she never directly so testified. Instead, she testified that her managers approved her time sheets. The record indicates that, prior to the written reminder, the Employee's managers had objected to her late arrivals. The IM department head's November 6, 2000 daybook entry, and his testimony, indicates that he told the Employee of her manager's objection to her "inconsistent work schedule," Ex. 16;

Tr. at 332. In another context, the Employee confirmed the November 6, 2000 meeting, although she did not address this statement.

Moreover, the record indicates that the Employee's late arrivals did not always involve required work or notice to her manager. Although the Employee has a record of her e-mails, 5/ the Employee did not submit any documents to support her position that, prior to the written reminder, her late arrivals followed notification to her manager of necessary after hours work. The only evidence in the record about a late arrival is her February 13, 2001 e-mail, which indicates that her after hours work was discretionary and that she did not notify her supervisor of the work or her expected late arrival. Ex. 25. Finally, even if she notified her manager of an expected late arrival, her testimony indicated that she did not tell him when she expected to arrive. The Employee testified that when she scheduled after hours work, she gave general notice to users that the system would be down and that this general notice was notice to her supervisor. Tr. at 872-874. She further testified that when she had unscheduled after hours work, she notified her supervisor that she would be in late the next day and "usually" gave him "some idea of what time" she would arrive but "kind of backed off of that." *Id.* at 873. Accordingly, based on the entire record, I conclude that the Employee did not maintain a proper work schedule.

The written reminder also cited failing to follow management direction: repeatedly questioning her manager's decisions, disregarding his authority, being argumentative and insubordinate and, in some cases, disrupting the work and the morale of others. Ex. 28 at 2. The Employee attributes her conflicts with her managers to the fact that she made disclosures about personnel in the IM department, including her managers. The evidence is contrary to her claim.

The Employee failed to follow management direction. Examples are (i) her stated opinion that her supervisors did not have the authority to reverse her decision limiting a subordinate's computer access, Ex. 13, and (ii) her failure to follow management direction to restore the subordinate's access. Ex. 13; Ex. P-324. As discussed in subpart b below, a third example is her failure to comply with her managers' requests that she establish and maintain

5/ Ex. 77; Tr. at 1256-58.

backups. The fact that the Employee made disclosures concerning her management did not remove her from their supervision or justify insubordinate conduct.

Finally, the written reminder cited the Employee's communication style as "unprofessional" and creating "a tension filled atmosphere where teamwork is difficult to achieve." Although the Employee testified that, prior to the written reminder, no one had ever complained about her e-mails, see Tr. at 891, she acknowledged at least one instance in which she was cautioned about her e-mails. See, e.g., Tr. at 855-859 (Ex. P-410-424). In any event, the Employee denies that her communication was unprofessional. Again, the evidence is contrary to her claim.

The Employee's communication style was unprofessional and created a tension filled atmosphere. The Employee's e-mails would springboard from a given issue into an attack on a person. The August 9, 2000 e-mails to a subordinate are an example. Ex. 13. From her disagreement with the subordinate's recommendation on a computer-related matter, she launched into a discussion of the "negatives" of his tenure with the Contractor, prompting him to complain about the message to the IM department head. Other co-workers complained about her conduct. See, e.g., Tr. at 668-674; Ex. 17. Accordingly, the record supports the written reminder's statement that the Employee's communication style was unprofessional and created a tension filled atmosphere.

b. The May 31, 2001 decision making leave

The decision making leave cited the Employee's failure to establish and maintain backups. The Employee maintains that she had backups and that she was in the process of complying with the Network Manager's May 24, 2001 request to train others.

The decision making leave accurately cites the failure to have backups. Despite her assertion that she had backups, the Employee's May 24, 2001 e-mail to her managers indicated that she did not have backups for internet monitoring and the firewall: the individual identified for internet monitoring could not analyze reports, and the individual identified for the firewall had left. Ex. 46. See also Tr. at 1101-1110 (inadequacy of another employee as firewall backup). The Employee's protests about the difficulty of training anyone in IM for internet monitoring and the firewall confirm the lack of trained personnel.

Ex. 46. The Employee's assertion that she was in the process of complying with her

manager's May 24, 2001 request, even if correct, does not change the fact that she did not have backups and that she might not have them by the time of her departure. 6/ Furthermore, her e-mails indicate that the Employee failed to follow specific management direction and improperly tried to establish preconditions before she would follow specific direction.

The decision making leave also cited the Employee's "unacceptable communications style" in recent e-mails to the Network Manager. The Employee denies that these e-mails had an unacceptable communication style.

The Employee's e-mails to the Network Manager had an "unacceptable communications style." Her May 23, 2001 statement that "You tend to manage (as opposed to lead) where you are not needed" is an example. Ex. 42. Her statement that "beyond reading articles, etc. and pulling out and trying to use buzzwords, you lack the technical ability to know what you are asking and therefore are making an unreasonable request" is another example. *Id.* Her May 24, 2001 statement "Who is running this project? You, [a co-worker] or me?" is a third example. Ex. 43. Accordingly, the decision making leave correctly cited recent e-mails to her manager as having an "unacceptable communications style."

c. The job transfer

The job transfer cited the Employee's withdrawal of her VSP application, the training of individuals to take her place, and the need for the Employee's skills in the Programmer Manager's area. Ex. 57. The Employee argues that other IM employees who rescinded their VSP application were able to stay in the same jobs.

The Contractor had strong reasons for the transfer. The facts recited in the transfer letter are accurate - there were individuals trained to take the Employee's place and the Programmer Manager had a need for the Employee's skills.

6/ As an example, on May 24, 2001, the individual to be trained for internet monitoring e-mailed the Network Manager that the Employee had "laid out her plans for training me;" that he needed to acquire certain background information on his own or she would "recommend that I not be trained." Ex. 46. See also Ex. 44 (Employee's objection to individual designated for training on the firewall).

Moreover, the record indicates that the job transfer was largely the result of the Employee's ongoing conflict with the Network Manager, including her repeated statements that she did not want to report to him, and her stated refusal to work after hours. As discussed earlier, the IM department head had begun considering alternative assignments in early 2001, see, e.g., Exs. 19, P-64, and the Employee's April 2001 refusal to work after hours prompted the employee relations department head to conclude that she should be moved to a job that did not require her to be on call, Ex. P-108, 110; see also Ex. P-97, P-100, P-113 (discussions about transferring the Employee). Accordingly, I find that the Contractor would have transferred her to a different position in the absence of the protected disclosure and that the designated position accommodated both the Employee's refusal to be on call and her desire not to work with the Network Manager. Accordingly, the record amply supports the Contractor's position that it had strong, non-retaliatory reasons for transferring the Employee.

2. Whether the Contractor Would Have Taken the Same Actions in the Absence of the Protected Activity

The Contractor has also demonstrated, by clear and convincing evidence, that it would have taken the same actions in the absence of the protected disclosures. As explained above, the Contractor has demonstrated that it had strong reasons for the two disciplinary actions. The Employee's failure to follow a proper work schedule, her refusal to accept her managers' authority and follow their direction, her harsh style of communication, her refusal to be on-call, and her failure to train backups for the security systems are inconsistent with a productive work environment. Moreover, the Contractor has submitted evidence of disciplinary actions involving other employees, including one against the Network Manager. Ex. 79. The actions cover a variety of behavior including tardiness, absences, and communication style. Although the Employee maintains that any inappropriate conduct on her part is attributable to her disclosures, this argument is not persuasive. First, the inappropriate conduct extended to unrelated matters, such as the August 2000 situation with a subordinate. More importantly, employee disclosures do not insulate the employee from the consequences of unacceptable behavior. As for the job transfer, the Employee's repeated objection to reporting to the Network Manager and her refusal to be on-call necessitated the transfer. Accordingly, the evidence is clear and convincing that the contractor would have taken the same actions in the absence of the protected disclosures.

IV. *The July 2003 Involuntary Separation*

A. Background

The Employee reported to the Programmer Manager from June 25, 2001, the date of her transfer, until her involuntary separation on July 7, 2003. The Employee got along better with the Programmer Manager and her staff, although there were specific instances in which others objected to her behavior as "inappropriate" or "harsh." See, e.g., Tr. at 1155 (a co-worker) & Tr. 1233-1234 (the Employee); Tr. at 754-758, 781 (the Programmer Manager); Ex. 72. Some of these instances are discussed below, in connection with the Employee's challenges to her separation.

On April 24, 2003, the Contractor announced a planned reduction of 77 positions. Ex. 74. The Contractor arrived at that number through its Management Planning System. Ex. 4. The Contractor used that system to determine the number of employees that it needed in various job classifications.

For job classifications in which it had excess employees, the Contractor used a standardized process for identifying which employees would be separated. Ex. 5. The Contractor established "core skills" that were applicable to all employees. They were "initiative," "communication skills," "quality of work," and "work habits." The Contractor established "job-specific essential skills" for each job classification or sub-classification. The Contractor used a standard form that provided a rating scale from "1" to "5" (with "1" being the highest). The form also contained two additional blocks: one for "Education/Certification" and one for "Skills Transferability." These two blocks provided for the identification of relevant material and comments, but did not provide for a rating.

A number of teams and offices participated in the ISP process. Ex. 5. The HR department was responsible for coordinating the process. A senior management team, consisting of the highest level management, oversaw the process. For each job classification, a functional job review team determined whether sub-classifications were appropriate and established the job-specific essential skills and weighting factors. Supervisors, without knowing the weighting factors, evaluated their employees against the criteria. The functional job review team then reviewed the evaluations and forwarded them to the HR department, which calculated the employee ratings and prepared a ranking list. The functional job review

team and then the senior management team reviewed the evaluation and ranking forms.

The IM department managers and staff fell into two job classifications: Information Systems Manager (hereinafter IM managers) and Information Systems Representative (hereinafter IM staff members). Ex. 6. The IM department had five managers and 29 staff members. The Contractor determined that it needed three IM managers and 21 staff, giving the IM department an excess of two managers and eight staff members.

The functional job review team for the staff members - the information systems representatives - consisted of the HR department head and the Administration head. Ex. 7. Those two officials identified two sub-classifications in the "information systems representatives" classification: a network group and a programmer group. With input from a former IM manager, the team developed job-specific essential skills for each group. The team also met with the IM division managers to identify the number of employees to be retained in each group. The managers determined that they needed a minimum of six employees in the network group. Since there were eight employees in that group, the managers determined that two employees would be separated from the network group, leaving six employees to be separated from 21 person programmer group.

Each IM division manager evaluated the employees under his or her supervision. Ex. 7. The two network managers consulted each other to assure the consistency of the ratings for the employees in their group; the two programmer managers did the same for the employees in the programmer group. The IM department head and the functional job review team reviewed the evaluations (which used a scale of 1 to 5 with 1 being the highest), and for each group the HR department calculated the employee ratings and ranking, reversing the scale so that 5 was the highest score.

For the network group, the ratings ranged from 4.75 to 1.95. Ex. P-499. The six retained employees had ratings from 4.75 to 3.00; the two separated employees had ratings of 2.50 and 1.95.

For the programmer group, the ratings ranged from 4.55 to 2.05. Ex. P-529 to P-531. The top 15 ratings ranged from 4.55 to 3.10. The bottom six ratings were 3.05, 3.00, 2.95, 2.75, 2.55, and 2.05. The Employee's rating was 2.75. The Contractor separated five of

those employees; the employee with the 2.95 was separated three months later, in October 2003. 7/

B. Findings of Fact and Analysis

At the outset, it is clear that the Contractor's decision to conduct the June 2003 ISP had nothing to do with the Employee. Rather, it was one of a series of voluntary and involuntary separation programs associated with the upcoming site closure. Moreover, the Contractor's determination that it had an excess number of employees in the IM department had nothing to do with the Employee. Finally, the Contractor's decision to create two groups for IM staff members had nothing to do with the Employee.

The Employee has not challenged any of the foregoing. The Employee's main argument is that the Contractor should have evaluated her according to the network group criteria. In the alternative, the Employee challenges her rating in the programmer group as too low.

1. Whether the Employee Belonged in the Programmer Group

In support of her position that she should have been evaluated according to the network group criteria, the Employee cites notes of manager discussions recognizing that some employees had skills in both the network and the programmer area and the "skills transferability" column on the evaluation form.

The recognition of diverse skills, either in management discussions or on the evaluation form, did not affect whether an employee was evaluated in the network group or the programmer group. The network group consisted of the staff members in the two network divisions; the programmer group consisted of the staff members in the two programmer division. Each division manager evaluated the staff members in his division. Consistent with this, the Employee, who was in a programmer division, was in the programmer group and evaluated by her manager. Accordingly, the Contractor's treatment of the Employee was consistent with its treatment of the other IM employees.

7/ The Contractor contemporaneously documented that the person with the 2.95 rating was being "skipped" because he had unique knowledge on a project that would be completed in October 2003.

The Employee further maintains that, even if she properly belonged in the programmer group under the ISP structure, she should not have been included in that group. The Employee reasons that she would not have been in that group if she had not engaged in protected activity. She points to her June 2001 job transfer, which she maintains was the result of protected activity.

As explained above, the Contractor has demonstrated, by clear and convincing evidence, that it would have transferred the Employee in the absence of the protected activity. Accordingly, there is no merit to this contention.

2. Whether the Employee Deserved a Higher Rating in the Programmer Group

The Programmer Manager testified in detail about why she assigned the ratings that she did. She stated that she evaluated the employees against the rating factors and relative to each other. She discussed her comments, and she gave examples. The Programmer Manager's testimony was highly credible. Based on her demeanor and the even-handed explanations that she gave, I believe that she was testifying honestly and candidly. Moreover, many of her comments and examples were corroborated by documents, including e-mails from the Employee and the testimony of others.

Although the Employee generally maintains that her rating was too low, the Employee did not specify what she thought her rating should have been or who she believes should have been separated in her place. Instead, the Employee objected to the rating in two ways.

First, she argued that the rating was inconsistent with her November 2002 performance appraisal. She sought to draw analogies between the criteria and rating scales for the performance appraisal and those for the ISP rating.

The November 2002 performance appraisal does not cast doubt on the accuracy of the ISP rating. The two are simply not analogous. The first rated performance during the last half of 2002; the second considered skills based on criteria and rating scales that were not coextensive with the performance appraisal.

Second, the Employee objected to the written comments on her evaluation. She viewed them as inaccurate or as understatements of her skills.

As an initial matter, I find that the written comments were not intended to be an all inclusive statement of the basis for the rating. They were a relatively small block on the evaluation form. Accordingly, arguments that the written comments do not reflect the full range of an employee's skills do not themselves cast doubt on the rating.

The Employee objected to the written comment for "initiative." 8/ The Programmer Manager rated the Employee a "4" ("occasionally fails to meet some standards and expectations"), with the following comment:

Has not taken initiative to learn software development tools or our data/work processes that we support. This limits work that can be assigned from the remediation systems group.

Ex. P-605. At the hearing, the Programmer Manager cited the leachate system and the meteorological data system as examples. 9/

8/ Initiative was defined as follows:

The extent to which the employee takes independent action, suggests work improvements and is able to achieve project requirements consistent with the current mission: Makes active attempts to influence events to achieve goals; self-starting rather than waiting to be told what to do; takes action to achieve goals beyond what is required; constantly looks for incremental improvements in work processes and results.

Ex. P-605.

9/ The Programmer Manager stated:

When someone is introduced to a new area, you just don't throw the whole thing at them. I give her the first part, and then you expect that to take over.

And the leachate system, for example, that could have been just do it, take the whole thing. Just do it. And that didn't happen. So we had some of those cases where things aren't being taken over.

Tr. at 799.

The Employee has not cast doubt on the rating. Although the Employee cited learning Winbatch, the Programmer Manager testified that the Employee learned that as the result of an assignment, not on her own initiative. Tr. at 820. Similarly, although the Employee cites learning JAVA and volunteering to use that skill for the portal project, that initiative did not involve remediation systems, the work done in her division. Tr. at 764. Finally, the Employee's statement that she had a lot of free time, Tr. at 961-962, generally supports the Programmer Manager's statement that she did not take the initiative to learn the tools and data/work processes that the group supported.

The second core skill was "communication skills." 10/ The Programmer Manager rated the Employee as a "4" ("occasionally fails to meet some standards and expectations), with the following comment:

[The Employee's] statements that she is the best qualified in IM, the only one qualified to run it, her inflammatory emails and her questioning of others' competence and honesty make effective team work difficult. She does write and speak well.

Em. Ex. P-605. The Programmer Manager testified about the Employee's communication skills:

[T]he way [the Employee] talked to people and worked with people, impacted our ability to do work well. It doesn't mean that she was mean or rude all the time.

It means that there ... were cases in which she would be harsh. [She]'s very sensitive to anything other people would

10/Communication skills is defined as follows:

The extent to which the employee communicates clearly and effectively and seeks to listen to and understand others: Expresses idea effectively in individual or team situations; adjusts language or terminology to the needs of the receivers uses proper grammar, organization and structure in written communications; listens to and acknowledges feelings, concerns, opinions, and ideas of others.

Em. P-605.

say ... but not as sensitive to how other people would take harsh words.

And assuming - questioning people's motives on some small things makes it difficult for those people to work. If you've been yelled at by someone at work, even once by someone, it impacts that.

If someone speaks harshly to you in public, even if they're nice to you the rest of the time, that's just natural that people are going to have some problems with that.

And I think it's just the core of the problems, is those kind of - that harshness, occasionally.

Tr. at 754-55. As an example, the Programmer Manager stated that one day she received a call from a first responder team member trying to get in touch with the Employee. When the Programmer Manager later asked the Employee if the team member had reached her, the Employee "yelled" at the Programmer Manager in front of others, stating "it wasn't any of [the Programmer Manager's] business." Tr. at 781. 11/ With respect to the Employee's

11/ The Employee apparently viewed the question as an affront to her authority on her first responders team. She later e-mailed the Programmer Manager:

Apparently you were unable or unwilling to hear what I was trying to tell you regarding [the] phone call to you. As I see it, someone, whomever, called my boss and otherwise created a big uproar this morning, as if I am some kind of non-responsive, non-performing employee. Why? Because they wanted a thermometer. I didn't and don't appreciate it, especially when they weren't using or used to using the proper procedure.

I also don't like or enjoy the middle-man arrangement of communication used too often here at Fernald. I'm used to taking care of issues myself.

As with all my responsibilities over the last twenty-five years since becoming a professional employee, I have made arrangements for my absence, including First Responders, when necessary, such as during my recent 2-week vacation.

Nice welcome home.

statement that she was the "only one qualified to run" the IM department, the Programmer Manager cited the Employee's November 19, 2002 letter to her, in which the Employee stated:

I know who I am, what I have contributed, what I am capable of and where I am going. Only the envious and intimidated have tried and will try to deter me. Both they and I know who they are. Ultimately, I'm the one person in the department with the capabilities to run the whole operation, but I'm also the most under-valued.

Tr. at 755 (quoting Ex. 73). As for the e-mails, the Programmer Manager cited an incident in which the Employee did not want to give the network division access to her computer to install security software. Tr. at 756. The Programmer described the latter situation as follows:

[I]t became a big thing, involved the management and HR and a lot of things. And really when you think about it, it was just, we need to install this on your computer like we installed on everybody's on the whole site's, you know? The president of the company, I assume got it. So that's what I mean.

Tr. at 758 (referring to Ex. 68 and 70). The Programmer Manager also cited a situation in which the Employee attributed her inability to access the Contractor's intranet to improper interference by others, but it turned out to be a technical glitch created by software that the Employee had installed on her computer. Tr. at 755-56; see Ex. 71.

The Employee's letter, her e-mails, and her testimony support the Programmer Manager's rating of her communication skills. Although the Employee testified that the purpose of her letter was to ask for additional work, Tr. at 977, the letter does not make any such request. Instead, it complains about the lack of promotion and

refers to "those who have repeatedly displayed a lack of integrity." If, as the Employee testified, her purpose was to ask for work, she did not communicate that purpose. The e-mails document other incidents, which turned routine matters into attacks on IM staff integrity and motives. Exs. 70, 71, 72. Finally, the Employee's striking indifference to how her communications are received by others supports the rating. The Employee testified:

Q: Had [the Programmer Manager] ever counseled you on any e-mails that you wrote that she thought were improper?

A: I don't know about improper. She didn't necessarily like a couple that I had written. But I felt like, number one, if I was - if in an e-mail I was complaining about somebody, the e-mail was not directed at them, okay? It was an attempt to address issues.

Q: Did [the Programmer Manager] ever refer to any e-mails that you wrote as inflammatory?

No, not that - use the word, inflammatory, no. I think one of them she said something about hostile, maybe. But I'm not sure I know what inflammatory means.

My idea of inflammatory, to me that means how somebody else reacted to it. Not that any - I really can't control anybody else's reaction. Most people don't like to be criticized or corrected or anything.

Tr. at 977-78. Accordingly, the Employee has not cast doubt on the Programmer Manager's assessment of her communication skills.

The third core skill was "quality of work." 12/ The Programmer Manager rated the Employee as a "3" ("consistently meets all standards and expectations)" with the following comment:

Does good job of developing working real time data loaders. She has performed all tasks directly requested but does not step up to take ownership.

Ex. P-605. The Programmer Manager testified:

Again, you have to look at it related to the other people. In order to make a good system in the environment we're working in - we're not a big commercial software company.

We work with our customers and deliver things they need, which sometimes they're not sure what they need. We have to be part of the process. So to be good you have to be able to deliver something useful to the people who are keeping us employed.

And so you need that technical ability to make - which she did do, but then you also need to be able to go back and forth with customers. Go back and forth and make sure that this is the final, good product. That's the way we all work in both of the application areas.

Tr. at 761.

The Employee has not cast doubt on the accuracy of this rating. It is undisputed that, in general, the Employee did not work with the end-users, as did the other employees with higher ratings. Because the evaluation was based on demonstrated skills, the "why" is not relevant to the rating. Moreover, the Employee has not asserted that the Programmer Manager treated her differently than similarly situated employees in terms of allowing access to customers: she

12/ "Quality of work" was defined as:

The extent to which the employee's work is accurate, well organized, thorough, and complete: Provides accurate information in an useable form to others that need to act on it; follows policies and procedures correctly; anticipates and prepares for problems that may interfere with desired outcomes.

attributed the difference to fact that the others had long tenures in the programmer division. Tr. at 980. Accordingly, the record indicates that the Programmer Manager properly rated the Employee as "consistently meets all standards and expectations."

The Programmer Group had three job-specific essential skills. 13/ The first skill was defined as follows:

Skill and ability to write/code programming language with emphasis on Oracle, Power Builder, JAVA, JSP, ACCESS, and GIS.

Ex. P-606. The Programmer Manager rated the Employee a "3" with the following comment:

Knows Oracle DBA, PL/SQL, SQL well. Learning JAVA. No Forms, Reports on Oracle. Knows WINBatch very well & Has NT/2000 Knowledge which is useful to developers.

The second essential skill was defined as follows:

Ability to analyze and solve technical problems as demonstrated by application of skills via problem solving and high level of productivity.

Ex. P-606. The Programmer rated the Employee with a "3" with the following comment:

Is very good at trouble shooting at a technical level, programming level but does not address data/functionality.

The third essential skill was defined as follows:

13/ Job-specific essential skills are defined generally as follows:

The extent to which the employee's skills, knowledge and abilities apply to the required scope of work. Identify specific skills required to perform work in the job category that are essential to performing work to be done in the future. List most important skills (preferably 3-5).

Ex. P-606.

Knowledge of user community data and functions to demonstrate application of skills and knowledge providing customer support.

Ex. P-606. The Programmer Manager rated the Employee as a "4" with the following comment:

Does not know our customer work processes or database structure to a level sufficient to help in troubleshooting actual functionality or user issues to provide analysis for new user business needs.

Id.

The Employee has not cast doubt on the accuracy of the job-specific skills ratings. The Employee asserts that first comment understated her skills by stating that (i) she was "learning" when she had completed a course, (ii) she "has NT/2000 knowledge," and (iii) she did not know Oracle forms and reports. These asserted understatements are insignificant. The statement "learning JAVA" was accurate in that the Employee was just completing a course and had yet to demonstrate her knowledge on a project; the Programmer Manager testified that the division did not use NT/2000 knowledge or Oracle reports and, therefore, those skills would not have affected her rating. Tr. at 762-768. For the second skill, the Employee did not argue that she had a high level of productivity, and any such statement would be inconsistent with her statement about idle time. For the third skill, the Employee concedes its accuracy and has not alleged that the Programmer Manager treated her differently than similarly situated employees in terms of access to customers.

Aside from the core and job-specific skills, the Employee challenges the portion of the evaluation listing "Education/Certification." The Employee cites the use of an acronym, with two letters transposed, to describe "Microsoft Certified Systems Engineer," i.e., "MSCE" instead of "MCSE." The Employee also cites the Programmer Manager's failure to attach an e-mail message that she was completing a JAVA course.

These objections do not cast doubt on the accuracy of the Employee's rating. First, the "Education/Certification" was not part of the rating; even if it could serve as a tiebreaker, there was no tie to break in this case. See, e.g., Ex. 9; Tr. at 92, 165. In any event, there is no evidence to indicate that the

transposed acronym would confuse anyone, and the evaluation clearly recognized her JAVA training in the skills comments. Accordingly, for the foregoing reasons, the omissions do not cast doubt on the rating.

The Employee argues that her "Skills Transferability" should have placed her in the group of retained employees. The Programmer Manager commented that the Employee knew "network and security related issues." The Employee maintains that her range of skills made her more valuable to the Contractor, and she notes that the other employees with a similar range of skills were not separated.

These objections do not cast doubt on the rating or the Employee's separation. The evaluation form did not provide for a rating for "Skills Transferability;" the "transferability" is to "other functional groups" and is intended to identify skills that might allow a person to be transferred to a job opening in another area. See, e.g., Ex. 9; , Tr. at 42-45, 70, 73, 92-94.

Finally, the Employee submitted a matrix of the knowledge, skills, education, and certifications, of all the employees in both groups; for hers, she added information that was not on her evaluation form. Ex. P-617; Tr. at 1234-1235. Based on this chart, she concludes that she should have been retained.

As indicated above, the Contractor did not evaluate people according to whatever knowledge they might have. Instead, the Contractor evaluated employees according to their demonstration of core skills and the essential job-specific skills for their job classification or sub-classification. I find that the Programmer Manager evaluated the Employee against the relevant specified criteria honestly and fairly, notwithstanding the Employee's objections. Accordingly, I have concluded that the Contractor would have taken the same action in the absence of the protected disclosure.

V. Conclusion

As indicated above, the Contractor had the burden of demonstrating, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. As also indicated above, the Contractor met that burden. For that reason, the employee is not entitled to relief.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by S.R. Davis, OHA Case No. VBH-0083, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless, by the 15th day after receiving the initial agency decision, a party files a notice of appeal with the Director of the Office of Hearings and Appeals.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: April 21, 2004

