

# Case No. VWA-0033

November 4, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioners: Gretencord v. West Valley Nuclear Services Co., Inc.

Date of Filing: March 19, 1999

Case Number: VWA-0033

This decision considers a Complaint filed by John L. Gretencord (Gretencord) against West Valley Nuclear Services, Inc. (West Valley) under the Department of Energy's (DOE) Contractor Employee Protection Program, which is codified at 10 C.F.R. Part 708. Mr. Gretencord requested a hearing on his Complaint under 10 C.F.R. Part 708 on March 19, 1999.

## I. Background

The Department of Energy established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). The criteria and procedures for Part 708 were amended in an Interim Final Rule effective April 14, 1999. 64 Fed. Reg. 12862. The Interim Final Rule provides that its amended procedures will apply prospectively to any complaint pending on April 14, 1999. Part 708's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit discrimination by a DOE contractor against an employee on the basis of certain activities by the employee, including certain disclosures by the employee to "a DOE official, a member of Congress, any other government official who has responsibility or oversight of the conduct of operations at a DOE site, [an] employer or any higher tier contractor, . . ." 10 C.F.R. § 708.5(a).

Gretencord was employed by West Valley as a Senior Quality Control/Quality Assurance Engineer from January 15, 1990 to March 18, 1997. On March 26, 1997, Gretencord filed a complaint under 10 C.F.R. Part 708 with the DOE Office of Inspector General's Office of Inspections (IG). In this complaint, Gretencord alleged that he was retaliated against for disclosures of possible safety violations, fraud and mismanagement.

After conducting an investigation of Gretencord's allegations, the IG issued a Report of Investigation (the Report) on February 11, 1999. The Report found that: "[A] preponderance of the available evidence supports a finding that during his employment and work in quality assurance, [Gretencord] disclosed various concerns to [West Valley] officials and to DOE about possible safety violations and incidents of possible rule infractions." Report at 5. However, the Report further found that: "[A] preponderance of the available evidence does not indicate that the substance of [Gretencord's] 'good faith' concerns contributed to actions that were taken against him." *Id.* at 6. The Report further states: "It is the conclusion of this

inquiry, based upon information obtained through interviews of [West Valley] employees and supporting documents, that the evidence is clear and convincing that [Gretencord] was terminated for reasons other than his protected disclosures." *Id.* at 8. On March 8, 1999, DOE received Gretencord's request for a hearing and I was appointed as the Hearing Officer.

## II. Analysis

Under the DOE's Contractor Employee Protection Regulations, "the employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . as described under §708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employer by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure . . . ." 10 C.F.R. § 708.29.

West Valley admits that Gretencord made at least 14 protected disclosures while employed at West Valley. Moreover, the record shows that a number of negative personal actions occurred during Gretencord's tenure with West Valley. These negative personal actions include several letters of reprimand, poor performance evaluations, a suspension, and eventually an involuntary termination.

In most whistleblower cases, it is difficult or impossible for a complainant to find a "smoking gun" that proves an employer's retaliatory intent. Therefore, Congress and the courts, recognizing this difficulty, have found that a protected disclosure 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 a protected disclosure 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 (8th Cir. 1989).

Gretencord's protected disclosures were interspersed throughout his tenure at West Valley, as were the negative personnel actions taken against him. (1) Applying the above principles to the present case, I find that Gretencord has met his initial burdens under § 708.29 thereby shifting the burden to West Valley to prove by clear and convincing evidence that it would have taken the same actions without Gretencord's protected disclosures. However, I have also found that West Valley has clearly and convincingly proven that each of the personnel actions it took against Gretencord were motivated by legitimate managerial considerations instead of a desire to retaliate against Gretencord for his protected disclosures. Accordingly, I am denying Gretencord's complaint under 10 C.F.R. § 708.30(e).

Simply put, the record developed during the hearing I conducted, shows that Gretencord has, from the very beginning to the end of his tenure with West Valley, frequently engaged in unprofessional and socially inappropriate behavior. To some extent, Gretencord's behavior was merely eccentric, unusual or socially awkward. However, the record indicates that Gretencord would often engage in behaviors that compromised his effectiveness and interfered with the operation of West Valley's day-to-day business operations. (2)

As explained below, during Gretencord's eight years with West Valley, he had an extraordinary number of personality conflicts, confrontations, and arguments with other members of West Valley's workforce. Moreover, he repeatedly failed to control his temper, issued threats to fellow employees, and made bizarre and disturbing statements in the presence of co-workers.

Gretencord attributes these conflicts to an alleged conspiracy on the part of West Valley's management to cover up safety, financial and management deficiencies. Gretencord claims that his efforts to expose safety concerns and corruption at West Valley threatened management and that they responded by harassing him,

interfering with his ability to do his job and trumping up allegations about his behavior. Gretencord, however, failed to present any evidence in support of these allegations. In contrast, West Valley has clearly and convincingly rebutted these allegations by submitting Gretencord's personnel file and by presenting the testimony of co-workers, which show that Gretencord's actions provided West Valley with legitimate justification for taking negative personnel actions against him.

I find the evidence submitted by West Valley concerning Gretencord's behavior and conduct to be credible since, for the most part, Gretencord does not deny that he made the statements or performed the behaviors attributed to him and because of the sheer number of similar reported occurrences.

Gretencord's personnel file contains voluminous documentation of his unacceptable behavior and statements. My review of Gretencord's personnel file has convinced me that he frequently exhibited poor self-control and repeatedly treated his fellow employees in an abusive manner. The personnel file also documents that Gretencord's actions and statements insulted and frightened fellow West Valley employees. Moreover, Gretencord did not respond to any of West Valley's proactive attempts to help Gretencord modify his behavior.

Gretencord's personnel file shows that on March 14, 1990, a secretary complained to West Valley management that Gretencord had made public comments disparaging secretaries. Gretencord's supervisor at the time, David Crouthamel, indicated that he had discussed this incident with Gretencord. Gretencord has not denied that this incident occurred.

On February 6, 1991, two West Valley employees reported to Crouthamel that they witnessed Gretencord harassing a co-worker over a work order. Crouthamel spoke with Gretencord about this incident, but Gretencord denied it had occurred.

On or about March 18, 1991, a West Valley engineer complained to Crouthamel about Gretencord's behavior and refused to work with Gretencord in the future. Crouthamel indicated that he raised the matter with Gretencord. Gretencord responded by losing his temper, stating that he would leave West Valley if he "had to deal with personalities" and storming out. Gretencord has not denied that these incidents occurred.

On March 23, 1991, West Valley received another complaint from a secretary that Gretencord had been rude to her. After being informed of this complaint, Crouthamel counseled Gretencord to "work with people, not against them." Gretencord has not denied that this incident occurred.

On August 2, 1991, Crouthamel issued a memo to Gretencord's personnel file documenting his concerns about "Gretencord's abusiveness and lack of professionalism in inter-personal relations."

On September 19, 1991, David Shugars issued a memo to Gretencord's personnel file concerning Gretencord's verbal intimidation of an employee. Shugars counseled Gretencord about this incident, suggesting that Gretencord should attend interpersonal skills training. Apparently, Gretencord did not heed this advice.

On March 20, 1992, West Valley issued a reprimand letter to Gretencord in response to an incident in which Gretencord displayed unprofessional and abusive behavior towards a co-worker. That letter warned Gretencord that future behavior of this kind could result in his discharge.

On May 14, 1992, West Valley received a complaint from two cafeteria workers that Gretencord had been rude to them. The workers reported that Gretencord had stated that "women are beneath him." Crouthamel discussed this incident with Gretencord, who indicated that his statements were misinterpreted.

On May 19, 1993, a co-worker submitted a memo complaining about an incident in which she alleges Gretencord's behavior made her feel threatened. Gretencord has not denied that this incident occurred.

On October 27, 1993, a West Valley manager communicated the fact that he was concerned that

Gretencord presented a threat to his personal safety. In response, West Valley's Employee Assistance Program (EAP) was consulted. The EAP recommended that Gretencord should receive professional counseling. Apparently, Gretencord did not accept this offer of assistance.

On November 16, 1995, Dave Dempster and Jack Hummel met with Gretencord to discuss his behavior. During this meeting, Gretencord was told that his frequent outbursts would no longer be tolerated and he was informed that his employer was concerned about "his continued inability to interface with his co-workers in a professional or even a civil manner." In response, Gretencord allegedly threatened to report West Valley for incompetence and a cover-up. Gretencord has not denied that this incident occurred.

On December 21, 1995, a memo was placed in Gretencord's personnel file indicating that he had been instructed to seek help from the EAP because of his abusive language and inability to get along with co-workers. Gretencord has not denied that this incident occurred. Nor is there any indication that Gretencord took advantage of this offer of assistance from the EAP.

On February 17, 1997, a memo was placed in Gretencord's personnel file indicating that a co-worker had asked Gretencord to "watch his filthy mouth." The co-worker reported that Gretencord responded by becoming aggressive. Gretencord has not denied that this incident occurred.

On February 20, 1997, the Supervisor of West Valley's Electrical Department, Bruce Covert, encountered Gretencord engaged in a conversation in the Electrical Department's offices. Covert asked Gretencord why he was there. Gretencord informed Covert that he was assigned to conduct a surveillance of that department. Gretencord then asked to see some documents. Covert then telephoned Gretencord's supervisor, who informed Covert that Gretencord had not been assigned to conduct a surveillance of the electrical area. Gretencord then became angry. Covert reported that Gretencord said "I am coming back to write you up on paperwork issues and I am going to [West Valley] and DOE with this as you must be hiding something." A co-worker reported that he overheard Gretencord say "I just love doing that sort of thing." Another co-worker reported that Gretencord made a similar statement the next day.

On February 25, 1997, Gretencord met with Tom Crisler of West Valley's Human Resources Department. Crisler recounted that, during this meeting, Gretencord expressed his belief that direct, aggressive and disrespectful conduct was acceptable for a Quality Assurance Engineer. At this meeting, Gretencord was informed that he was being suspended pending an investigation into his conduct.

On February 27, 1997, Gretencord again met with Crisler. Crisler informed Gretencord that his employment with West Valley was being terminated because of his lack of respect for his co-workers. During this meeting, Crisler alleges, Gretencord held out his left arm. Allegedly, Gretencord noted that his arm was very steady and that enabled him to be good at aiming a gun. Crisler further alleged that Gretencord then said he needed to think about becoming a whistleblower.

The testimony presented at the hearing buttressed the impression that I formed from reviewing Gretencord's personnel file. A number of Gretencord's co-workers testified that they or other co-workers personally feared him. Transcript at 359, 603, 671-672, 818-19, 825-26, 830, 951, 1422-24, 1435. Moreover, a number of Gretencord's co-workers testified that they witnessed Gretencord engaged in disturbing behaviors. Thomas J. Holden testified that he had witnessed Gretencord engaged in loud and threatening confrontations on a few occasions. Tr. at 65-66, 80-81. Vitto Riggi testified that he witnessed Gretencord have violent outbursts on at least two occasions. Tr. at 201-04. Linda Baker testified that she saw Gretencord in a local mall. When Baker asked why he was at the mall he indicated that he was there to bump into little kids or to trip them. Tr. at 362, 424, 432. Baker also testified that she witnessed Gretencord get mad at people and yell and scream at them. Tr. at 423. Jerome E. Hager recounted an incident where Gretencord provoked a fellow employee to slap him by refusing to stop singing a song about that employee. (This song was sung by Gretencord to the tune of the Gilligan's Island theme song). Tr. at 470. Jack Gerber testified that Gretencord joked about stepping on little children's toes in the mall. Tr. at 652. Phil O'Brien testified that Gretencord had told him that he had a vendetta against Bruce Covert.

Tr. at 781. Dave Crouthamel testified that Gretencord had talked about poisoning and shooting "little Halloween kids." Tr. at 1150, 1214-15, 1240-42.

The actions and statements attributed to Gretencord in his personnel file and by the testimony of his co-workers provide an extraordinarily strong basis for any negative personnel actions taken against him, including his termination. Since Gretencord did not even attempt to specifically rebut the veracity of most of these allegations, I assume they happened as they were recounted in the record.

### **III. Conclusion**

The documentation contained in Gretencord's personnel file and the testimony of his co-workers and managers show that while employed at West Valley, Gretencord frequently exhibited behaviors and made statements that understandably disturbed and frightened those around him. Moreover, Gretencord's unacceptable and unprofessional behavior unnecessarily interfered with West Valley's legitimate business operations. Accordingly, I find that West Valley Nuclear Services, Inc. has proven by clear and convincing evidence that it would have taken each of the negative actions it took against John L. Gretencord without his protected disclosures.

It Is Therefore Ordered That:

(1) The Complaint filed by John L. Gretencord against West Valley Nuclear Services Co., Inc., on March 19, 1999, Case No. VWA-0033, 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 4, 1999

(1)For example, in late 1996 Gretencord disclosed a concern about radiation exposure readings to West Valley and the DOE and on February 21, 1997, Gretencord informed West Valley of his plans to take an "employee concern" to the DOE. Both of these disclosures occurred in sufficient temporal proximity to Gretencord's February 1997 suspension and termination to establish a prima facie case, thereby shifting the burden of proof to West Valley.

(2)The record also shows that West Valley's management attempted to help Gretencord by counseling him, recommending professional counseling and detailing him to a position where social skills were less important.