Case No. LWA-0010

January 4, 1995

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Howard W. Spaletta

Date of Filing: June 27, 1994

Case Number: LWA-0010

This Decision involves a whistleblower complaint filed by Howard W. Spaletta (Spaletta) under the Department of Energy's (DOE) Contractor Employee Protection Program. From 1970 through May 1992 when he retired, Spaletta was employed as a metallurgical engineer at DOE's Idaho National Engineering Laboratory (INEL). For a number of years, EG&G, Idaho, Inc. (Contractor) was the management and operating contractor at INEL, and Mr. Spaletta was employed by EG&G Idaho at the time he filed his complaint.(1) Spaletta alleges that the Contractor retaliated against him for making health and safety disclosures to EG&G upper-level management, DOE's Idaho Operations Office (ID), DOE's Office of Inspector General, members of Congress, and the Nuclear Regulatory Commission (NRC). Spaletta maintains that because he made disclosures the Contractor (1) referred fewer and less important work assignments to him, (2) lowered his annual merit pay increases, (3) required him to take unpaid leave during a 1990 Christmas holiday curtailment of operations, and (4) constructively terminated him.(2)

After bringing his allegations of reprisal to the attention of a number of governmental entities, Spaletta filed a complaint with ID on April 14, 1992. ID was unable to resolve the complaint and forwarded it to the DOE's Office of Contractor Employee Protection (OCEP). OCEP investigated Spaletta's complaint and issued a Report of Investigation and Proposed Disposition on May 12, 1994. In its Proposed Disposition, OCEP found that Spaletta had made protected disclosures and thereafter the Contractor had retaliated against him by referring fewer work assignments to him and by reducing his annual merit pay increases. At the same time, OCEP found that Spaletta had not shown that the Contractor had retaliated against him by failing to assign him important and meaningful work, by requiring him to solicit work, or by requiring him to take unpaid leave during a Christmas 1990 holiday curtailment of work. In a letter dated June 7, 1994, Spaletta requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer to challenge OCEP's findings and conclusions.

I. Background

A. Factual Background

The following summary is based on the OCEP investigative file, the hearing transcript (hereinafter "Tr."), and the submissions of the parties. Except as indicated below, the facts set forth below are uncontroverted.

In 1970, Spaletta began his employment at INEL's Materials Technology Group (MTG). His duties included design and program review, engineering failure analysis, materials specification, materials performance evaluation, and technical consulting. OCEP Proposed Disposition at 1. The record shows that he enjoyed, and continues to enjoy up to the present time, a reputation among his peers and managers for excellence in engineering, technical integrity, and reliability.

In October 1985, the Tennessee Valley Authority (TVA) contracted with DOE to provide an independent evaluation of welding at TVA's Watts Bar Nuclear Power Plant, Unit One (Watts Bar), located in Oak Ridge, Tennessee. The purpose of the evaluation was two-fold: to determine whether TVA's welding program had complied with its Final Safety Analysis Report (FSAR) commitments, and to address the 472 concerns raised by TVA employees about the safety of welding performed at Watts Bar. DOE assigned the responsibility for conducting the evaluation to the Contractor. The Contractor in turn established a Weld Evaluation Program (WEP) and named Frank Fogarty as the WEP's director. In July 1986, Fogarty created a Senior Review Committee (SRC) consisting of Spaletta and four other EG&G employees to assist in evaluating the code compliance of the Watts Bar welding program and to review the WEP's final report (the report). James (Curt) Haire was chosen by Fogarty to act as Chairman of the SRC. During the week of July 7, 1986, the SRC members conducted an on-site assessment of the WEP at Watts Bar.

Spaletta and the three other members of the SRC with technical expertise each developed reservations about the Watts Bar welding program. Among their concerns was WEP's use of an inspection code (NCIG-01(3)) that was different from the inspection code TVA committed to use in the Watts Bar plant's FSAR (AWS D1.1, 1972, Rev. 2, 1974(4)). The SRC members believed that the

welding standards contained in the NCIG-01 code were less stringent than the standards contained in the AWS D1.1 code.(5) On August 22, 1986, Chairman Haire wrote a memorandum to Fogarty on behalf of the SRC summarizing the results of the SRC's on-site review of the WEP. In that memorandum, Haire informed Fogarty of the SRC members' concerns, including the use of the NCIG-01 code to evaluate welds at the Watts Bar plant. In the following years, each of the SRC's technical experts communicated their concerns about the WEP or the final report to Fogarty or Haire in writing. *See* December 8, 1987, Interoffice Correspondence from T.F. Burns to J.C. Haire; December 11, 1987, Interoffice Correspondence from Ralph Marshall, Jr., to F.C. Fogarty. Spaletta's concerns about this issue were two-fold. First, he was concerned that the FSAR required welds at Watts Bar to be inspected using the AWS D1.1 code. Second, Spaletta was concerned that using the less stringent NCIG-01 code to evaluate employee safety concerns resulted in a conclusion which Spaletta believed to be false, namely, that the employee concerns were almost all inconsequential.

Fogarty prepared a draft version of the WEP final report, which he then provided to the members of the SRC for review and comment. The SRC identified a number of areas in which the report could be improved. While the final version of the report incorporated a number of the SRC members' suggestions, it did not incorporate all of them. Among those unheeded suggestions was a recommendation that the final report explicitly acknowledge that the WEP reinspected the welds using the NCIG-01 code instead of the AWS code set forth in the FSAR. Instead, the final report stated that the welds were reinspected to "applicable codes." Each of the SRC's technical experts expressed concern that the draft final report obscured the WEP's use of the less stringent NCIG-01 reinspection code without prior NRC approval. Testimony at the hearing indicated that adoption of this suggestion would have resulted in the addition of one or two sentences in the report and the modification of one table. The final report also stated that 451 of the 472 employee concerns about safety-related weld issues -- 95.6 percent -- could not be specifically confirmed. Of the remaining 4.4 percent, the final report found that two-thirds identified welds that "are in compliance with the applicable code and required no corrective action." Final Report, Weld Evaluation Program, ¶ 4.3 at 13.

The WEP final report was issued to ID in November 1987. On January 26, 1988, ID forwarded the WEP report to TVA. TVA submitted the WEP report to the NRC on February 17, 1988.

After the final report was issued, Spaletta continued to express his concerns about the final report to various EG&G and ID officials. He also sought its retraction or correction. A little more than one year after the TVA submitted the report to the NRC, on March 9, 1989, ID submitted Spaletta's concerns to the NRC. On July 10, 1989, the NRC's Office of Nuclear Reactor Regulation issued a document entitled "Allegation Evaluation" in response to the issues raised by Spaletta. In its evaluation, the NRC stated in pertinent part:

The NRC staff concluded that the allegation is substantiated because the same observations were made by the NRC staff during its review of the DOE/WEP report. However, these issues were resolved in a meeting held on October 11, 1988 and based on the NRC staff's review of the raw data compiled by WEP, the staff concluded that the DOE/WEP reinspection at [Watts Bar] was an effective sampling effort, thus the reinspection results can be used to assess the welding at [Watts Bar]. Further, the staff concluded that the WEP was adequately implemented. In addition, TVA's current corrective action plans that resulted from the DOE/WEP evaluation appear adequate and, if properly implemented, should provide reasonable assurance that the quality of the welds at [Watts Bar] are adequate.

Allegation Evaluation at 6. Despite this NRC evaluation, Spaletta continued his efforts to have the Report retracted or corrected. On April 24, 1990, Spaletta sent a letter to Don Kerr, the Executive Vice President of EG&G, Inc. (EG&G Idaho's parent corporation), expressing his concerns about the WEP Report. On June 19, 1990, Spaletta sent a similar letter to John M. Kucharski, the Chairman and Chief Executive Officer of EG&G, Inc. On September 25, 1990, Spaletta wrote to William F. Willis, TVA's Executive Vice President, expressing his concerns. On October 16, 1990, Spaletta sent a letter to the DOE's Office of Inspector General (OIG) communicating his concerns about the WEP and its associated report.

During the period in which Spaletta made disclosures, he: (1) had difficulty obtaining work assignments; (2) received the lowest annual percentage merit increases of any professional employee in his work unit; (3) was warned that his continued failure to obtain new work assignments could result in the loss of his job; and (4) was directed to take leave during a company-wide, Christmas 1990, holiday work curtailment. Spaletta's employment at INEL ended on May 29, 1992, when he accepted an offer of early retirement.

B. Procedural History of the Case

On April 14, 1992, Spaletta filed a complaint with ID pursuant to 10 C.F.R. Part 708. On May 12, 1992, after concluding that it had found no record of retaliatory personnel actions by EG&G against Spaletta, ID forwarded Spaletta's complaint to OCEP. OCEP conducted an on-site investigation of Spaletta's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on May 12, 1994. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that: (1) Spaletta had made protected disclosures related to health and safety concerns; and (2) EG&G had retaliated against Spaletta by granting him lower annual merit pay increases than he otherwise would have obtained, and by referring less work to him.(6) Accordingly, OCEP proposed to order EG&G to:

(1) Pay lost wages representing the difference between his merit pay increases subsequent to February 11, 1991, and the average of the merit pay increase percentages given in 1991 and 1992 to employees within EG&G's Science and Technology Department who were rated as either "Excellent" or "Excellent Minus" in 1991, and rated "Excellent" or "Good" in 1992, and who were in the same salary range quintile as Spaletta;

(2) Pay Spaletta "reasonable" interest on his lost wages;

(3) Pay Spaletta's legal fees and expenses; and

(4) Review its policies and practices governing both work referrals and employee requirements for developing their own work assignments in order to safeguard against reprisals and adverse consequences stemming from protected employee disclosures and actions.

On June 7, 1994, Spaletta sent a letter to OCEP in which he requested a hearing under 10 C.F.R. § 708.9. The OHA received Spaletta's request from OCEP on June 27, 1994. On July 1, 1994, the Director of the OHA appointed me as Hearing Officer. Spaletta's pre-hearing brief was received on September 2, 1994, and the Contractor's pre-hearing brief was received on September 20, 1994. A pre-hearing conference was conducted via telephone on September 27, 1994. The hearing was held in Idaho Falls, Idaho, on October 3-4, 1994.(7) At the conclusion of the hearing on October 4th, the parties elected to forego oral argument, and requested permission to file post-hearing briefs. The parties' post-hearing briefs were received by the OHA on December 5, 1994.

II. Legal Standards Governing This Case

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's government-owned, contractor-operated (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers.

Proceedings under 10 C.F.R. Part 708 offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by providing for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.*See David Ramirez*, 23 DOE ¶ 87,505, *affirmed*, 24 DOE ¶ 87,510 (1994). The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has "[d]isclosed to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), information that the employee in good faith believes evidences [a] violation of any law, rule, or regulation [or] a substantial and specific danger to employees or public health or safety." 10 C.F.R. § 708.5(a)(1); *see also Francis M. O'Laughlin*, 24 DOE ¶ 87,505 (1994).

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.9(d). *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)).

B. The Contractor's Burden

If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure . . . ." 10 C.F.R. § 708.9(d). *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence, § 340 at 442 (4th ed. 1992)). Accordingly, in the present case if Spaletta establishes that he made a protected disclosure that was a contributing factor to an adverse personnel action, EG&G must convince me that it would have taken the action even if Spaletta had not raised any health or safety concerns.*Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507, at 89,034-35 (1994).

III. Analysis

After considering the record established in the OCEP investigation, the parties' submissions, the testimony presented at the hearing, and the post-hearing briefs, for the reasons stated below I have concluded that Spaletta has met his burden of proving by a preponderance of the evidence that he made protected disclosures concerning health or safety that resulted in adverse personnel actions against him. In addition, I have concluded that the Contractor has not shown by clear and convincing evidence that the same personnel actions would have been taken absent Spaletta's disclosures. Accordingly, relief is warranted under § 708.10.

A. Whether Spaletta's Disclosures Are Protected Under 10 C.F.R. § 708.5(a)(1).

There is no dispute that Spaletta has made numerous disclosures to EG&G's management, to the DOE, and to Congress consisting, in part, of allegations that a safety report prepared by the Contractor for submission to DOE concealed the WEP's use of a weld inspection code less stringent than the code required by the Watts Bar FSAR. The Contractor contends that Spaletta's disclosures are not protected under § 708.5(a)(1) because: (1) his disclosures were made out of a concern for his reputation rather than a good faith belief that a threat to safety existed; (2) the safety issues disclosed by Spaletta were not substantial and specific; (3) Spaletta's disclosures related to technical and administrative issues rather than safety concerns; and (4) after the NRC had determined that the underlying data collected by the WEP established that the welds at Watts bar were "suitable for service," any subsequent disclosures could not have been made with a good faith belief that a threat to health or safety existed. Each of these arguments will be discussed in turn.

First, the Contractor contends that Spaletta's safety disclosures were not made in "good faith" because they were motivated by

Spaletta's concern for his personal reputation rather than his concern for safety. As an initial matter, the Contractor has misinterpreted the term "good faith" as used in the regulations. The requirement that disclosures be made in “good faith” is not intended to require that a complainant prove that his only motive for making a disclosure was a concern for safety (or any of the other protected subjects). Instead, the good faith clause is intended to relieve complainants of the burden of proving that their allegations are correct or accurate. Under 10 C.F.R. § 708.5(a)(1), complainants must show only that they had a r*easonable belief* that their allegations were accurate. Therefore, as long as the complainant reasonably believed that his allegations were accurate, they were protected, regardless of the complainant's ultimate motives for making the disclosures. Accordingly, whether Spaletta was in fact motivated to protect his reputation is irrelevant to the question of whether the disclosures are entitled to protection under §708.5(a)(1).(8)

Second, the Contractor contends that the safety issues disclosed by Spaletta were not substantial and specific, as required by 10 C.F.R. § 708.5(a)(1). The Contractor spends many pages in its pre-hearing brief arguing that the facts in this case are similar to the facts in *Francis M. O’Laughlin*, 24 DOE ¶ 87,505 (1994), in which the OHA hearing officer held that the disclosures were not specifically related to safety. However, in that case, O’Laughlin complained about a proposed company reorganization, and none of the people to whom he complained reasonably understood there to be any safety implications in his complaints based upon the content and context of his communications. In the present case, not one witness has suggested that safety concerns were not involved in Spaletta’s disclosures. I therefore conclude that the record amply indicates the presence of reasonable-held safety concerns of a “substantial and specific” nature.

The Contractor next contends that Spaletta's disclosures were not related to safety but were technical or administrative in nature. There were numerous disclosures by Spaletta during the relevant period, and the record supports the Contractor’s position that some of them concerned non-safety issues. For example, on December 28, 1988, Spaletta wrote a memorandum to Dennis Keiser, a senior manager, articulating his concern that EG&G's management did not have an effective procedure for resolving employee concerns.(9) However, most of Spaletta's complaints involved a report concerning a safety inspection of a controversial nuclear power plant which he contends intentionally concealed potential safety problems, denigrated safety-related employee concerns, and violated NRC requirements and EG&G internal guidelines. I would be hard pressed to find a more substantial and specific danger to public health or safety than allegations of this nature.

Finally, the Contractor argues that any of Spaletta's disclosures made after July 10, 1989, (when the NRC informed Spaletta that it had resolved the WEP issues brought to its attention by Spaletta) could not have been made with a good faith belief that a threat to safety existed. This contention is without merit. First, it incorrectly assumes that a complainant's disagreement with a regulatory agency's safety determination could not be reasonable. Second, the NRC's written report actually confirmed Spaletta's concerns and reserved its final judgment of the suitability of Watts Bar welds for a future date. Finally, this argument ignores the changing nature of Spaletta's allegations over time. As Spaletta began elevating his concerns up the chain of EG&G management, he began focusing on what he perceived to be a systematic failure on the part of EG&G management to address what he believed to be a recurring safety and quality problem. Spaletta frequently alleged that management's emphasis on business development often prevented its employees from bringing safety and quality problems to the attention of management. Spaletta often analogized this systematic deficiency to similar conditions identified by the Presidential Commission that investigated the Challenger space shuttle disaster. He also alleged that EG&G did not have a formal system established to resolve such concerns. In any event, many of the disclosures pre-dated the NRC's evaluation of the issues raised by Spaletta.

Under these circumstances, I have concluded that Spaletta made his disclosures with a good faith belief that the final report did not disclose that WEP had used a weld inspection code that was not mentioned in the FSAR and, as a consequence, evaluated employee weld safety concerns against a standard different from the standard contained in the FSAR. After considering the evidence submitted in this matter and the testimony and demeanor of the witnesses at the hearing, I have also concluded that Spaletta believed that these conditions impacted on safety at the Watts Bar plant. I therefore hold that Spaletta's disclosures are protected by 10 C.F.R. § 708.5(a)(1)(i) and (ii).

B. Whether the Contractor Retaliated Against Spaletta

Spaletta contends that as a result of his disclosures, EG&G retaliated against him by: (1) referring fewer work assignments to him, (2) lowering his annual merit pay increases, (3) requiring him to take unpaid leave during a 1990 holiday curtailment of operations, and (4) constructively terminating him. I will discuss each of Spaletta's contentions in turn.

1. Whether the Contractor Referred Fewer Work Assignments to Spaletta

Spaletta asserts that because of his disclosures, EG&G managers began referring fewer work assignments to him. The Contractor admits that the demand for Spaletta's services did noticeably decline, but contends that Spaletta's reduction in work assignments merely reflected the changing nature of the INEL's mission, which was shifting away from nuclear reactor production to research and environmental protection. According to the Contractor, this change in mission produced a decrease in demand for Spaletta's expertise.

The record, however, supports Spaletta's assertions. It shows that: (1) prior to Spaletta's disclosures his services as a welding engineer were in high demand, (2) despite the high esteem in which Spaletta's engineering skills were held by both his colleagues and managers, he began receiving fewer work referrals and assignments from them, (3) the decline in demand for Spaletta's services occurred after his disclosures to DOE, NRC, TVA, and EG&G management, (4) at least one EG&G manager who frequently referred assignments to Spaletta discontinued assigning work to Spaletta out of concern that the manager would antagonize a higher level EG&G manager, and (5) during the period in which Spaletta's work assignments declined, EG&G utilized the services of another engineer and hired an additional welding engineer to undertake assignments which Spaletta was

capable of handling.

As late as early 1989, Spaletta's services were in demand at INEL. Two witnesses, Ralph Marshall and Bert L. Barnes, testified at the hearing that Spaletta's services were in great demand at INEL. Tr. at 61 (Marshall), Tr. at 109 (Barnes). No one suggested otherwise. At the same time, while Spaletta's dispute about the WEP report was known to many of his peers and managers, the record contains numerous statements by EG&G employees attesting to Spaletta's engineering excellence. In fact, at the hearing a number of witnesses went out of their way to state that they still considered Spaletta to have excellent technical skills. The testimony concerning Spaletta's excellent professional reputation is corroborated by comments contained in Exhibit 47 to the Report of Investigation, which is Spaletta's performance evaluation for the year 1989.

However, Spaletta began having difficulty obtaining work assignments and referrals. His supervisor began discussing this failure to obtain referrals of new work assignments in his performance evaluations and eventually began warning him that his failure to obtain new assignments could result in the loss of his job. Handwritten note of Dennis Keiser (July 18, 1991).

The testimony of one EG&G employee, Bert L. Barnes, provides crucial information about why this reduction in work assignments occurred. Barnes testified that he had formerly referred a great deal of consulting work for the NRC to Spaletta because of his high regard for Spaletta's engineering expertise and reliability. Tr. at 108-10. However, Barnes also testified that he discontinued referring or assigning projects to Spaletta because he feared retaliation from EG&G Management, particularly Frank Fogarty. Tr. at 108-09, 112-13, 119; Proposed Disposition at 13 (quoting E-mail Message from Barnes to Fogarty). Barnes testified that he was aware of Spaletta's disagreements with EG&G management about the WEP project since the disagreements were common knowledge among EG&G's employees. Tr. at 121. Those disagreements, Barnes testified, motivated him to discontinue referring work to Spaletta. Tr. at 108-12. Barnes also testified that no EG&G manager, including Fogarty, ever told him not to refer work to Spaletta. Nevertheless, it is clear that one EG&G manager -- Mr. Barnes -- discontinued assigning work to Spaletta because of his disclosures.

The loss of referrals from Barnes most likely had a significant impact on Spaletta's workload. An EG&G questionnaire completed by Spaletta on December 12, 1984, indicated that his consulting activities for NRC accounted for approximately 30 percent of his working hours. Since Barnes assigned NRC work to Spaletta, it appears that Barnes' decision to stop assigning Spaletta work resulted in a significant reduction in Spaletta's work assignments.

The record shows that EG&G hired other welding engineers during the period in which the demand for Spaletta's services declined. Ralph Marshall testified that the Advanced Test Reactor Project, which was managed by Frank Fogarty, hired additional personnel to do the work that had previously been assigned to Spaletta. Tr. at 62. Marshall specifically testified that EG&G had hired another welding engineer, Downey, who, in his opinion, was not as well qualified as Spaletta. Tr. at 63, 92-93. Marshall's testimony was corroborated by Spaletta's testimony that the Advanced Test Reactor Project had hired Downey as a welding engineer, Tr. at 465. Spaletta and Marshall's testimony concerning Downey was further corroborated by the testimony of Mark Henderson, EG&G's Manager of Loop Engineering Support. Tr. at 526. The record also shows that EG&G hired another metallurgical engineer, Peter Nagata, in May 1989. Nagata's primary function was to act as a consultant to the NRC. Tr. at 521-22. Although Nagata specialized in evaluating the brittleness of metal exposed to radiation, he testified that he was used on a number of occasions to evaluate weld failures. He stated that he saw no reason why he was assigned to do that work instead of Spaletta. Mark Henderson testified that he assigned work to Nagata that could have been performed by Spaletta. Tr. at 528-29.

The evidence cited above meets Spaletta's burden of proving that fewer work assignments were referred to him because of his disclosures. Accordingly, the burden shifts to the Contractor to submit clear and convincing evidence that the decline in demand for Spaletta's services would have occurred absent Spaletta's disclosures.

The Contractor has offered a number of reasons why Spaletta's workload decreased at this time. First, in support of its contention that Spaletta's reduction in work assignments was due to INEL's changing mission, the Contractor presented a number of witnesses who agreed with the statement that the mission and kind of work at INEL has changed since 1989. However, none of the witnesses was able to link the changes in mission at INEL to specific decreases in Spaletta's workload. The witnesses at the hearing agreed with the logic that the change in mission would necessarily mean that there would be less need for the services of a welding engineer. But they never went beyond that to support the Contractor's contention by saying that Spaletta's workload would be affected in a substantial way. Indeed, some of the testimony at the hearing, outlined just above, contradicts these general statements. For example, at the time the mission at INEL was changing, an additional welding engineer was hired. Under these circumstances, I find that these statements fall short of the applicable clear and convincing evidentiary standard and are clearly rebutted by the evidence summarized above.

The Contractor also submitted the testimony of two witnesses to attempt to show that the decline in availability of work for Spaletta resulted from his poor performance. Ronald Hilker testified that he was dissatisfied with the results of an assignment that he had provided Spaletta. According to Hilker, during the two months that Spaletta charged his time to the assignment, Spaletta showed no progress and exceeded the budget for the assignment. Hilker testified that he had to remove responsibility for the assignment from Spaletta and have it completed by others. Robert Neilson, Spaletta's direct supervisor at this time, testified that he had heard some complaints about Spaletta's performance. However, the record strongly suggests that Spaletta's inability to obtain assignments was not due to his poor performance or a poor reputation. To the contrary, each of the individuals testifying at the hearing agreed on one thing: to this day Spaletta enjoys an excellent reputation among his peers and is a highly skilled engineer. Hilker himself testified that he was surprised about Spaletta's performance on the assignment he had provided and that he viewed it as an aberration. Neilson testified that the number and severity of complaints he received about Spaletta were not unusual, given the type of work Spaletta did. Neilson also testified that he received a number of compliments regarding Spaletta's work. After considering the Contractor's contentions together with the testimony presented at the hearing, I find that the Contractor has not shown that the decrease in work assignments resulted from any performance deficiencies on the part of Spaletta.

Accordingly, Spaletta has proven, by a preponderance of the evidence in the record, that his disclosures were a contributing factor in the reduction in work assignments he suffered during the period beginning in 1990 and continuing through 1992. Since the Contractor has not submitted clear and convincing evidence to the contrary, I hold that EG&G retaliated against Spaletta for making protected disclosures by reducing the amount of work assigned him. By doing so, EG&G violated 10 C.F.R. § 708.5.

2. Whether Spaletta's Work Performance was Evaluated Properly

The Record also supports Spaletta's claims that the Contractor retaliated against him by reducing his annual merit pay increases for the years 1989 through 1991.(10) Exhibit 48 to the Report of Investigation shows that for 1987, 10 of the 18 employees who were then employed in Spaletta's work unit received higher merit increase percentages than Spaletta. The next year, 1988, 11 of these 18 employees received higher merit increase percentages than Spaletta. For 1989, 1990 and 1991, however, Spaletta received the lowest merit increase, as a percentage, of any employee in his work unit, which by 1992 had grown to 30 employees.

The timing of Spaletta's fall from grace coincides with a period in which Spaletta began to escalate his concerns. During 1989 and 1990, Spaletta's concerns were brought to the attention of the NRC, TVA, DOE's Inspector General, and the highest levels of EG&G's parent corporation's management. *See, e.g.*, Memorandum of Telephone Conversation between Dave Terao and G. Georgiev of the NRC's Office of Special Projects and Spaletta (April 13, 1989); Letter from Spaletta to Don Kerr, Executive Vice President EG&G, Inc. (April 14, 1990); Letter from Spaletta to John M. Kucharski, Chairman and CEO, EG&G, Inc. (June 19, 1990). The proximity in time between these protected disclosures and the precipitous decrease in Spaletta's merit increase percentage relative to his peers strongly suggests that they were related, and therefore suffices to meet Spaletta's burden of showing that his disclosures were a contributing factor in those merit increases. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Accordingly, the burden shifts to the Contractor who must show that it would have given Spaletta the same merit increases even if he had not made his protected disclosures. The Contractor attempts to meet this burden by contending that Spaletta's merit salary increases were determined solely by his work performance and his relatively high position in his job classification's salary range. However, the record does not support this explanation.

It is hard to reconcile the Contractor's contention that Spaletta's low merit increases resulted from his work performance. As discussed above, the record contains a great deal of evidence that Spaletta enjoyed, and continues to enjoy to this time, an excellent reputation among his peers and EG&G's managers, including those with whom he had an adversarial relationship regarding the WEP report. Indeed, the only negative comments appearing in his performance evaluations involve his failure to develop work and his exceeding time and cost limits for projects. As I will show below, these were not the reasons EG&G reduced Spaletta's merit pay increases.

The performance evaluations' comments concerning Spaletta's "failure" to develop new work are instructive. As I discussed above, Spaletta's difficultly in obtaining work was due at least in part to his disclosures. Therefore, these statements provide a direct link between the withholding of work from Spaletta and his receipt of lower pay. Since Spaletta has established that his disclosures were a factor contributing to his difficulty in obtaining work assignments, lowering his annual merit increases because of his inability to develop new work violated 10 C.F.R. § 708.5(a).

While the record shows that Spaletta had exceeded some cost and time limits on projects assigned to him, the Contractor has failed to show that other employees who similarly exceeded cost and time limits incurred significant merit pay percentage decreases. An EG&G manager, Ronald Hilker, testified that he had assigned a project to Spaletta that exceeded the previously agreed upon time and cost limits. Tr. at 500. However, Hilker also testified that it was not uncommon for cost and time limits to be exceeded and that similar problems had arisen with other employees in the past. Tr. at 510. Similarly, another EG&G manager, Robert Neilson, Jr., Spaletta's direct supervisor from 1988 through 1992, testified that he had received some complaints about cost overruns and missed deadlines on various projects conducted by Spaletta. Tr. at 232-33. However, Neilson also testified that he had received complimentary feedback concerning Spaletta and admitted that Spaletta was not the only employee who missed deadlines and overran costs. *Id.* On the basis of the testimony at the hearing, I conclude that the Contractor has failed to show by clear and convincing evidence that the cost and time overruns by Spaletta justify the precipitous decline to the lowest merit pay increases of any employee in his unit.

The Contractor also contends that Spaletta's relatively high salary for his job classification accounts for his relatively low merit increases. However, this contention is not supported in the record. While it appears that Spaletta's salary was relatively high for his job classification and that EG&G took an employee's position within his or her job classification's salary range into account when making its merit pay increase determinations, the Contractor has failed to provide either an adequate explanation or documentation of its claim that Spaletta's position in his salary range accounted for his low merit pay increase percentages. Moreover, my analysis of the information supplied to OCEP by EG&G suggests that EG&G's determinations of Spaletta's merit increases for the years 1989, 1990, and 1991 were inconsistent with its standard practices. As the Contractor explained, it used a grid to allocate its budgeted merit pay increases in each year. One of the grid's coordinates consisted of five possible performance ratings. The other coordinate consisted of salary quintiles which were calculated by dividing a job classification's salary range into five equal ranges. This grid was designed to combine the two factors in order to equitably determine an employee's merit salary increase percentage. A higher performance rating was to positively affect an employee's merit increase and a higher position in an employee's salary range was supposed to lower an Employee's merit salary increase percentage. Spaletta's performance evaluations and Exhibit 48 to the Report of Investigation show that Spaletta should have at least been placed in that portion of the grid which corresponded to the second highest salary quintile and the second highest performance rating for 1989, 1990, and 1991. Given Spaletta's relatively high performance ratings during the years in question and given the fact that Spaletta was not in the highest salary quintile for his job classification in any of the years in question, it is surprising that Spaletta received the lowest merit increase percentage in his work group. The Contractor was in position to show that other employees in the same portion of the grid received similar merit increase percentages or that no other employees occupied similar or less favorable sectors of the grid, but did not do so.

Accordingly, I find that the Contractor has failed to submit clear and convincing evidence showing that the grid was properly applied to Spaletta.

Spaletta has shown that his disclosures were a contributing factor to an inability to obtain new work, which negatively impacted his performance evaluations and his merit pay increases. As a result, the burden shifted to the Contractor to show that it would have given Spaletta the same merit increases if he had not made the protected disclosures. I find that the Contractor has failed to submit clear and convincing evidence that Spaletta's merit increases for the years 1989, 1990, and 1991 were not negatively affected by his disclosures.

3. Whether the Contractor's Requirement that Spaletta Take Leave During the Holiday Curtailment of 1990 was a Reprisal.

Spaletta alleges that EG&G retaliated against him by requiring him to take leave without pay during a company-wide work curtailment at the end of 1990. On August 14, 1990, Spaletta received a memorandum sent to all EG&G Idaho employees urging them to take leave during the period between December 25, 1990 and January 1, 1991, unless their work was "required." According to Spaletta, this memo also stated that no employees would be compelled to take time off. On December 19, 1990, Spaletta alleges that his supervisor urged him to take leave during the curtailment, but reiterated that Spaletta would not be required to do so. Two days later, however, Spaletta received a memorandum from his supervisor informing him that since his services were not essential he was "requested" to take either vacation leave or leave without pay during the curtailment. Spaletta apparently elected to take leave without pay during the work curtailment period.

The record is devoid of any evidence supporting even a reasonable inference that the EG&G's holiday curtailment policy was applied to the Complainant during the relevant period in a manner that was inconsistent with that applied to other EG&G employees. Accordingly, I find that the Complainant has failed to carry his burden of proof on this issue.

4. Whether Spaletta Was Constructively Terminated.

Spaletta alleges that the Contractor constructively terminated him. Traditionally, employees alleging constructive discharge bear the burden of proof. *Boze v. Bransteter*, 912 F.2d 801, 804-05 (5th Cir. 1990). Courts considering claims of constructive discharge require employees to prove that their working conditions were so difficult or unpleasant that a reasonable employee in their shoes would have felt compelled to resign. *See, e.g., Ugalde v. W.A. McKenenzie Asphalt Co.*, 990 F.2d 239, 242-43 (5th Cir. 1993); *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1072 (4th Cir. 1993); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 200 (5th Cir. 1992). An employee seeking to show constructive discharge must also establish that the intolerable working conditions resulted from the deliberate actions of the employer. *See, e.g., Johnson v. Shalala*, 991 F.2d 126 (4th Cir. 1993); *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990). The test is an objective one, and therefore the question is not whether the employee felt compelled to resign, but whether a reasonable person in the employee's shoes would have felt so compelled. *Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 207 (5th Cir. 1986). Whether a reasonable employee would feel compelled to resign depends on the facts of each case. *Barrow V. New Orleans S.S. Ass'n.*, 10 F.3d 292 (5th Cir. 1994). "Deliberateness can be demonstrated by actual evidence of intent by the employer to drive the employee from the job, or circumstantial evidence of such intent, including a series of actions that single out [an individual] for differential treatment." *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993). A showing of constructive discharge is difficult to make.

Spaletta has failed to meet his burden of proof on this issue. As an initial matter, I note that Spaletta did not claim that he had been constructively terminated until he filed his pre-hearing brief, which occurred relatively late in this proceeding. That fact, while not fatal to a constructive discharge claim, detracts from its credibility. More importantly, Spaletta has failed to submit any evidence in support of his constructive discharge claim. Nor has Spaletta made any apparent effort to develop the claim in his pre-hearing submissions, at the hearing, or in his post-hearing brief. Under these circumstances, I must conclude that Spaletta has failed to show that EG&G deliberately created a work environment that a reasonable employee would find intolerable.

C. Remedy

Having concluded that the Contractor has failed to meet its burden of showing by clear and convincing evidence that it would have taken the same personnel actions against Spaletta absent his protected disclosures, and that a violation of Part 708 has occurred, I now turn to the remedy.

For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the goal of the DOE regulations is to restore the employee to the position to which he or she would have otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. *See, e.g.*, Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4(B). The initial agency decision may include an award of reinstatement, transfer preference, back pay, and all reasonable costs and expenses (including attorney and expert witness fees) "reasonably occurred" by the complainant in bringing the complaint. 10 C.F.R. § 708.10(c). Spaletta does not seek reinstatement or a transfer preference.(11) Instead, Spaletta seeks back pay, compensation for lost benefits, as well as, costs and expenses (including attorney's fees) associated with the prosecution of the present claim. In addition, Spaletta seeks the following forms of extraordinary relief:

1) "That EG&G Idaho, Inc. must review its policies and practices governing both work referrals and employee requirements to develop their own work assignments in order to safeguard against reprisals and adverse consequences stemming from protected employee disclosures and actions." Pre-hearing brief at 2.

2) "That EG&G Idaho, Inc., shall formally withdraw its Weld Evaluation Project (WEP) final report for the Tennessee Valley

Authority's Watts Bar Nuclear Power Plant Unit 1, dated November 1987 (Ref: DOE/ID-107175-9). Further, this report shall not be used by the Nuclear Regulatory Commission for licensing purposes or any other safety related activity."

3) "That DOE shall, within 120 days after the date of order, conduct a hearing to ensure that EG&G Idaho, Inc., complies with the relief sought [above]."

The first form of extraordinary relief proposed by Spaletta is that EG&G be required to conduct an internal review of its policies concerning work referrals and requirements that its employees develop their own work assignments. However, this request is now moot. As of October 3, 1994, EG&G was replaced by Lockheed Idaho Technologies Company as INEL's management and operating contractor.

The second form of extraordinary relief requested by Spaletta is the formal withdrawal of the Weld Evaluation Program final report. This remedy would clearly be inappropriate. Part 708 proceedings are not designed to make findings concerning the validity of a whistleblower's safety related allegations. While it is clear that the issuance of the report in its final form has caused Spaletta a great deal of discomfort, directing the withdrawal of the WEP report would not mitigate an adverse action taken against Spaletta. Therefore, I conclude that withdrawal of the report is beyond the scope of the present proceeding.

I therefore turn to the third and final form of extraordinary relief requested by Spaletta: that OHA conduct a hearing to ensure compliance with its order of relief. This request is simply unnecessary. Spaletta has not provided any evidence that such a procedure is necessary to effectuate the relief granted by this decision.

I turn now to Spaletta's request for back pay. Back pay is intended to restore the complainant to his proper position by providing compensation for the tangible economic loss suffered by the complainant and to act as a deterrent to future acts of reprisal by employers. *See United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973). Spaletta seeks: (1) the salary and benefits that he would have received if he had not retired in May 1992, but rather continued to work for EG&G until the present; and (2) compensation for any reduction in merit pay increases resulting from his protected disclosures.

Spaletta's request for salary and benefits for the period between his retirement and the present is based upon his contention that he was constructively discharged. However, since I have found that Spaletta has failed to show that he was constructively discharged, an award of this nature is inappropriate.

However, Spaletta has shown that his annual merit pay increases for work performed during the years 1989, 1990, and 1991 were negatively affected by his protected disclosures. Thus an award of relief in the form of back pay is appropriate. Such relief is appropriately calculated as the difference between the annual merit pay increase percentage that Spaletta actually received during each of the three years and the average annual merit increase percentage of those employees in Spaletta's work group who received the highest performance rating and who were in the second highest salary quintile. Since I do not have the information necessary to accurately calculate this award, I will direct the Contractor to provide us with sufficient information to allow us to accurately calculate this portion of the award. After I receive this information I will issue a Supplemental Order specifying the exact amount of back pay to be granted to Spaletta.

Spaletta should also receive interest compensating him for the time value of money lost while bringing his complaint. *See, e.g., Garst v. Dep't of the Army*, 90 FMSR ¶ 5037 (1993) (interest on back pay awarded under the Whistleblower Protection Act) (*Garst*). In the past, OHA Hearing Officers have followed the practice of the Merit Systems Protection Board under the Whistleblower Protection Act. *See, e.g., Ronald Sorri*, 23 DOE ¶ 87,503 (1993). The MSPB awards interest on back pay under the Office of Personnel Management (OPM) regulation found at 5 C.F.R. § 550.806(d). That regulation refers to the "overpayment rate" established by the U.S. Treasury in 26 U.S.C. § 6621. The overpayment rate is the Federal short-term rate, plus two percentage points. The Federal short term rate for a particular calendar quarter is the short term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent. 26 U.S.C. § 6621(a)(1); (b)(2)(A). I will calculate an exact amount of interest in a Supplemental Order.

Next I consider Spaletta's request for reimbursement of legal expenses. Since Spaletta has prevailed in his whistleblower claim, he may receive from the Contractor an amount corresponding to all of the direct costs he reasonably incurred in bringing his whistleblower claim, including the reasonable value of the attorney services he utilized. In addition to attorney's fees, Spaletta may also receive mileage, long distance phone charges, postage, photocopying, and any other related expense.

Attorney's fees shall be calculated by the use of the "lodestar" approach described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and first applied to proceedings under 10 C.F.R. Part 708 by the OHA Hearing Officer in *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). Under the lodestar approach, reasonable attorney's fees are calculated as the product of reasonable hours multiplied by reasonable rates. The fee applicant has the burden of producing satisfactory evidence that his requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 888 (1984).

Accordingly, Spaletta should submit a full accounting of all costs and expenses he reasonably incurred in bringing the complaint. This accounting should include the following elements.

a) A detailed and itemized list of each and every expense incurred, the dates incurred and the provider of the good or service in question.

b) Documentation for each requested expense such as bills, invoices, receipts or affidavits.

c) For any attorney fees claimed; the identity of each attorney providing such services, the date, time, duration and nature of all services provided to the complainant.

d) For any attorney who provided services to Spaletta; evidence that the hourly rate for services incurred is comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

After Spaletta and the Contractor have provided the information described above, I will issue a Supplemental Order specifying the exact amount to be awarded Spaletta.

IV. Conclusion

For the reasons set forth above, I have concluded that Spaletta has proven by a preponderance of the evidence that he engaged in activities protected under 10 C.F.R. Part 708 and that those activities were a contributing factor to his receipt of fewer work assignments and lower annual merit increases for the years 1989, 1990, and 1991. The Contractor has failed to prove by clear and convincing evidence that it would have taken these adverse personnel actions absent Spaletta's protected activities. I therefore find that a violation of 10 C.F.R. §708.5 has occurred and Spaletta should be awarded back pay lost as a result of the reprisals taken against him (plus interest), as well as all costs and expenses reasonably incurred by him in bringing the present complaint.

It Is Therefore Ordered That:

(1) Howard W. Spaletta's request for relief under 10 C.F.R. Part 708 is hereby granted as set forth in this Decision and denied in all other aspects.

(2) Howard W. Spaletta shall no later than 30 days after the issuance of this Decision, submit to the Hearing Officer a full accounting of any and all costs and expenses reasonably incurred by him in bringing this complaint under 10 C.F.R. Part 708. This accounting shall include a full accounting of hourly charges for attorney's fees and appropriate documentation as evidence that the rates requested are comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. A copy of any submission shall be sent on the same day to Lockheed Idaho Technologies Company.

(3) EG&G, Idaho, Inc., or its successor Lockheed Idaho Technologies Company, shall no later than 30 days after the issuance of this Decision, submit to the Hearing Officer information which shows the average merit increase percentage for employees in Howard W. Spaletta's work unit who received the second best performance rating and who were in the second highest salary quintile for the years 1989, 1990, and 1991. A copy of any submission shall be sent on the same day to Howard W. Spaletta.

(4) No later than 15 days after receipt of a copy of the submissions referred to in paragraphs (2) and (3), Howard W. Spaletta and Lockheed Idaho Technologies Company may submit to the Hearing Officer a response to the submission served by the other party. Each response shall be limited to the reasonableness and accuracy of the calculations set forth in that submission.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complaint in part unless within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: January 4, 1995

(1) As of October 3, 1994, Lockheed Idaho Technologies Company became the management and operating contractor at INEL. Lockheed has agreed to assume the responsibilities of the contractor in this proceeding. Hearing Transcript at 12.

(2) Spaletta was still employed by EG&G when he filed his complaint with ID. Thus his complaint did not contain any allegation of constructive termination. His constructive termination allegation first appears in his pre-hearing brief.

(3) The NCIG-01 code was promulgated by the Nuclear Construction Issues Group.

(4) The AWS code was promulgated by the American Welding Society.

(5) They were not alone in harboring these concerns. Similar concerns were expressed by the NRC. See July 24, 1986 letter from B.J. Youngblood, Director of PWR Project Directorate #4, NRC, to S.A. White, TVA's Manager of Nuclear Power.

(6) OCEP also concluded that Spaletta's other allegations of retaliation by EG&G were not sufficiently substantiated.

(7) OHA staff attorneys Steven Fine and Ann Augustyn attended the hearing and assisted in the preparation of this decision.

(8) Moreover, the record contradicts the contention that Spaletta's disclosures were not motivated by his concerns about the safety consequences of the Report. While the record contains Spaletta's complaint that the WEP report had hurt his reputation, that fact alone does not suggest that Spaletta was not concerned about safety and adherence to safety rules and regulations. To the contrary, the record contains numerous instances of Spaletta's contemporaneous statements expressing his concerns that the allegedly misleading nature of the WEP report would compromise the safety of the Watts Bar welding program, interfere with the proper functioning of Watts Bar's NRC-mandated employee concerns program, and serve to cover-up TVA's failure to meet its FSAR commitments. For example, in the same letter in which Spaletta expressed his opinion that "[t]he subject report is an embarrassment to me," he also expresses a safety concern by stating: "There are many similarities between the causes of the Challenger disaster and the conduct of EG&G Idaho's Management during the TVA weld program." Memorandum from Howard W. Spaletta to Dennis Keiser (August 17, 1989). Spaletta went on to contend that EG&G violated some of its own internal guidelines by preparing a misleading Report. Id. at 2.

(9) While Spaletta characterizes this concern as safety related, it is more in the nature of an administrative concern.

(10) Merit pay increases for a given year were based up a performance evaluation that occurred in February of the next year. Therefore, for example, a merit pay increase for 1989 was based on an employee’s evaluation in February 1990.

(11) In his post-hearing brief, Spaletta for the first time states that he seeks reinstatement. While I might be inclined to entertain such a late request if I were to find that he had been constructively discharged, I have not so found and I decline to consider that request.