March 15, 2007

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: **Curtis Hall**

Date of Filing: **June 22, 2006**

Case Number: **TBH-0042**

This Initial Agency Decision involves a whistleblower complaint filed by Mr. Curtis Hall (also referred to as the complainant or the individual) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of Bechtel National, Inc. (BNI), the prime contractor at the DOE's Hanford Site in Richland, Washington. From January 10, 2005 until July 28, 2005, he was employed as a Controls & Instrumentation (C&I) Engineer to work at the Waste Treatment Plant (WTP) being constructed at the Hanford Site. On October 20, 2005, he filed a complaint of retaliation against BNI with the DOE Office of River Protection, Employee Concerns Program Office (ORP) at the Hanford Site. In his complaint, the individual contends that he made certain disclosures to officials of BNI, and that BNI retaliated against him in response to these disclosures.

I. Summary of Determination

In this Decision, I first provide background information concerning the Part 708 program. I then discuss the filing and the development of the issues raised in the individual's Part 708 Complaint, focusing on the Office of Hearings and Appeal's Report of Investigation and the parties' subsequent efforts to frame issues for the Hearing. I then present the relevant testimony provided at the Hearing. Next is my analysis of this complaint, beginning with a discussion of the legal standards governing this case. With regard to the issues raised in this proceeding, I first find that the Complainant made at least two protected disclosures that are proximate in time to BNI's decision to select the

complainant for a Reduction in Force (RIF) at the WTP (the adverse personnel action). I therefore find that the complainant has shown by a preponderance of the evidence that BNI's decision to select the complainant for its RIF constitutes a retaliation against him under Part 708. On the basis of that finding, Part 708 imposes the significant requirement that BNI show by clear and convincing evidence that, in the absence of the complainant's protected disclosures, it would have taken the same personnel action against the complainant.

Ultimately, I find that BNI has failed to establish by clear and convincing evidence that it would have selected the complainant for its RIF in the absence of the complainant's protected disclosures. Accordingly, I find that BNI should be required to take restitutionary action.

II. Background

A. The DOE Contractor Employee Protection Program

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 or -leased 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 such "whistleblowers" from adverse personnel actions by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not take any adverse personnel action against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; or a substantial and specific danger to employees or to public health or safety. See 10 C.F.R. § 708.5(a)(l), (2). Employees of DOE contractors who believe that they have made such a disclosure and that their employer has taken adverse personnel actions against them may file a whistleblower complaint with the DOE. As part of the proceeding, they are entitled to an investigation by an investigator appointed by the Office of

Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they are entitled to an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. History: The Individual's Part 708 Complaint and the Identification of Relevant Issues for the Hearing

The complainant filed his Part 708 complaint with the ORP in October 2005. In February 2006, following an unsuccessful effort by the complainant and BNI to mediate the complaint, the complainant requested that his complaint be referred to the OHA for an investigation followed by a hearing. The OHA Director appointed an Investigator on March 10, 2006, and on June 22, 2006, the Investigator issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the complainant's claims with regard to his employment with BNI, and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions.

The ROI states that BNI is a large engineering-construction firm which develops, engineers, builds, manages and operates installations for customers internationally, and is a prime contractor at the DOE's Hanford Site in Richland, Washington. The 586-square-mile Hanford Site was established during World War II to produce plutonium for the nation's nuclear weapons defense and operated for four decades until the late 1980's. Since that time, the Hanford Site has been engaged in the world's largest environmental cleanup. Sixty percent by volume of the nation's high-level radioactive waste is stored at Hanford in 177 underground storage tanks that are aging and deteriorating. The Office of River Protection (ORP) was established by Congress in 1998 to manage the complex cleanup of waste that has become a threat to the Columbia River corridor. In December 2000, BNI was awarded a ten-year contract by ORP to design, build and commission the WTP at Hanford to immobilize the millions of gallons of chemical and radioactive waste through a process known as vitrification, whereby the waste will be mixed with molten glass and the resulting glass logs will be shipped to a federal repository for safe storage. ROI at 3.

The ROI finds that the complainant was hired by BNI on January 10, 2005, and began working on January 18, 2005, as a Controls & Instrumentation (C&I) Engineer at the WTP construction project. He was assigned to the Plant Wide Systems (PWS) group of C&I Engineering which is responsible for design, configuration and qualification testing of the integrated network control system and interconnected field devices that will track waste and materials as they are processed through the WTP. The C&I Manager is Stephen Anderson and the C&I PWS Supervisor is Peter Douglass. At the time the complainant began employment, there were approximately 25 engineers working in the C&I PWS group. *Id.*

The ROI finds that upon assuming his position as a C&I engineer, the complainant's primary function was to configure and test Foundation Fieldbus (FF) measuring devices to determine their compatibility with the WTP's planned control system.1/ The integrated control network system being developed for use in the WTP was designed by ABB (hereinafter the ABB control system). The ROI finds that the ABB control system was procured by BNI for use at the WTP under a $15 million contract awarded in 2001. ROI at 3.

The complainant's task leader was senior engineer Shaun Luper, who reported to group leader Todd Billings, also a senior engineer. Mr. Billings reported to C&I PWS Supervisor Peter Douglass, who also functioned as the complainant's official supervisor. Another PWS engineer, Brandon Gadish, who previously performed measurement device compatibility testing, was assigned by Mr. Luper to assist and mentor the complainant in assuming his compatibility testing duties. The complainant also was required to interact frequently with the ABB on-site engineer, Dave Thomas. As part of his compatibility testing duties, the complainant was assigned the task of writing a Device Test Guide to be used by other BNI engineers to perform this function. ROI at 4.

1/ FF is a communication technology that will link the WTP's integrated control network system to external measuring devices throughout the plant. Each of the numerous FF field devices must be configured and tested before being purchased on a large scale for installation. These FF measuring devices are generally comprised of transmitters, analyzers, indicators and control valves that measure and execute various process variables including pressure, temperature, flow, conductivity and radiation.

With regard to the complainant's alleged disclosures, the ROI finds that on April 1, 2005, Mr. Hall made statements to his BNI supervisors regarding safety concerns raised by the unreliability of the ABB control system, and that these disclosures appear to be protected disclosures under Part 708. However, the ROI also notes that BNI argues that the complainant did not have a reasonable basis for believing that the ABB control system raised a safety concern, particularly since the ABB system was not yet operational. ROI at 12.2/

With regard to the complainant's allegations of a Part 708 retaliation by BNI, the ROI investigator found that it is undisputed that BNI relieved the complainant of significant job duties after April 1, 2005, and selected him for a Reduction in Force (RIF) that resulted in the termination of his employment with BNI in July 2005. ROI at 15.3/ The ROI also notes that BNI claims that the complainant's supervisor sought to terminate the complainant as early as March 2005. ROI at 17. BNI later explained that in March 2005, BNI officials changed the Assignment Completion dates for the complainant and four other PWS engineers as a means of terminating their employment, but that this process was supplanted by the July 2005 RIF. Hearing Transcript (TR) at 47. The ROI investigator finds that BNI justified the complainant's selection for lay off on the basis of performance

---

2/ The ROI also discusses earlier alleged protected disclosures made by Mr. Hall to BNI personnel and finds that they do not appear to be protected disclosures under Part 708. ROI at 10-14.

3/ The ROI discusses other alleged retaliations raised by the complainant. These include (1) acts of harassment and intimidation by Mr. Gadish that were condoned by his supervisors; (2) the cancelling of a training opportunity for the complainant after it had been approved; (3) placing the complainant's name at the bottom of an organization chart; (4) requiring the complainant to perform work responsibilities at a desktop computer located at a PWS lab workbench; and (5) blacklisting of the complainant by Mr. Douglass when he applied for other positions with BNI. The ROI Investigator found that alleged retaliations (1) through (4) occurred prior to the complainant's April 1, 2005 protected disclosure, and that alleged retaliation (5) was unsubstantiated. ROI at 14.

deficiencies including lack of computer and interpersonal skills. ROI at 17, 18.4/

Following my appointment as Hearing Officer on June 23, 2006, I directed the complainant and BNI to submit briefs focusing on the findings and conclusions in the ROI that they intended to dispute at the Hearing.5/ In a September 19, 2006 e-mail to the parties, the complainant's counsel indicated that he did not intend to pursue some of the alleged retaliations raised by the complainant and discussed in the ROI and agreed to withdraw these allegations. Accordingly, the Hearing focused on the complainant's April 1, 2005 and April 15, 2005 disclosures concerning the ABB system and on the chief adverse action that Mr. Hall experienced after April 1, 2005, *i.e.*, his inclusion in a July 28, 2005 RIF of WTP employees.

III. Hearing Testimony

At the Hearing, testimony was received from fifteen witnesses. The complainant testified and presented the testimony of BNI software engineer Timothy Spicer. BNI presented the testimony of Peter Douglass, Todd Billings, Brandon Gadish, and David Thomas. BNI also presented the testimony of Stephen Anderson, who is the

---

4/ The ROI investigator notes that BNI submitted 4500 pages of investigatory materials and reports compiled by its Employee Concerns Program (ECP) concerning the complainant's issues. He stated that these materials may contain conclusive evidence and that "BNI will have an opportunity to present such evidence and to carry its burden under Part 708 at the hearing stage." ROI at 16-17. BNI has submitted significant documents from among these investigatory materials as Hearing Exhibits and has presented the testimony of BNI officials and employees who participated in the investigation. Accordingly, I will rely on the BNI Hearing exhibits and witness testimony in evaluating BNI's positions concerning the complainant's issues. I will not include the 4500 pages of materials generated by the ECP investigation in the record of this proceeding, or specifically address the conclusions of the ECP investigation.

5/ In this regard, I noted that while the ROI has made certain findings, I would be conducting an independent review of the issues. In making my findings, I stated that I would be most convinced by the best available evidence. June 23, 2006 letter to the parties at 2.

Discipline Engineering Manager for the control system discipline at the WTP, Tanya Zorn, who was a human resources interfacer in the Engineering Department of the WTP, and Patricia Talmadge, who is a Senior Quality Engineer for BNI with an area of expertise in control systems. In addition, BNI presented several witnesses from its Personnel and Human Resources area: Linda McKenney, BNI's Employee Relations Manager; Sheila Spellman, BNI's Human Resources Administrator for the WTP; Edward Rogers, BNI's Business Manager for the WTP; Cathy Tuttle, BNI's Manager of Human Resources at the WTP; and Thomas Stuart, BNI's Employee Concerns Manager at the WTP.6/ At the outset of the Hearing, counsel for the complainant and for BNI presented detailed opening statements aimed at providing an overview of their respective positions in this matter.

A. Opening Statement of the Complainant

The complainant's counsel argued that the hostility of the complainant's group leader and supervisor toward the complainant for his raising of safety issues in March and April 2005 was a significant factor in BNI's decision to include the individual in the July 2005 RIF. He stated that throughout March 2005, the complainant raised various safety issues with his task leader, Mr. Luper, and his group leader, Mr. Billings. He asserted that BNI officials met on March 24, 2005 for the purpose of discussing how to terminate the complainant's employment. The counsel asserted that the complainant's April 1, 2005 statement about the safety of the ABB control system created a flashpoint of hostility to the complainant. Following the April 1, 2005 statements, he states that BNI officials acted on the advice of the Human Resources Coordinator to bifurcate the complainant's safety issues from issues relating to his conduct and performance. This led Mr. Billings and Mr. Douglass to meet with the complainant concerning his safety issues on April 15, 2005. He asserts that the performance rating for the complainant that got him included in the initial RIF notice issued on April 21, 2005 was completed by Mr. Billings on about April 18, 2005. However, due to employee complaints, BNI directed that new ratings be conducted regarding the RIF. The final rating of the complainant that resulted in his being part of the RIF was completed in early July 2005.

6/ The job titles refer to the positions held by these individual's during the first half of 2005.

B. Opening Statement of BNI

In its Opening Statement, counsel for BNI stated that in February 2005, the WTP was seriously short of operating funds. BNI's business manager for the WTP, Mr. Rogers, concluded that a major layoff was required. Consequently, the complainant was one of about 350 WTP employees whose jobs were eliminated in July 2005. She stated that all employees of BNI have "assignment complete" dates, and that when the complainant was hired in January 2005, his assignment complete date was January 15, 2006. She stated that in late March 2005, BNI management decided in light of the budget situation that the complainant and four other grade 24 engineers should have their assignment complete dates moved up significantly. She stated that once it was decided to conduct a plant wide RIF, the complainant was included in those deliberations, and that he was selected for the RIF pursuant to evaluations that took place in mid-April and again in early July 2005. TR at 47.

Counsel for BNI acknowledged that the complainant made several statements to BNI management in February, March and April 2005 regarding the functionality of the WTP's control system. She stated that the complainant's April 1, 2005 allegations concerning the safety of the ABB system are unreasonable and that there is no evidence that the ABB system is unsafe. TR at 50. She asserted that BNI management was having problems with the complainant's inability to get along with his coworkers. TR at 48. She stated that as a result of the complainant's ongoing conflicts with his mentor, Brandon Gadish, and others, Mr. Douglass, Mr. Luper and Mr. Billings arranged a meeting with Linda McKenney in Employee Relations on March 24, 2005,

> **not because they are hoping on firing [the complainant]. They go to talk to Linda McKenney because they are seeking advice on what process should we use from an employee relations perspective because this person has behavioral issues. He's disruptive to our group.**

TR at 52. She stated that following the complainant's April 1, 2005 meetings with Mr. Billings and Mr. Douglass, BNI's Human Resources and Employee Concerns offices advised the complainant's supervisor to address his behavioral issues and his safety concerns separately, and that the behavioral issues were addressed in a meeting that took place with the complainant, Mr. Douglass, and Mr. Billings on April 14, 2005. TR at 53. In a meeting on April 15, 2005, Mr. Douglass and Mr. Billings met with the complainant and

asked him to identify his safety concerns.7/ She asserts that BNI concluded that

> Mr. Hall's problems with ABB were not about ABB. They were about the fact that he did not understand the programming that was necessary for ABB to talk to the equipment.

TR at 54-55. She contends that his disclosures had nothing to do with his being selected as one of 350 individuals who would be laid off at the WTP site. TR at 55.

As indicated in my analysis below, the two key issues for my determination in this matter are (1) whether the complainant has shown that the statements that he made on April 1, 2005 and repeated on April 15, 2005 concerning the impact of problems in the ABB system on environmental safety are protected disclosures under Part 708, and (2) assuming the complainant made a protected disclosure, whether BNI has shown that the complainant would have been terminated in the July 2005 RIF even in the absence of such a protected disclosure. Accordingly, my summary of relevant testimony will focus chiefly on those two issues. With regard to the latter issue, it is critical whether BNI has shown that the July 2005 evaluation of the complainant by Mr. Billings accurately and impartially rated the complainant's abilities for purposes of the RIF.

C. The Complainant's Witnesses

1. The Complainant

a. The Complainant's Professional Training and Work Experience

The complainant testified that initially he received a two-year degree in instrumentation controls at Columbia Basin College, and worked at the Hanford Site from 1985 until 1989. TR at 59. In 1989, he went back to school on a part-time basis during which he

---

7/ Counsel for BNI states that the specific concerns identified at that meeting all were reviewed and addressed by BNI. TR at 54. This proceeding does not concern whether BNI's response to the complainant's disclosures was reasonable. The only relevance of BNI's response is the extent to which it indicates whether the complainant reasonably believed that the disclosures indicated a significant danger.

also worked part-time as an instrument technician at facilities regulated by the Nuclear Regulatory Commission (NRC). TR at 61. In 2000, he completed his education when he received a Bachelor of Science degree magna cum laude from Washington State University in electrical engineering. TR at 59.

With regard to his work experience with nuclear control systems, he has worked a total of seven contract assignments at NRC-licensed powerplants in the capacity of an instrument technician and a compliance engineer. He stated that NRC-licensed plants are run for eighteen months and then shut down for a two-month maintenance period. During that period, the complainant was employed to run testing procedures for the plant's instrumentation. TR at 62. He testified that it is very important for both NRC-licensed powerplants and DOE run facilities to follow procedures and ensure that procedural compliance is met

> Because properly done, nuclear energy is very safe. That hinges upon following procedures and documentation and working to implement safety standards.

TR at 62.

The complainant stated that he considers himself to be experienced with the use of personal computers and has some computer programming skills. He stated that while at college, he wrote software programs in "Basic, Four-Tran, and C." TR at 69. He also stated that he was not hired by BNI to do computer programming or software design, but to perform configuration and functional testing for FF measuring devices. TR at 70.

He stated that in November 2004, he was interviewed by Mr. Billings and another BNI official for a position at the WTP, and later accepted BNI's employment offer. He stated that he was never given any indication of a time limit for the position that he accepted, and that the hiring document stated that the position was "long term." TR at 71.

He stated that he joined the Plant Wide Systems (PWS) engineering group at the WTP on January 18, 2005, and from that date through mid-February 2005, he completed a total of 35 BNI project documents and training modules, most of which involved procedures having to do with nuclear safety, "procedure compliance and quality assurance, which is strictly synonymous with nuclear safety." TR at 72. With respect to the ABB control system itself, he stated that he observed that there was no procedure to document to the DOE

the safety standards for FF instrument testing. He testified that he took the initiative to begin to write his own procedure for testing, and that his task leader, Mr. Luper, asked him to write a formal procedure for FF testing. TR at 75.

b. The Complainant's Two Concerns About the Safety of the ABB System

The complainant testified that he learned that the ABB system had been ordered for installation at the WTP in 2002, and that by 2004 there were issues involving the functioning of the ABB system. The complainant stated that he would go to the on-site ABB representative, Dave Thomas, with his questions about the ABB system because the complainant's assigned mentor, Mr. Gadish, lacked a practical background in the implementation of control systems. TR at 77-79.

The complainant testified that he believed that proper operation of the ABB control system is important to safety at the WTP because it maintains

> process variables at their set point: pressure, temperature level, flow, radiation – and it's the first line of defense for safety.

TR at 88-89. He stated that some of the waste to be processed at the WTP using the ABB control system would contain uranium or plutonium. TR at 93.

I. The Computer Lock-Up Concern

The complainant testified that the ABB control system was designed to be run on dedicated computers and would have its own software code. TR at 94. He stated that on February 22, 2005, the ABB system locked up on his computer.

> It was not a blue screen. It was a lockup freeze. And that has nuclear safety implications in a facility because it could freeze up and the operators would be looking at the screen and everything would appear to be okay but it wouldn't be okay.

TR at 94-95, 98. He then reported this event to Mr. Thomas, who "looked to be very distressed about it." TR at 100. He stated that he had to

> go down into the code and set down some of the software to clear up the frozen condition. . . . An operator wouldn't be able to do that.

TR at 100. He stated that another engineer in PWS, Mr. Jason Aldridge, told him in March 2005 that the Engineering 2 server which was on the ABB integrated control network had locked up on him. TR at 101, 125. The complainant explained that a lock-up cannot safely be addressed by rebooting the system because it could cause some of the valves the system's cooling and other processes to go into a state of emergency and shut down. TR at 104.

The complainant stated that in his work at NRC regulated power plants, he has had experience with four different distributed control systems, and that the ABB system is a hybrid of these systems. He stated that he helped to install, test, and start up a distributed control system at the Hanford Inlet nuclear plant. TR at 104. He stated that he never experienced a freeze-up while working with these four other systems, and that a freeze-up is a potentially dangerous proposition. TR at 105. The complainant testified that the WTP's process for testing and fixing the ABB system as it was being installed at the WTP was "very inadequate" because

> No one, to my knowledge, was documenting when the system froze up, how often it froze up, what caused it to freeze up.

TR at 105. He contended that the ABB control system did not meet the required safety specifications for a control system. TR at 105. He stated that he shared his concerns about the ABB system's unreliability on several occasions in March 2005 with his task leader, Mr. Luper.

> I spoke to Mr. Luper. He said, well, that's the system we got and we've got to make the best of it. And [he said that] I realize the Delta B [control system] is a better system but [the ABB System is] the one they purchased, you know, [Mr.] Billings and [Mr.] Douglass. And he was basically resigned to just going along with the system which is kind of rotten.

TR at 108.

ii. Concerns Related to ABB Communications with FF Measuring Devices

The complainant stated that he was assigned to conduct verification and validation testing of field measuring devices prior to their purchase in bulk for installation at the WTP. TR at 114-115. The complainant stated that in March 2005, he was unable to get the ABB control system to communicate with a field measuring device known as a Foxboro pressure transmitter. After the initial failure, he contacted Foxboro and asked the company to send him a second transmitter along with testing documentation.

> **I said, take another pressure transmitter, same model, and test it, and I want to see the documentation. And they tested it on two different [control] systems and it passed both systems without a problem. And we got the second transmitter shipped directly to me. . . . And we hooked it up to the ABB system, and the ABB system failed to communicate with it.**

TR at 139.8/ He stated that he worked with a BNI expediter and a responsible engineer (known as an RE) on this problem, and the expediter and the RE both suggested that BNI send the device to the Fieldbus Foundation, the independent foundation that sets FF standards and tests measuring devices, to determine whether the Foxboro transmitter was compliant with FF standards. The complainant stated that he agreed with this advice because the representatives of Foxboro and ABB were "pointing fingers at each other" and the Fieldbus Foundation, in his opinion, would provide a definitive test of whether the Foxboro pressure transmitter or the ABB system was noncompliant with industry standards.9/ TR at

---

8/ The complainant later testified that sometimes the Foxboro pressure transmitter would appear to be properly installed on the ABB system and then "drop off" the system within 24 hours. TR at 178.

9/ The complainant appears to assume that if either the ABB system or the field measuring devices require capabilities in excess of existing FF standards, their failure to conform to those standards is itself a safety concern. While that appears to be a plausible conclusion, there is very little in the record to support that assumption or to convince me that ongoing adjustments in communications standards are not

(continued...)

140. On about March 31, 2005, he suggested to Mr. Billings in an e-mail that the Foxboro pressure transmitter be sent to the Fieldbus Foundation for independent testing. The complainant stated that he believed that the problem rested with the ABB system rather than the Foxboro transmitter because he had observed a pattern of measuring devices that would not communicate consistently with the ABB system.

> **This is an ongoing problem with [the ABB] system. They've got another, different manufacturer of a control valve that wasn't imported in the [ABB] system. They had a Foxboro temperature transmitter that wasn't imported into the ABB system. And so it wasn't just that one transmitter that wouldn't work on the ABB system. And that showed me as an engineer that the common problem here was the ABB system.**

TR at 142.

c. The Complainant's Alleged Protected Disclosures

I. The Complainant's April 1, 2005 Disclosures

The complainant testified that Mr. Billings called a staff meeting for the morning of April 1, 2005. He stated that the meeting was attended by several BNI engineers, and that they discussed the Foxboro pressure transmitter issue. On the morning of the meeting, while he and Mr. Billings were walking to the meeting, Mr. Billings asked him what he thought was the source of the problem. The complainant told him that the Foxboro pressure transmitter tested good, so he thought that the ABB system was the problem. TR at 146-147. The complainant stated that at the meeting he explained that the Foxboro pressure transmitter had tested good on two other control systems, and that two of the engineers, Mr. Larry Odom and Mr. Shareet Amant, appeared ready to look at the ABB system as the problem. TR at 148-149. The complainant testified that after the meeting had gone on for ten or fifteen minutes, he passed out copies of a survey from a trade magazine for control systems whose readers rated the ABB last out of five systems being assessed. TR at 153. He stated that after a short discussion of the ABB, Mr. Billings asked to speak with him outside the meeting, where he told the complainant that he did not want to discuss the ABB system

---

9/ (...continued)
appropriate.

being the problem, and directed the complainant to return to his office. TR at 150-151.

The complainant testified that later that morning, Mr. Billings escorted him to a meeting with Mr. Billings and the complainant's supervisor, Mr. Douglass. TR at 164. He stated that Mr. Douglass was upset about his behavior at the earlier meeting, and said that the complainant should not bring up any issues about the ABB control system except to him. TR at 164-165. The complainant stated that he told Mr. Douglass about computer lock-ups involving the ABB system and about the measuring devices dropping off the ABB system. He told Mr. Douglass and Mr. Billings that these problems indicated safety concerns. TR at 165-166. The complainant stated that he felt that his job had been threatened by his disclosures that the ABB control system was the source of several operating problems.

> I asked [Mr. Douglass] if he was going to fire me, and he sat there and grinned. And I think that's the point where I told him that [I could] go to the DOE about it. And then I ended up going back to my cubicle.
>
> TR at 17. The complainant stated that about half an hour after this meeting, Mr. Billings "informed me that I would no longer be working on the ABB-Foxboro transmitter issue." TR at 168. The complainant stated that Mr. Billings instructed him to inform his contact at Foxboro to direct all e-mails concerning the ABB system to Mr. Billings. TR at 169.

ii. The Complainant's April 15, 2005 Disclosures

The complainant testified that on April 15, 2005, Mr. Douglass arranged a meeting attended by the complainant, Mr. Douglass and Mr. Anderson, the Discipline Engineering Manager for the WTP, to provide the complainant an opportunity to discuss his concerns with the ABB control system. The complainant testified that at the beginning of the meeting, Mr. Douglass stated that he asked Mr. Anderson to attend because Mr. Douglass had a "conflict of interest" regarding the ABB system. TR at 174. At that meeting, the complainant stated that he told Mr. Anderson about the lockups and the communication problem with measuring devices. TR at 176. The complainant stated that Mr. Thomas, the ABB representative, was assigned by Mr. Billings to handle the lock up issue that he had reported. The complainant testified that when Mr. Thomas questioned other WTP engineers about the issue, two of them

reported that the ABB system software had locked up on them. TR at 184.

d. Subsequent Information Supporting the Individual's Concerns

At the Hearing, the complainant testified that subsequent research by Foxboro regarding its pressure transmitter verified that the transmitter's inability to communicate properly with the ABB system was caused by the ABB system. The complainant stated that his position that the ABB system had caused the communication problem was supported by a June 2005 letter from Foxboro to Mr. Campbell at BNI. Complainant's Exhibit 26. TR at 153. That letter stated that "Todd Billings speculated that there was a mismatch between the code in the transmitter and the files sent on diskette with the transmitter [for loading into the ABB system]. We would like to assure Bechtel that there is no such mismatch." After Mr. Billings testified that Foxboro eventually had revised its software to make the transmitter compatible with the ABB system, the complainant asserted that the fact the Foxboro had been required to revise its software indicated that the ABB system was not properly designed to operate with all field measuring devices that meet the FF standards. TR at 1170-1174.

After hearing the testimony of Ms. Talmadge, BNI's Senior Quality Engineer, the complainant stated that he disagreed with her assessment that the WTP's function of processing waste rather than generating power would not raise a danger of serious safety incidents. He stated that the WTP will have to handle and move nuclear waste on a regular basis, while power plants

> don't move nuclear waste around except when they procure a plant. It is very limited.

TR at 1208. The complainant also rejected Ms. Talmadge's testimony that the testing being done by the complainant at PWS could not raise safety issues because the instruments will be retested before the WTP is put on line. He stated that the communication incompatibility between measuring devices and the ABB system might not be revealed through "a different type of test" at a later time. He also stated that he believed that the ABB system problems of lockups and communication failures with measuring devices would cause lengthy and costly delays in bringing the WTP on line, and that such delays presented a significant health and safety problem because of the ongoing leakage of untreated radioactive waste into the groundwater. TR at 1223-1224. He added that the system failure rate for the ABB system was far in excess of the contract

specifications for a nuclear control system, based on the problems that he had observed or been told about concerning the ABB system prior to April 1, 2005. TR at 1251-1253.

e. The Complainant's Job Performance Issues

The complainant stated that he disagreed with the Mr. Gadish's testimony that he was responsible for their workplace personality conflict. TR at 1189. With respect to his task leader, Mr. Luper, the complainant testified that he "had a pretty good working relationship" with him. TR at 1241. When asked about negative assessments of himself that Mr. Luper provided in a September 2005 interview with BNI officials (BNI Exhibit 203), the complainant stated that

> I said on the surface, that I felt that Shaun and I had a pretty good working relationship, but, you know, he may have had his own agenda. And that may have been the agenda of Mr. Billings and Mr. Douglass.

TR at 1242. The complainant stated that after he was notified in April 2005 that he would be part of the RIF, he was assigned to train his replacement, Mr. Scott Roselle, in the testing of FF devices. TR at 1235. He reported that he became friends with Mr. Roselle, and that they had a good working relationship. TR at 1235.

The complainant also stated that he disagreed with the testimony of Mr. Spicer, Mr. Thomas, Mr. Gadish and the cited assessment of Mr. Luper (BNI Exhibit 203) that he lacked basic computer skills.

> Well, I think the record proves I wrote the H-1 Foundation Fieldbus test guide, which has detailed steps on how to use the ABB software. And Mr. Luper complimented me on the writing of that test guide. So, I don't see how this can be true, when the fact is . . . that I wrote it, and my peers reviewed it and Mr. Anderson approved it.

TR at 1209.

2. Mr. Timothy Spicer, BNI Software Engineer

Mr. Spicer testified that in early 2005, he was assigned by Mr. Douglass to develop a safety plan for the PWS laboratory at the WTP. TR at 218. He testified concerning the need for better safety procedures at the laboratory, and cited that hazards posed by certain laboratory equipment, such as forced air canisters. TR at 222-223. He stated that Mr. Thomas, the ABB representative, had made one of the female programmers cry because he made her feel ignorant when she went to him for advice. TR at 227. He characterized Mr. Thomas as "a rough guy." TR at 229.

Mr. Spicer stated that he had observed Mr. Thomas and the complainant interact, and that he thought that Mr. Thomas was frustrated by the complainant's lack of basic computer skills. TR at 237. He testified that he observed the complainant on more than one occasion have trouble logging onto the system and selecting the correct domain. TR at 243. He also observed the complainant shut down his computer in an improper manner without logging off. TR at 241.

Mr. Spicer stated that he did not believe that any of the laboratory safety concerns that the complainant raised constituted serious safety concerns. TR at 232.

With respect to the ABB system, he stated that "ABB is a very difficult controller." TR at 239. He further stated that

> I've spent probably half my career in the nuclear industry. While any software PLC or DCS-based system has troubles – I mean, they all have their little quirks. So does Microsoft. I've been on several FAT [Factory Acceptance Tests], successful FAT tests, one with a very sophisticated robot just outside Denver where [the ABB system] performed flawlessly.

TR at 239-240.

D. BNI's Witnesses

1. Peter Douglass

a. The complainant's disclosures

Mr. Douglass stated that he was the complainant's supervisor during the complainant's 2005 employment at the WTP. TR at 493. He stated that on April 1, 2005, Mr. Billings reported to him that the complainant had made negative comments at a staff meeting concerning the ABB System. He stated that Mr. Billings was "notably upset" regarding the complainant's behavior and statements at the meeting. TR at 504. He stated that Mr. Billings told him that

> **The meeting was to try to resolve an issue with a transmitter which was communicating to the ABB system and there was a problem therein, and [the complainant] was making declarations about the entire ABB system being unsuitable for the nuclear facility, being unsafe, and he was adamant that ABB was at fault in this situation.**

TR at 505. Mr. Douglass testified that he did not believe that the complainant's criticism of the ABB system raised safety issues because the ABB control system does not perform safety functions, and because he believed that the complainant "was speaking without knowing all the background" concerning the ABB system. TR at 506. He stated that later that morning he had a meeting with the complainant and Mr. Billings. He testified that the complainant asserted that Mr. Billings had told him to leave the earlier meeting because he was bringing up quality and safety issues with the ABB system. TR at 508. He stated that he did not tell the complainant that his [Douglass'] career was dependent on the success of the ABB system.

Mr. Douglass testified that he told the complainant in the context of finding the proper ways to resolve safety issues or concerns regarding the control system, that

> **the safety or reliability of the control system is - you know, my career is dependent on that. I did not make any reference to it needing to be the ABB system - [that] it had to be ABB that was successful.**

TR at 510.

Mr. Douglass testified that he was on the BNI team that recommended that BNI procure the ABB system for use at the WTP. He stated that initially the team had recommended the Honeywell control system because it was more mature, but that they later endorsed the ABB system. TR at 511-512. He acknowledged that at a 2004 PowerPoint presentation to the Defense Nuclear Facility Safety Board, the WTP presentation stated that "Control systems are an important but frequently overlooked component of a safe facility." BNI Exhibit 268. He further testified that this statement referred "only in part" to the ABB control system, because there also were "safety instrumented systems" and a "programmable protection system" at the WTP that was dedicated to safety functions. TR at 512-517. He stated that the ABB system monitors the safety functions performed by these other systems. TR at 518.

Mr. Douglass stated that he met with Thomas Stewart, the Employee Concerns Manager, who told him that the complainant had "whistleblower potential" and advised him to investigate the complainant's statements about safety and keep them separate from the complainant's performance problems. TR at 520. He stated that on April 14, 2005, he met with the complainant concerning his workplace conflict with Mr. Gadish.

> In the meeting we went through all the items that I had identified [as] concerns. Curtis responded with all the problems he was having with Brandon and identified those items. And at the end of the meeting, I tried to talk to Curtis. You know, maybe there were other reasons or maybe the problems were maybe not all Brandon's and asked him to try to work out and try to work through some of the issues.

TR at 521.

Mr. Douglass testified that on April 15, 2005, he and Mr. Anderson, the WTP's Discipline Engineering Manager, met with the complainant to listen to his safety concerns. He stated that he later documented the concerns in an e-mail (BNI Exhibit 75). He stated that the complainant was asked to document his complaint that one of the Fieldbus devices that he was testing was getting a slow response. He also was asked to document the criteria used to evaluate control systems in the magazine survey cited by the complainant at the April 1, 2005 staff meeting. TR at 525. He stated that the complainant later informed him that each participant in the survey simply ranked the control systems on the basis of their personal criteria. TR at 525. Mr. Douglass stated

that he concluded from this information that the survey could not be used as evidence that the ABB system was considered unsafe by the survey participants. *Id.*

Mr. Douglass testified that in its final technical evaluation prior to the award of the plant-wide control system to ABB, BNI acknowledged that there was a certain amount of risk in procuring the ABB system because certain aspects of the system could not be fully evaluated at the time of purchase. TR at 549. He also agreed that data on the ABB system's compatibility with FF standards was not available and could not be evaluated at the time of purchase. TR at 553. He added that "the integrated engineering tools were not currently available and could not be evaluated at that time." TR at 558. He stated that the project team considered this to be an acceptable risk.

> The project team was well versed in the state of the Foundation Fieldbus at the time. We evaluated the risks and so we knew all the potential problems we were going to have with Foundation Fieldbus. So that issue was definitely discussed and the risk accepted.

TR at 554. He stated that the PWS group at the WTP is continuing to conduct testing on the ABB system's compatibility with FF measuring devices at the present time, and that it is "occasional work for one individual." TR at 590. He testified that there is still work to be done to insure that the FF measuring devices will function with the ABB system. *Id*.

b. Employment issues

Mr. Douglass testified that Mr. Gadish complained to him in March 2005 concerning the complainant's behavior towards Mr. Gadish in the workplace. He stated that he did not recall advising Mr. Gadish to submit a complaint to the WTP's Human Resources department. He stated that in March 2005 he, Mr. Billings and Mr. Luper met with Ms. McKenney, BNI's employee relations manager, concerning the conflict between Mr. Gadish and the complainant and that they discussed options. He stated that they discussed giving a verbal warning to the complainant, followed by a written warning and possible termination, but that a course of action was not finalized. TR at 498-504.

c. Rating and RIF issues

Mr. Douglass testified that a salary planning ranking was done for WTP employees around February 24, 2005, and he identified that document as the portion of the Complainant's Exhibit 13 designated "Hall Ex. 013-2." He stated that he prepared cards for each employee and numbered the cards as a ranking. Then Mr. Anderson would take the cards and develop the completed list. TR at 529. He stated that because the complainant had only been employed at the WTP for about six weeks, he was not included in the initial portion of the employee ranking process.

> **After we did the first ranking or ranked everyone, [Mr. Anderson] pulled the cards out for the people who were new to the job and said, we have to put these people in. [The complainant] would be one of those. And they were put in like in the low Bs basically so that it doesn't help them or hinder them.**

TR at 530.

Mr. Douglass testified that he first learned of the need for a RIF at the WTP in the last week of March or the first week of April 2005. TR at 530. He stated that he met with Mr. Meinert and Mr. Billings in early April to develop a list of employees to be included in the RIF, and that the complainant was included on this list. He stated that the complainant was selected for the RIF because

> **He hadn't been here on the project long, so we didn't have any in-depth knowledge that would be difficult to lose. The activities Curtis was working on weren't activities that were critical at the time. It was something that could be absorbed by others or done later. And we also had the performance problems with Curtis as well.**

TR at 532. He stated that when the complainant was informed that he was included in the RIF, the complainant asserted that he should be retained because his FF device testing would need to continue. TR at 535.

Mr. Douglass testified that prior to the expiration of the two month notification period for the RIF, the decision was made to go through the selection process again, using a standardized format. TR at 537. He testified that Mr. Billings completed the

standardized ranking form for the complainant, and that he then signed it. He stated that he did not instruct Mr. Billings how to rate the complainant, and that they did not talk about the complainant specifically during the second review process. TR at 537. Mr. Douglass stated that he believed that there was no connection between the statements regarding safety made by the complainant and the determination that he should be laid off. TR at 540.

2. Todd Billings

Mr. Billings stated that he was the lead engineer for the complainant's PWS working group. TR at 253. He stated that when the complainant joined the working group, he was on the team that interviewed the complainant, and that he recommended that the complainant be hired.

> I felt that his background in instrumentation and in other nuclear facilities might be beneficial to our project as well as his stated background in working with smart devices, the types of devices that communicate using a digital protocol with the control system.

TR at 265. He stated that the complainant was assigned to Mr. Luper as a task leader to assist with FF instrumentation testing. TR at 266.

a. The Complainant's disclosures

Mr. Billings stated that in March 2005, the complainant had reported that there were communication problems between the ABB system and the Foxboro pressure transmitter. TR at 298. He stated that he learned through Mr. Luper that the complainant concluded in late March 2005 that the ABB system was the source of these communication problems. *Id.* Mr. Billings stated that he told Mr. Luper that he thought that it was "too early in the investigative process to have reached that conclusion, although that was certainly one of the possibilities." TR at 299. He stated that at the April 1, 2005 staff meeting, the complainant explained that he had tested two Foxboro pressure transmitters and that they would not communicate properly with the ABB system. The complainant had handed out copies of a trade magazine article that gave a low rating to the ABB system, and he then made the statements that the ABB system was the cause of the problems with the Foxboro transmitter, and that the ABB system was not good for

use in a nuclear facility. TR at 304-306. Mr. Billings stated that he thought that the complainant's statements that the ABB system was inappropriate for use in a nuclear facility were clouding the discussion of the communication issue and taking over the meeting, so he sent him away. TR at 305-306. He stated that at a subsequent meeting with Mr. Douglass, he told Mr. Douglass that the complainant had undermined "myself and other members of our team that was working on the [ABB] system. . . ." TR at 309. He stated that he the complainant later joined the meeting with Mr. Douglass and himself and repeated the issues that he raised at the staff meeting. TR at 311.

Mr. Billings stated that he viewed the complainant's assignment of blame to the ABB system as a hindrance and removed him from the review of the communication problem involving the Foxboro transmitter. He stated that the complainant is the only person who has questioned the propriety of using the ABB system at the WTP. Mr. Billings stated that later that day he sent an e-mail to Ms. McKenney documenting this meeting [BNI Exhibit 72] because he believed that the complainant's behavior "violated some of the Bechtel covenants and needed to be categorized in that way":

> In addition, Mr. Hall had made a statement to the effect that he had enough evidence to go public as far as the implication being something about the ABB system. And to me that sort of raised the bar as far as what his intentions might be and that I needed to ensure that I was trying to document what I had observed that day and what I had been involved with.

TR at 313.

Mr. Billings stated that the communication problem between the Foxboro pressure transmitter and the ABB system was later revealed to be a problem with the Foxboro transmitter:

> Foxboro and ABB had collaborated to identify the problem. Foxboro had then relayed to us that the problem was in their transmitter, that they had an issue that was causing it to drop off the network, the Foundation Fieldbus Network. . . .

TR at 317-320, citing BNI Exhibits 51, 52 and 53. Later during questioning on this issue by complainant's counsel, Mr. Billings was asked to review a June 2, 2005 letter from Foxboro project manager Brian Haynes to BNI concerning BNI's problem with the

pressure transmitter. In the letter, Mr. Haynes stated that the complainant had identified the interoperability problem to Foxboro on March 16, 2005. BNI Exhibit 65. Mr. Haynes then discussed his finding that certain unique characteristics of the ABB system led to a data overload and the communication problem with the Foxboro pressure transmitter. BNI Exhibit 65. Mr. Haynes then stated that installing a secondary communication buffer on the Foxboro pressure transmitter appeared to resolve the problem, but he noted that such a buffer is not required by FF specifications. *Id*. Finally, Mr. Haynes stated that it was up to the Fieldbus Foundation that sets standards for FF devices to decide whether this additional capability required for interface between Foxboro's pressure transmitter and the ABB System would become part of its FF specifications. *Id.*

Responding to this letter in his testimony, Mr. Billings stated that the Foxboro pressure transmitter already had the necessary secondary buffer to handle the ABB system's continuous readings of all parameters, but that a previously undetected error in the software code of the Foxboro transmitter had made it inoperable:

> Foxboro had never tested that secondary communication buffer. The first time that this had come up was in our testing because in the way that we had configured the ABB system it had actually stressed the network a little bit more than Foxboro had during their testing process, and that's where this line of code that was causing the fault inside their transmitter was revealed. And they had to go in and modify that so that the secondary communication buffer which they had implemented actually worked.

TR at 384.

Mr. Billings stated that sometime in 2005, the start-up date for the WTP was "pushed out" until at least the "the 2012 time frame." TR at 259. Mr. Billings stated that the untreated waste currently at the Hanford site has created a "danger to the environment and potentially to people's health." He also agreed that the longer this waste goes untreated, the longer that danger persists. TR at 390.

b. Employment and RIF issues

Mr. Billings stated that when a conflict developed between the complainant and his assigned mentor, Mr. Gadish, Mr. Luper

unsuccessfully attempted to rectify it. TR at 283. He stated that in March 2005, he attended a meeting with Mr. Luper and Mr. Douglass and Employee Relations specialist McKenney concerning the complainant's conflict with Mr. Gadish. TR at 285-286. He stated that he also had been told by PWS supervising engineer Meinert that the hostile environment created by this conflict was affecting his team, and by ABB system representative, David Thomas, that the complainant was not taking instruction well and causing people in the laboratory environment "to sort of avoid being in there with him...." TR at 290-291. He said that firing the complainant was viewed as only a potential outcome by the attendees at the meeting, not the objective. TR at 286. Ms. McKenney told them that they needed to closely monitor the situation and clearly lay out expectations whenever the complainant was asked to do something. He stated that Ms. McKenney said that she would start a file associated with the concerns. TR at 291-292.

Mr. Billings testified that he removed the complainant from working on the Foxboro pressure transmitter problem

> Because I felt the Mr. Hall's biases, his stated biases, would prevent him from being objective and presenting all the information that was necessary on both sides, both between Foxboro and to Bechtel.

TR at 321. He stated that after the complainant was removed from the Foxboro pressure transmitter testing, the complainant continued to test other FF measuring devices and to write a guide for testing measuring devices. TR at 322.

Mr. Billings testified that prior to the April 2005 RIF announcement, the complainant had been rated 12 out of 17 in his peer group and given the grade of B. TR at 373 citing complainant's Exhibit 13. He stated that he could not recall participating in this rating of the complainant. After the RIF was announced in late March or early April, he gave input to Mr. Douglass and they provided BNI management with a list of employees to be included in the RIF. He stated that he included the complainant on the list because he had difficulty getting along with other members of the team and because while working on the Foxboro transmitter issue he displayed a lack of engineering judgment by concluding that the use of the ABB control system raised safety concerns. TR at 325-326. He stated that in early July 2005, he rated the complainant on a form provided by BNI and that Mr. Douglass signed the rating. TR at 327, BNI Exhibit 146. He stated that this evaluation was

> sort of a confirmatory action, you know, with a structured worksheet to the - some of the discussions that we had had previously with Mr. Douglass.

TR at 327-328. He stated that he did not know how the rating he provided was used by BNI Human Resources in selecting employees for RIF. TR at 328.

3. David Thomas

Mr. Thomas testified that he works for ABB as an engineer and in 2005 was assigned to the PWS laboratory at the WTP. TR at 396. The ABB system will be the main operator interface and control system for the WTP vitrification plant, encompassing mechanical handling, process control, and general operational control of the plant. TR at 397. He stated that the designated safety system at the WTP will not be the ABB system but the Trikonics system, which he described as "a backup system [that] monitors and controls important safety items." TR at 398.

Mr. Thomas stated that when the complainant reported to him that his ABB central processing unit (CPU) locked up, the complainant was unable to repeat the sequence of events that led to the lock-up. TR at 400-401. He stated that the complainant demonstrated a lack of computer skills:

> There was no proficiency. There was a definite learning curve necessary for him to be able to do the job.

TR at 401-402. Mr. Thomas stated that on or after April 15, 2005, he was tasked with investigating the complainant's assertion that PWS engineers had experienced computer lock-ups while using the ABB system. TR at 407. He stated that the first thing that he did was to gather the people who were using the ABB equipment frequently to get a summary of the issues that they were having. He described the ABB system at the laboratory as consisting of the following:

> . . . we had I believe at that time it would have been 15 ABB clients connected to the system and five ABB aspect system servers that were being used by miscellaneous engineers plus three . . . laptops that were being used for factory acceptance testing or equipment in the field.

TR at 408. He stated that the only problems that he recalled being reported to him were some blue screen issues involving a laptop. TR at 415. He described this problem as follows:

> The blue screens was an ongoing issue that we were addressing through Dell computers. That was a Dell laptop that was purchased. Although it was procured through ABB, it was a Dell laptop. [An ABB engineer] contacted Dell on several occasions regarding that problem. Dell had made one trip to site and replaced the CPU and fan, I believe.

TR at 410. Mr. Thomas believed that Dell had not fully resolved the problems with this laptop at the time that he reported his results to Peter Douglass on May 2, 2005. BNI Exhibit 80. Mr. Thomas then was asked to review BNI exhibit 201, which is an unsigned document purporting to be responses by PWS engineer Jason Aldridge to statements made by the complainant. These responses indicate that Mr. Aldridge's only problem involving a computer lock-up at the laboratory occurred when a Dell laptop "began to crash at various stages of boot-up and operating." BNI Exhibit 201. Mr. Thomas testified that he believed that this statement was consistent with what he had learned from Mr. Aldridge during his investigation. TR at 414. Mr. Thomas stated that he agreed with BNI's conclusion that the ABB system was reliable and safe for use at the WTP:

> The [ABB] system as it will be configured at the plant is totally different from the office environment. Reliability issues that were brought up here would, even if they did occur, a blue screen, would not impact plant safety. The Trikonics safety system is handling all safety issues. The operators had dual CPUs for their operating consoles. There's lots of redundancy in the system, lots of fallback options so to speak on how it's configured, how the system is distributed. The office environment that we were working under was loading all services and systems under one server, which would not be the norm.

TR at 419-420.

Mr. Thomas testified that he believed that control systems are an important part of plant safety. TR at 421. He stated that the ABB system would be responsible for the monitoring of radioactive materials. TR at 424-425. He agreed that a systemic problem in the ABB system could result in all of the computers in the WTP control room going blank. TR at 426.

After reviewing an unsigned interview purporting to be of PWS engineer Glenn Upton [Exhibit 202], Mr. Thomas recalled that Mr. Upton had experienced problems with the Dell laptop that he had previously discussed. TR at 435. Mr. Thomas disagreed with the statement attributed to Mr. Upton that a number of employees using the ABB system had experienced a crash or blue screen on their computers. TR at 436. Mr. Thomas stated that in conducting his investigation, he did not contact all of the ABB users to inquire if they had experienced lock-ups on their computers. TR at 436. He also stated that he is not aware that the ABB control system being installed at the WTP is used currently in any nuclear facility. TR at 445.

4. Patricia Talmadge, Bechtel's Senior Quality Engineer

Ms. Talmadge testified that she is a software quality and safety engineer who has worked for BNI since 2001. She stated in August and September 2005, at the request of WTP's Employee Concerns Program, she participated in the Quality Assurance surveillance of the WTP's controls and instrumentation equipment testing activities in the laboratory where the complainant had been working. This surveillance and the accompanying report (BNI Exhibit 269) were aimed at addressing safety concerns identified by the complainant. Ms. Talmadge concluded that the laboratory had no significant safety problems, and characterized the surveillance as a waste of taxpayer dollars. TR at 638, 649. Ms. Talmadge stated that the ABB is not a safety-related system and is not intended to be used for safety purposes at the WTP:

> We have nuclear engineers that conduct what we call [integrated safety management] meetings. They do the actual walkdowns of all the accident scenarios that could possibly occur per the design at the time and it evolves over time. And the control system strategy is based on the difference between a safety system and a non-safety system. And if you were crediting yourself with a safety function it belongs on the safety system.

TR at 609. When asked how BNI would address the hypothetical problem of a non-safety system that created numerous safety-related incidents, she responded that

> based on the severity of the hazard or the possibility of recurrence you put additional barriers in place and those barriers could be swapping equipment out, going to another supplier, changing your design if you have to.

> There's multiple, multiple things that you could do to mitigate that.

TR at 613.

With regard to the complainant's concerns about the ABB system, she testified that the test environment does not mimic an operational environment. TR at 614. She stated that her investigation found only one laptop issue involving the ABB system, and no server lock-ups. TR at 615-616.

Ms. Talmadge testified that in October 2005, BNI made the decision not to use FF devices as monitors for its safety control system (PPJ/Tricon):

> We cannot use Foundation Fieldbus on a programmable system. And that's due to some of the technical issues we have with the pulse jet mixer system. That type of technology will not be allowed on the [PPJ/Tricon] system because of the fact that we don't feel it's reliable and the signals do not transfer to the length we need them to.

TR at 626. She testified that the digital communication using FF standards is not reliable enough for the WTP's safety system. However, she stated that she had no safety reservations about the use of FF measuring devices with the WTP's integrated control system [ICN] which will use the ABB technology:

> The remaining part of the plant, the controls are closer together and it's not an issue. The issue would be when it's in the hot cells and I have to rely on that reliability. As far as any of the other [systems], PPJ is responsible for shutting the system down. It takes control from the ICN if there's a problem. The ICN is basically a monitoring system. It monitors, it tells the operators if there's alarms. It shows communications happening amongst non-safety equipment in the plant.
>
> The PPJ monitors and actually has control over safety equipment in the plant. So for safe shutdown everything is independent from each other and the PPJ is master.

TR at 627-628. She stated that the PPJ system would have its own monitors that would operate independently from the monitors for the ABB system. TR at 628, 634-638.

Ms. Talmadge stated that the complainant's manual of procedures for testing the communication of FF measuring devices with the ABB system erred in not being related to the formal process for certifying the equipment to become operational. TR at 642-646.

Ms. Talmadge testified that the WTP did not require the same level of nuclear safety protections that are required for nuclear power generating plants because there is little danger of a major release of radiation into the environment:

> We are not a nuclear facility in the sense of having a reactor or large critical events that occur or that could occur or that have occurred. A release of radiation is nominal in the majority of the cases of the accident scenarios in the plant. When there is a release, it's in a contained area which is considered a hotset basically. It's a hot environment.

TR at 611. She stated that the Safety Requirements Document for the WTP specifically provides that

> The control philosophy for a nuclear power generating station is not applicable for the RPP WTP project.

TR at 654, citing BNI Exhibit 273.

Under questioning by the complainant's counsel, Ms. Talmadge agreed that delays in treating radioactive wastes at the Hanford site are potentially bad for public safety. TR at 670. She also agreed that if operating problems with the ABB system delayed the WTP coming on line, that would "be a bad thing." TR at 671.

5. Stephen Anderson, former Discipline Engineering Manager for the WTP's Control System Discipline

Mr. Anderson testified that he started working at the WTP 2000 as the discipline control manager, and that his role was to develop an execution plan for constructing the WTP. TR at 720.

a. The Complainant's Safety Concerns

Mr. Anderson stated that at the April 15, 2005 meeting with Mr. Douglass and the complainant, he and Mr. Douglass gave the complainant an opportunity to document problems he observed with the ABB system. TR at 730-731. He stated that the complainant was

unable to replicate in a laboratory setting one of the problems that he claimed to have experienced with a FF device not interacting properly with the ABB system. TR at 731. He agreed with Mr. Douglass that the ABB system concerns reported by the complainant were all resolved in April 2005 and that the ABB system was suitable for the WTP. TR at 732.

He stated that the ABB system at the WTP was not responsible for "program protection", "although it did monitor program protection." TR at 733.

b. The Complainant's Salary Ranking

Mr. Anderson testified that WTP's 2005 salary planning program was conducted in late February and early March 2005. He stated that it consisted of a ranking exercise using input from his group's supervisors and fitting that input into the fixed percentages for each rating level. TR at 741. Mr. Anderson was shown a document entitled "2005 Salary Planning Program, Bechtel Systems Infrastructure, Inc." BNI Exhibit 276. He stated that he did not know the date of the document, but that the date of November 2005 printed on the document was not correct. He affirmed that it reflected the salary planning process that took place in February or early March 2005. Mr. Anderson was asked to explain why BNI Exhibit 276 lists the complainant with a B-minus rating while another 2005 salary ranking document [Complainant's Exhibit 013-2 lists him with a B rating. He stated that the B rating "would have been our input" into the ranking process. TR at 745. He stated that adjustments to these grades can take place "when all the disciplines are brought together and everybody has to meet these quotas." TR at 744. He stated that officials in human resources convene a meeting a discuss how to put the ratings together.

> Because what happens is a lot of people that are well-known on the project either good or bad and so people have input on those people. So sometimes there's adjustments. In addition to that, there are a number of people that did not get graded and they're inserted in this process during that review. When that happens somebody is inserted as an A and moves everybody down, somebody is inserted as a B, everybody below that gets pushed down. So they try to protect – at the margins you try to protect your people from that happening. But it does happen.

TR at 744.

c. The Complainant's Assignment Complete Update

Mr. Anderson stated that BNI maintains a document called the "register" that lists every employee's position number, who occupies the position, the date they started, and their projected release date. He stated that he maintains this register for the employees in his division at the WTP, and that he electronically enters any changes in an employee's projected release date. TR at 780-781. He testified that he would provide a mark-up of his changes in release dates to Tanya Zorn, who would manage the Assignment Complete process for the affected employees.

Mr. Anderson testified that in early 2005 the WTP was "near our peak [of staffing] and were starting to reduce down" through normal staff reductions. TR at 746. He stated that just prior to the announcement of the RIF, on March 29, 2005, the complainant's assignment complete date and that of some other engineers had been moved up to May 5,2005. TR at 749, Complainant's Exhibit 48. He stated that

> **The position that [the complainant] was occupying we predicted that it must not be a position that we would need to sustain for a long period of time.**

TR at 750. He stated that the ending of assignments for employees was a means "to keep our resources within . . . budget levels." *Id.*

Mr. Anderson stated that he has the "final input" for moving up an employee's assignment complete date, but that Mr. Douglass, as the complainant's supervisor, "would have had some input" in moving up the complainant's assignment complete date. TR at 750. However, Mr. Anderson testified that in this instance he had no "specific knowledge" that Mr. Douglass had any input into moving up the complainant's assignment complete date. TR at 780.

Mr. Anderson testified that when the RIF was announced, the complainant and the other employees who had received 30-day assignment complete notices got rolled into the RIF process. TR at 751. He stated that in a November 2005 memorandum to Mr. Robertson in Employee Concerns he wrote that a change in an employee's assignment complete date

> **is probably not a good indication that we wanted to terminate someone, only that we expected that some work**

> would be completed in the near term. Generally we did some long range forecasting of the reduction in positions based on schedule and budget considerations. Many times these reductions are less than accurate as they were not adjusted every month.
>
> I think a better indication of the status of performance would be the salary planning effort. There was an exercise in February or March '05 to indicate general performance of our engineers, designers and technologists for salary planning purposes.

BNI Exhibit 44, TR at 757. He stated that Mr. Douglass and Mr. Hall's group leaders had given him a B rating for this exercise. TR at 758.

d. The Complainant's Selection for the RIF

Mr. Anderson testified that the planning for the 2005 RIF at the WTP started in very early April. TR at 747. He stated that an employee's assignment complete date was considered in determining whether to include them in the RIF. TR at 775. He stated that he gave the complainant his RIF notice in late April 2005.

Mr. Anderson stated that in July 2005, BNI took a second look at the RIF. He stated that this involved an objective evaluation of all WTP employees using a standardized form, and that he had no input into the complainant's second evaluation. TR at 753.

6. Brandon Gadish, PWS engineer assigned as mentor to Complainant

Mr. Gadish stated that he has worked with the ABB system at the WTP laboratory since 2002, and had more than six months of experience with testing FF measuring devices when the complainant joined the laboratory workforce in 2005. He stated that the complainant was assigned to take over his FF device testing and that he was assigned to mentor the complainant. He stated that he provided the complainant with educational materials, but that the complainant rejected one-on-one training. TR at 793-795. He stated that he complained to Mr. Luper that the complainant had rejected training, and that Mr. Luper met with the complainant and Mr. Gadish to lay out boundaries and guidelines for their work duties. TR at 797-798.

Mr. Gadish stated that on March 10, 2005, he had an "in your face" argument with the complainant that led him to file an employee concern. Mr. Gadish admitted that he used an expletive and called the complainant an idiot during this encounter. TR at 806-808. He stated that he was not disciplined for this behavior. TR at 822-823.

7. Linda McKenney, former Employee Relations Manager at the WTP

Ms. McKenney testified that in 2005, she worked as an employee relations manager with HR at the WTP. She stated that she convened a March 24, 2005 meeting with Mr. Douglass, Mr. Billings and Mr. Luper concerning the conflict between the complainant and Mr. Gadish. After reviewing her notes of the meeting, she stated that at that meeting, no one stated that the complainant should be fired. TR at 850-852. BNI Exhibit 6. She stated that she recommended a formal verbal warning to the complainant regarding his behavior to Mr. Gadish. TR at 855-856. She testified that she later conducted an employee concerns investigation of Mr. Gadish's concern and learned from his co-workers that the complainant and Mr. Gadish were not speaking or interacting in the workplace. TR at 848-849.

Ms. McKenney stated when Mr. Billings sent her an e-mail complaining about his April 1, 2005 altercation with the complainant, she asked Ms. Spellman in HR to investigate. She stated that Ms. Spellman saw whistleblower potential in the statements that the complainant made to Mr. Billings and Mr. Douglass on April 1, 2005, and that she was comfortable with this assessment. TR at 857-858. She testified that on April 7, 2005, she had contacted Danette Brophy in the engineering, staffing and training department and instructed her that BNI policy required that the complainant could not be laid off while there were ongoing employee concern issues involving him. TR at 860.

She stated that her office did not classify the April 1, 2005 altercation between the complainant and Mr. Billings as an incident of misconduct by the complainant. She stated that there were no reports to her of any misconduct by the complainant occurring after her March 24, 2005 meeting with the complainant's supervisor. TR at 878-879.

8. Sheila Spellman, former Human Resources Administrator at the WTP

Ms. Spellman testified that she assisted Ms. McKenney in processing Mr. Gadish's employee concern regarding the complainant. TR at 882. She stated that she worked with Mr. Douglass and Mr. Billings to implement her recommendations to have a

> **discussion with the [complainant] about unprofessional behavior and how to talk to the [complainant] about learning the Bechtel covenants and following the covenants and interacting with his co-workers professionally.**

TR at 883-887. She stated that in an e-mail to Mr. Douglass, she wrote that the complainant has violated the Bechtel covenants because his behavior displays a lack of trust in his co-workers, that he does not welcome help from others, and that he displays a lack of teamwork. TR at 887. She stated that she understood that Mr. Douglass counseled the complainant on April 14, 2005 regarding these issues. TR at 889.

She testified that on April 6, 2005, Ms. McKenney asked her to respond to an e-mail from Mr. Billings about his April 1, 2005 altercation with the complainant. TR at 890, 900. BNI Exhibits 71 and 72. She testified that

> **I recognized that [the complainant] was bringing up issues that I identified at the time as quality issues. And I felt that they needed to be dealt with. We needed to know what they were. Is there any problem with the plant, with quality, safety, environmental issues that an employee is raising? That's something that we as a company are obligated to address and try to find out what they are.**

TR at 894. She stated that Mr. Billings' notes of the meetings indicated that the complainant would go public with his concerns if he was fired, and that this indicated that he might become a whistleblower. TR at 895. She stated that she discussed the complainant's situation with Mr. Stewart at Employee Concerns and that he advised that BNI needed to address the complainant's behavioral issues and his quality concerns separately. TR at 897. She stated that she learned on April 6, 2005 through Ms. McKenney that the complainant was listed to be laid off because his

Assignment Complete date had been moved up in late March. TR at 908-909. She stated that in late July 2005, she sent Ms. Tuttle in Human Resources a report on the complainant's situation. TR at 919.

9. Edward Rogers, Bechtel's Business Manager for the WTP

Mr. Rogers testified that he has worked for BNI for almost nine years and is BNI's Business Manager for the WTP. He stated that in February 2005, the WTP project was seriously short of operating funds. TR at 929-934. He stated that BNI concluded that its current "spend rate" was too high and looked at ways to reduce it. TR at 935. He stated that because of the need to review completed construction and planned construction to meet new seismic requirements, BNI made an immediate forced reduction in the field on craftsmen.

> That was followed up very closely by a forced reduction within the non-manual ranks both in construction and engineering and some of the other organizations.

TR at 935-936.

Mr. Rogers stated that all of the ratings of employees for the RIF were redone at the request of Ms. Tuttle, who was concerned about the criteria that was used:

> I believe we had used the rating originally from our salary, planning and rewarding for performance program that we have as kind of a bonus program. And she was concerned that that rating, the criteria used for the rating in those programs is slightly different than the rating criteria used for retention.

TR at 937. He stated that she also wanted a more standardized and formal process of employee rating. TR at 939.

10. Tanya Zorn, BNI Human Resources Representative in Engineering Department

Ms. Zorn testified that from January to July 2005, she worked as a human resources representative in the WTP's engineering staffing office, and was involved with moving and transferring employees and with workforce planning. TR at 945-947.

She testified that the complainant was hired as a "long term" employee, which meant that his position was expected to last more than twelve months. TR at 949-950. She stated that he also was an "at will" employee and could be terminated by BNI at any time for any reason. TR at 952-953. She stated that all WTP employees had assignment complete dates, and that these dates were based on the expected scope of work and changed frequently on the basis of project and staffing assessments. TR at 953-954. She stated that dates could be moved up for de-staffing purposes, and that normal de-staffing plans were reviewed by Ms. McKenney in HR for outstanding employee concerns. TR at 954-957. She stated that when employees are notified that they will soon reach their assignment complete date,

> it meant that the assignment at WTP was over. It did not necessarily mean that their career or their appointment with Bechtel was over. If the employee had notified us that he or she was mobile and could relocate to other projects and there were positions available on other projects, and they were selected, they could transfer to other Bechtel assignments.

TR at 958-959. She stated that she sent a list of five engineers that included the complainant with "assignment complete dates" of May 5, 2005 to Ms. McKenney in HR in late March 2005. TR at 955-960. Complainant's Exhibit 48. She stated that prior to March 29, 2005, the complainant's assignment complete date had been September 7, 2006. TR at 968. Ms. Zorn then testified that the May 5, 2005 assignment complete dates were never implemented with respect to any of the engineers:

> Just after I submitted this March 29th list there was some indication from our senior management that we would have to reduce our staff by a certain percentage. And so everything sort of got put on hold at that time to not give notifications until we can figure out what was going on. We knew we were going to have to reduce our staff by a bogey of 20 or 30 percent, if you will. And so engineering decided that rather than give notice of the assignment complete we would wait until we knew how deep our cut had to be to be funding compliant for the year. And we would roll the assignments complete into that larger reduction in force number. Eventually what happened was, rather than giving notification to these folks to go out and have their assignments completed on

> May 5th, their assignments were essentially extended out approximately two, almost three months.

TR at 968-969. She stated that the complainant's assignment complete was officially changed to June 16, 2005 on a project staffing assistant form dated April 12, 2005. TR at 973, BNI Exhibit 117. She stated that both the March 29, 2005 assignment complete date changes and the April 21, 2005 RIF selections relied on the salary planning rankings of employees within their peer groups that were completed in the February to March time frame. TR at 983-984. She stated that the complainant's ranking of 18 out of 24 employees in his peer group in the April 21 RIF selection reflected his B minus rating in the February/March 2005 salary ratings:

> In other words, [the complainant's rating] was equivalent to whatever the score was once everybody got considered, once Mr. Anderson' group got rolled into the bigger group and they came up with the master scores, if you will, that was what was used.

TR at 984-985.

Ms. Zorn testified that the positions filled by the lowest ranked employees were ended first under the Assignment Complete process because higher ranked employees had bumping rights over lower ranked employees.

> If there was a higher-rated individual holding a position that ended sooner than a lower-rated individual then the higher-rated individual would bump that person (the lower rated individual), and his or her employment would be extended for the position and end date and the lower-rated individual would either [be transferred to another BNI position] or their employment would end.

TR at 983.

Ms. Zorn testified that when the engineering group leaders and supervisors selected employees for the April 21 RIF notice, they relied on the employee ratings that already were established for the February/March salary ratings. She stated that "we didn't adjust ratings for the RIF." TR at 1002.

11. Kathy Ann Tuttle, Manager of Human Resources at WTP

Ms. Tuttle testified that she is an HR manager at the WTP working for Mr. Rogers, and that she never met the complainant during his employment at the WTP. TR at 1014-1016. She stated that on or about April 1, 2005, the decision was made to lay off employees through a RIF. TR at 1016. She stated that the goal was to reduce the workforce by 500 people in 90 days, with a 60-day notice to the affected employees. TR at 1018-1019.

She stated that initially supervisors were told where to get employee ratings and instructed to prepare their lists of employees for the RIF. TR at 1020. She testified that the supervisors

> **were to determine the scope of work that they were going to be able to do within the funding restrictions and the bogeys, the targets, that they were given. And then based on that scope of work, to make a determination of how many FTEs, full-time equivalents, they were going to need and what type of skill sets, define the skill sets for the positions for each discipline that they were staffing. And that they were to use the ratings from . . their salary planning ratings for the people in Grades 24 and below. And those had been done, I believe [in the] February and March time frame.**
>
> **And then that they were to look at the scope and the people they had, the skill sets, the individuals, determine how many of those from each skill set they needed to place into the positions that they had to perform the scope. And then the ratings would determine a totem ranking and they were to place the people in the positions from the top and we would release from the bottom if there were too many people in certain skill sets that there weren't enough positions for the number of people that we had. And then they were to develop that list and give it to Human Resources to run an adverse impact analysis.**

TR at 1023-1024. She stated that the initial selection process for the RIF led to questions and allegations that older employees had been negatively impacted. TR at 1022. She stated that BNI determined to take a second look at the selection process and to use standardized business assessments in each department and individual employee rating (IER) worksheets that used "very objective criteria." TR at 1028, citing BNI exhibit 277. She

stated that once the supervisors had rated their employees in different categories on the IER worksheets, these categories were weighted using spreadsheet software and rankings for peer groups of employees throughout the WTP were developed. TR at 1028-1035. She stated that some of the employee evaluation categories rated by supervisors received a greater weight in this spreadsheet ranking than did other categories:

> [The supervisor's rating] doesn't tell you how a peer group is totem ranked on the ratings because you have to put [the rating] in the worksheet and then the sections [of the rating] have weights applied to them. The way the weights are applied is that it's a higher weighting for individual skills and qualifications and value of contributions. It says here it's a 50 percent weight for the skills whereas the teamwork and leadership section . . . is weighted at 20 percent and the current state performance is at 30 percent.

TR at 1033. Ms. Tuttle stated that if the ratings assigned to an employee by his supervisor were consistently low, "it is reasonable to believe that [the employee] would fall in the lower totem rating." TR at 1057. She testified that, as a result of the rating that the complainant received from his supervisor, and the weights assigned to the categories of that rating by the spreadsheet software, the complainant was totem ranked 16th in his peer group of 19 Grade 24, Engineer III employees. TR at 1065-1066. She stated that BNI determined the number of employees in the peer group who were needed for future work at the WTP, and they then released employees from the bottom of the list until that number was achieved. TR at 1066. She stated that in the complainant's peer group, the employees ranked 14 through 19 received RIF notices. TR at 1094. BNI Exhibit 279.

12. Thomas Stewart, WTP's Employee Concerns Officer

Mr. Stewart testified that in July 2005, the complainant filed an employee concerns complaint alleging that his inclusion in the April 21, 2005 RIF was a retaliation for protected disclosures. He stated that on July 19, 2005, he met with the complainant for a couple of hours to discuss his concerns, and at that time the complainant asked that he not be released under the RIF. TR at 1270-1271. He stated that after a three-month complaint investigation, WTP's Employee Concerns found no nexus between the complainant's disclosures of alleged safety concerns and any adverse actions taken by BNI. TR at 1277-1279, BNI Exhibit 230.

With respect to BNI's decision to move up the complainant's Assignment Complete date, Mr. Stewart testified that his investigation found that in early March 2005, the PWS group at the WTP received word from the WTP's project controls group that it needed to eliminate a number of employees. He stated that by March 9, 2005, the C&I division headed by Mr. Anderson completed ratings for their employees "which were flowed up . . . to their management." TR at 1282-1283. He testified that Ms. Zorn helped him to establish that

> on or before March 29, the [Estimated Assignment Complete] had been submitted to Human Resources indicating that [the complainant] and others had been slated for estimate of completion, I believe around [May] 5th.

TR at 1281.

He stated that there is no nexus between the complainant's alleged disclosures on April 1 and April 15, 2005 and his inclusion in the RIF because BNI management had already decided to terminate the complainant prior to his disclosures:

> I am aware [that] in March [2005], prior to his management having any awareness of alleged . . . protected disclosures, they had made a decision that Mr. Hall and other co-workers were to be released. As we look at the subsequent re-rating and rankings that were done, at least two of them, Mr. Hall stayed essentially [in] the same position, even though there were deeper and deeper cuts being made into all of the organization.

TR at 1294.

> What I was told by my staff and Human Resources that the ratings and rankings stayed consistent throughout the process in regards to Mr. Hall's positioning. Therefore, I had no reason to assume anything negative had happened, he stayed about the same.

TR at 1301. Mr. Stewart stated that if the complainant had received a good rating in March 2005 and then his ratings had declined subsequent to his protected April 1, 2005 protected disclosure, "that would be an instant red flag to me." TR at 1309.

Mr. Stewart stated that he could not recall having reviewed Mr. Billings July 2005 rating of the complainant. TR at 1299.

IV. Legal Standards Governing This Case

A. The Complainant's Burden

Once it is determined that the complainant has met the procedural requirements for submitting a Part 708 complaint, he must then establish by sufficient evidence that relief is warranted. Specifically, it is the burden of the complainant under Part 708 to establish

> by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee 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, participation, or refusal.

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and by BNI. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992).

B. The Contractor's Burden

If I find that the complainant has met his threshold burden, the burden of proof shifts to the contractor. BNI must prove by "clear and convincing" evidence that it would have taken the same personnel actions regarding the complainant absent the protected disclosures. "Clear and convincing" evidence is a more stringent standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". *See Hopkins*, 737 F. Supp. at 1204 n.3. Thus if the complainant has established that it is more likely than not that he

made protected disclosures that were a contributing factor to an adverse personnel action taken by BNI, the contractor must convince me that it clearly would have taken this adverse action had the complainant never made this protected disclosure.

V. Analysis

A. The Complainant Made Protected Disclosures

As noted above, in order for the information that the complainant disclosed to his group leader, his supervisor and others on April 1, 2005 to constitute a protected disclosure under Part 708, the complainant must reasonably believe that the information reveals one of the following:

> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority . . .

10 C.F.R. § 708.5(a)(l), (2) and (3). Throughout this proceeding, the complainant has contended that the disclosures he made to BNI officials concerning problems involving the future control system for the WTP were protected because they revealed a substantial and specific danger to employees or to public health or safety under 10 C.F.R. § 708.5(a)(2). Specifically, he asserted that the ABB control system software did not communicate or interact reliably with field measuring devices or with the operating programs in computer monitors. He stated that this assessment was based on his experience (1) in testing FF devices for use on the ABB system, (2) his own experiences and reports he received concerning frozen computer screens and computer system lock-ups involving the ABB system, (3) his knowledge that the ABB system was a new and largely untested technology, and (4) his personal research indicating that the ABB system was not well regarded by people working with control systems. As discussed below, my review of the testimony and other evidence in the record of this proceeding leads me to conclude that the complainant made disclosures to BNI officials on April 1 and April 15, 2005 that were based on his reasonable belief that there were serious problems with the interoperability of the ABB control system selected for use at the WTP with other digital programs, and

that these disclosures presented "a substantial and specific danger to employees or to public health and safety" protected under Part 708.

1. The Complainant Made Disclosures on April 1 and April 15, 2005 Concerning the ABB Control System

The complainant testified that on the morning of April 1, 2005, he stated to his group leader, Mr. Billings, that he thought that the ABB system's software had problems communicating with the Foxboro pressure transmitter. Later, at a staff meeting, he explained to Mr. Billings and several BNI engineers that the Foxboro pressure transmitter communicated effectively on two other control systems, and therefore he believed that the ABB system appeared to cause the communication problem. He stated that he then passed out copies of a survey from a trade magazine for control systems that rated the ABB last out of five systems being assessed. In his testimony at the Hearing, Mr. Billings essentially confirmed that the complainant made these statements. TR at 304-306.

At a meeting with his supervisor, Mr. Douglass and Mr. Billings later that morning, the complainant stated that he repeated his observations that he had made earlier about ABB system communication problems with the Foxboro transmitter and also stated his concern that the ABB system was causing computer lockups. He stated that these problems were safety issues. TR at 165-166. These statements by the complainant were confirmed by the testimony of Mr. Billings (TR at 311) and Mr. Douglass (*see* TR at 508). The complainant testified that on April 15, 2005, Mr. Douglass arranged a meeting attended by the complainant, Mr. Douglass and Mr. Anderson, the Discipline Engineering Manager for the WTP, at which the complainant repeated his concerns regarding the computer lockups and communication problems. Mr. Douglass and Mr. Anderson confirmed that they met with the complainant on that date to hear his concerns about the reliability of the WTP's future control system.

Based on this testimony, I conclude that the complainant reported his concerns about computer lockups and FF measuring device communication problems to his group leader and his supervisor on April 1, 2005 and to his supervisor and another BNI official on April 15, 2005. The complainant also stated his belief at these meetings that the ABB control system was the cause of these problems, and further that the ABB control system was unsafe and unreliable to be utilized in the WTP.

2. The Complainant Had a Reasonable Belief that the Interaction of the Control System Components with ABB System Software Was Not Sufficiently Reliable

Based on the testimony and evidence at the Hearing, I find that the individual reasonably believed that his April 1 and April 15, 2005 disclosures raised significant reliability issues related to plant safety. The complainant has a BS in electrical engineering and has worked a total of seven contract assignments at NRC-licensed powerplants as an instrument technician and a compliance engineer. This education and work experience has provided him with a basic understanding of the workings of control systems and how they communicate with measuring devices.

The complainant testified that on February 22, 2005, the ABB system software locked up on his computer. TR at 94, 95 and 98. He stated that in March 2005, Mr. Aldridge, another PWS engineer, reported to him that a server running the ABB system software had locked up on him. TR at 101, 125. The testimony of Mr. Thomas, the ABB representative, indicates that Mr. Aldridge's computer problem may have been the result of hardware or operating software problems on a Dell laptop computer.10/ Nevertheless, I believe that the complainant experienced at least one problem and heard of at least one other similar problem. The complainant convinced me that he believed that if the ABB system displayed a frozen screen while monitoring control functions, the operators might not immediately recognize an emergency situation such as a failure in the cooling system that could lead to a serious outcome. TR at 104.

The complainant testified that he also had a concern about the ability of FF measuring devices to communicate reliably with ABB system software. Specifically, he stated that after he encountered a communication problem when testing the Foxboro pressure transmitter on the ABB system, he contacted Foxboro to see if they could identify a problem with the transmitter. When Foxboro sent him a second pressure transmitter that it had pretested on two different control systems, and this second pressure transmitter also failed to consistently communicate with the ABB system, the complainant concluded that the transmitter was functioning properly and therefore he reached the conclusion that the ABB system was

---

10/ The only evidence on this issue appears to be an unsigned statement attributed to Mr. Aldridge and Mr. Thomas' recollection of his April 2005 conversation with Mr. Aldridge. TR at 414, BNI Exhibit 201.

causing the communication problem. TR at 139. He also testified that he was told by co-workers that, prior to his being hired in 2005, PWS engineers had experienced trouble importing data from other measuring devices into the ABB system, including a Foxboro temperature transmitter, and a valve control device made by another manufacturer. TR at 142. Accordingly, when the complainant discussed his concerns with his group leader and supervisor on April 1 and April 15, 2005, I find that he reasonably believed that the ABB control system software was unable to consistently communicate with the Foxboro pressure transmitter and other devices.

At the Hearing, Mr. Billings testified that subsequent research by Foxboro and ABB revealed that the Foxboro pressure transmitter had a problem that caused it to stop communicating with the ABB system. TR at 317-320. The problem in the Foxboro pressure transmitter was not identified until early June 2005, and does not in my opinion serve to refute that the complainant reasonably believed in April 2005 that there was a serious communication problem involving the ABB system software. Indeed, the June 2, 2005 letter from Foxboro to BNI makes clear that the ABB control system's characteristic of constantly reading all parameters of measuring devices requires an operable secondary buffer in the Foxboro pressure transmitter to prevent a malfunction. In its letter, Foxboro noted that

> Generally, other control systems do not operate in this manner because this approach is perceived as an unnecessary risk to system performance.

BNI Exhibit 65. Foxboro also pointed out to BNI that such a secondary buffer on its pressure transmitter is an "implementation detail" not required by the FF specifications for such devices, and not tested by the Foundation. *Id*. It appears from this letter that the complainant was reasonable in his conclusion that the ABB system raised unique challenges for communication with measuring devices designed to meet the uniform communication standards of the Fieldbus Foundation.11/

11/ Even if BNI is correct that the communication problem was caused by the Foxboro pressure transmitter, the individual's repeated disclosures concerning that communication problem [the complainant's initial March 2005 disclosure to Mr. Billings (TR at 298), the complainant's March 31, 2005 email to Mr. Billings (TR at 139), the complainant's April 1

(continued...)

Finally, the complainant testified that he believed that the trade magazine's random poll that rated the ABB system last out of five control systems provided additional evidence that other professionals in the field appeared to be having problems with the ABB system and that the ABB system could be the source of the Foxboro transmitter communication problem. TR at 153.

Based on the testimony and evidence in the record, I find that the information known by the complainant in April 2005 was sufficient to provide him with a reasonable belief that the ABB system was the source of computer lock ups and that there were measuring device communication problems that raised concerns about the reliability of the control system being designed to control processes at the WTP.

3. The Complainant's April 2005 Disclosures Revealed A Substantial and Specific Danger to Employees or to Public Health or Safety

The complainant has shown that he reasonably believed that there were flaws in the plant operating system that caused computer screen lock ups and the system had problems communicating with measuring devices. He testified that once the WTP began operations, these problems with the ABB control system could result in emergency situations. TR at 104. However, BNI argues that none of the disclosures made by the complainant reveal a substantial and specific danger to the safety of WTP employees or the public. It first contends that no substantial or specific danger can exist because at the time the complainant made his disclosures, ABB system was in a testing and design mode in the laboratory environment and did not control or monitor any operations involving hazardous materials. BNI Reply Brief at 2.

It further argues that any dangers posed by flaws in the WTP's control system are completely mitigated by the redundancies that will be built into the system, and by a separate safety system that will monitor functions at the WTP.

I find that BNI's arguments are without merit. I reject the position that Part 708 does not protect whistleblowers who identify a danger to public health and safety that is substantial and

---

11/ (...continued)
and April 15, 2005 meetings with Mr. Billings and Mr. Douglass] might still qualify as protected Part 708 disclosures.

specific, and that is likely to occur at some point in the future. A danger, by definition, generally involves an element of future possibility and risk.12/ Moreover, the regulatory language does not state that the danger must be "imminent" or "immediate" as a means of restricting this aspect of the term's meaning. In the present case, the ABB system had been selected as the control system for the WTP, which was under construction. At the time that the individual made his April 2005 disclosures, he stated that he believed that the WTP was scheduled to be completed and operational by 2008. TR at 1250. Other testimony indicates that sometime in 2005, the completion date was extended to 2012.13/ Regardless of whether the scheduled operation date for the WTP was 2008 or 2012 at the time that the individual made his disclosures, I find that the design and the procedures for the future operation of the WTP were sufficiently established in 2005 to enable the individual to identify a substantial and specific danger relating to the future operation of the WTP.

BNI also argues that the there is no significant risk that any malfunction in the ABB system would lead to an emergency involving harm to employees or to the public. As an initial matter, I find that witness testimony at the Hearing did not establish BNI's contention that the ABB system controls no plant functions but only monitors "non-safety related instruments and equipment." BNI Reply Brief at 7. No testimony contradicts the complainant's assertion that the ABB control system will be used to maintain as well as to monitor process variables such as pressure, temperature level, flow, and radiation for the vitrification processes that will take place at the WTP. TR at 88-89. In addition, Mr. Spicer testified that the ABB system is being tested to perform robotic processes

---

12/ "DANGER, the general term, implies the contingent evil (troubled by the *danger* that the manuscript will be lost - Carl Van Doren)(realizing that the buffalo in the United States were in *danger* of becoming extinct - Amer. Guide Series: N.H.)(the *dangers* of travel by air) (the *danger* of lowering one's standards) PERIL implies more strongly the imminence and fearfulness of the danger (the ship was in deadly peril of seizure by mutineers - C.C.Cutler)" *Webster's Third International Dictionary, Unabridged*, G&C Merriam Company, 1964 at 573.

13/ The testimony of Mr. Billings indicates "sometime in 2005" the start-up date for the WTP was "pushed out" until at least the "the 2012 time frame." TR at 259.

that will be used at the WTP. TR at 239-240. Finally, Mr. Thomas stated that the ABB system would be responsible for the mechanical handling of container and canister movement control and monitoring at the WTP. He stated that these containers and canisters would contain samples of radioactive materials "at different points within the process." TR at 424-425.

Nor do I agree with BNI's position that design redundancy and a separate safety system eliminate any significant risk caused by a malfunction of the ABB system. As summarized above, Mr. Douglass, Mr. Thomas, Ms. Talmadge and others testified that even if concerns raised by the individual were correct and the use of the ABB system as an operating WTP produced a computer screen lock-up or a failure to communicate with measuring devices, there would be no significant danger to employees or the public. They testified that the WTP's PPJ/Tricon safety control system will operate independently from the ABB system, and is designed to detect and respond to emergency situations when the WTP is in operation. They also indicated that the use of multiple computer consoles in the ABB system's control room will insure that any lock-up of a single computer screen will be promptly detected and will not jeopardize the operation of the system.

I find that it was reasonable for the individual to believe when he made his disclosures in April 2005 that the flaws that he identified in the ABB control system would have the potential to create a situation that plant operators and the contingencies designed into the PPJ/Tricon safety system might not be able to control in time to prevent injury to employees or a significant public health problem. In particular, I find that it was reasonable for the individual to believe that his concern that the ABB system could fail to reliably communicate with measuring devices that provide it with data on the temperature and pressure levels created by waste processing functions presented a substantial danger to employees and the public.

In light of the evidence discussed above, I reject BNI's argument that the complainant could not have reasonably believed that problems he identified with the WTP's ABB control system created a substantial and specific danger to employees or to public health and safety. In fact, the individual disclosed significant information when he reported specific problems in the ABB system relating to computer screen lock-ups and to communication problems with FF measuring devices. I find that the evidence in this proceeding indicates that the complainant reasonably believed that his April 1 and April 15, 2005 disclosures revealed a substantial

and specific danger both to WTP employees and to the general public's health and safety, and therefore constitute the type of disclosures that are protected under Part 708.

B. The Complainant's Protected Disclosures Were a Contributing Factor to the Alleged Act of Retaliation

Under 10 C.F.R. § 708.29, the complainant must also show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994).14/ A protected disclosure may be a contributing factor to an adverse 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 personnel action." *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep't of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the retaliation he alleges. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to knowledge of the disclosures, the complainant made his disclosures to his group leader and his supervisor on April 1, 2005 and to his supervisor and BNI's Discipline Engineering Manager on April 15, 2005. The complainant's supervisor stated that he immediately conveyed these concerns to other BNI officials, including Ms. McKenney and Mr. Stewart.

14/ A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Luis P. Silva*, 27 DOE ¶ 87,550 at 89,263 (2000), *citing* 135 Cong. Rec. H747 (daily ed. March 21, 1989)(Explanatory Statement on Senate Amendment-S.20); *see also Stephanie A. Ashburn*, 27 DOE ¶ 87,554 (2000), *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)(applying the "contributing factor" test in a case under the Whistleblower Protection Act, 5 U.S.C. § 1201).

With regard to timing, the disclosures took place in early and mid-April 2005, and the alleged retaliation taken against the complainant, *i.e.* determining to include him in a July 28, 2005 RIF, took place in early July 2005.15/ A reasonable person could conclude that the protected disclosures were a factor in BNI's decision to RIF the individual because the RIF selection process began shortly after the disclosures were made and lasted only about three months. The disclosures were thus a contributing factor to the alleged retaliation. *See Jagdish C. Laul*, 28 DOE ¶ 87,006 at 89,050 (2000), *aff'd.* 28 DOE ¶ 87,011 at 89,086 (2001) (protected activity found to be contributing factor when it occurred proximate in time to a retaliation).

With respect to the alleged retaliation, I find that the complainant has shown by a preponderance of the evidence that his July 28, 2005 termination from employment is an adverse personnel action and meets the criteria for a Part 708 retaliation. I now will determine whether BNI has shown, by clear and convincing evidence, that it would have taken the same action to dismiss the complainant in the absence of the protected disclosures.

C. BNI has not Shown by Clear and Convincing Evidence that it would have dismissed the Complainant in the Absence of his Protected Disclosures

I find that BNI has established that the site-wide RIF that it conducted in 2005 was necessitated by a reduction in federal funding for the construction of the WTP and the need to adjust the design of the plant. Testimony of Mr. Rogers, TR at 931-935. It also has shown that the RIF reduced the workforce at the WTP site by about 500 people. Testimony of Ms. Cathy Tuttle, TR at 1018.16/ I therefore conclude that the purpose and scope of the RIF were legitimate. Accordingly, the issue that I will examine is whether BNI has shown by clear and convincing evidence that if would have RIFed the complainant absent the protected disclosures.

15/ As discussed below, I find that BNI has failed to show that a final decision to terminate the complainant was made before July 2005.

16/ BNI's Initial Brief that the complainant was "one of thousands at the Hanford site that was terminated in connection with the RIF" [Initial Brief at 13] therefore appears to refer to RIF selections at the entire Hanford site, not just at the WTP construction project.

1. BNI's Contentions Regarding Its Termination of the Complainant's Employment

BNI argues that the testimony of Ms. Zorn indicates that February 2005 salary planning ratings for the complainant's peer group were "an important consideration" for the assignment complete process. BNI Closing Argument at 22. BNI states that no later than March 29, 2005, the complainant and four other members of his peer group were "identified for termination" and their assignment complete dates were moved up to May 5, 2005. It contends that

> **because of a change in project priorities resulting from funding and seismic issues, the determination was made that Hall's skill set was no longer needed on the project and his end date was moved up to May 5, 2005 by March 29, 2005.**

Id. **17/ BNI then states that once it was determined that BNI would be required to engage in a large site-wide RIF at the WTP, all of the engineers on the Assignment Complete list were reviewed in connection with the RIF:**

> **BNI ceased the Assignment Complete process entirely and simply concentrated on the reduction in force procedure to accomplish the necessary destaffing requirements.**

BNI Closing Argument at 23. It states that the complainant and the four other employees on the Assignment Complete list "were ultimately identified for termination in connection with the RIF." ***Id.*** **BNI states that in early to mid-April 2005, Mr. Douglass, Mr. Billings and Mr. Meinert met to discuss the employees that they supervised and to identify the five employees to be slated for termination in the RIF. BNI states that**

17/ **In its July 31, 2006 Initial Brief in this proceeding, BNI asserted that BNI made its determination to select the complainant for a RIF "at the latest, on March 9, 2005." Initial Brief at 20.** ***See also*** **BNI's August 21, 2006 Reply Brief at 5 ("Hall's fate, as well as the fate of many other BNI employees, was sealed by early March 2005). I will treat the assertions made by BNI at the Hearing and in its closing argument as an alteration and clarification of its previous position.**

> The three supervisors wrote the names of the employees who were potential candidates for termination in connection with the reduction in force on a white board and discussed each employee. [BNI Exhibit 173]. The focus of the meeting, according to Billings, was to identify the employees who were contributing the least to the group, to find the weakest performers - those whose skills could be replaced in the future if necessary. *Id.* Billings explained that Hall's name was one of several that was discussed in connection with the reduction in force. *Id.* All were of the opinion that Hall was one of the weakest members of the group. Hall had not demonstrated strong computer skills, a strong understanding of control systems, leadership, or objectivity, making it difficult for his supervisors to assign him work. *Id.* Furthermore, his supervisors had observed his great difficulty in getting along with other members of the group. *Id.* The three supervisors agreed that Hall was one of the individuals to be slated for termination in connection with the reduction in force. *Id.*

BNI Closing Argument at 24. BNI states that as a result of this process, the complainant and the four other employees previously identified for the Assignment Complete termination were identified for the RIF termination. BNI asserts that when the April 2005 RIF determinations were reevaluated in June 2005, all employees at the WTP were reevaluated using a more objective tool - the WTP Individual Employee Rating Worksheet. *Id.*

> In the reevaluation, all employees at the WTP were re-rated and ranked against their peer groups. Their direct supervisors were responsible for filling out the worksheet and evaluating the employee in three areas - current/sustained performance; teamwork/leadership; and skills, qualifications, and value of performance. [BNI Exhibit 146]. In Hall's case, Billings completed his evaluation, but Douglass, as his manager, signed the worksheet. *Id.*

BNI states that after the managers rated the employees using this worksheet, the worksheets were forwarded to Human Resources where the scores were entered into a spreadsheet tool that weighted the scores. BNI contends that the use of this tool means that

> a supervisor cannot manipulate an employee's rating because he or she cannot know what effect the weighting will have on specific areas of the rating.

BNI Closing Argument at 25. BNI states that after this weighting was applied to the complainant's peer group of engineers, the complainant and the four other engineers identified for termination through Assignment Complete and the April 2005 RIF determination were once again identified for termination. *Id.*

BNI concludes that the testimony at the Hearing established that the complainant was a difficult employee who refused to take direction, was not a team player, was single-handedly eroding group morale, and that he had minimal skills for his position and especially poor computer skills. *Id.* at 26. For the reasons presented below, I find that BNI's assertions fail to establish by clear and convincing evidence that, in the absence of his protected disclosures, the complainant would have been included in the July 28, 2005 RIF based on workplace conflicts, poor performance or because he lacked necessary job skills.

2. BNI Has Not Shown that the Complainant's Workplace Conflict with Mr. Gadish Would Have Resulted in his Termination

The record indicates that on March 24, 2005, BNI officials convened a meeting to address the complaints made by Mr. Gadish concerning the complainant's behavior in the workplace. The meeting was convened by Employee Relations specialist McKenney and also was attended by Mr. Douglass, Mr. Luper and Mr. Billings. In his testimony, Mr. Billings stated that in addition to the complaint from Mr. Gadish, he also had been told by PWS supervising engineer Meinert that the hostile environment created by this conflict was affecting his team, and by ABB system representative, David Thomas, that the complainant was not taking instruction well and causing people in the laboratory environment "to sort of avoid being in there with him...." TR at 290-291. He stated that Ms. McKenney told them that they needed to closely monitor the situation and clearly lay out expectations whenever the complainant was asked to do something. He stated that Ms. McKenney said that she would start a file associated with the concerns. TR at 291-292.

While the complaints and concerns discussed at this meeting indicate that the complainant's supervisors had developed a negative view of his social skills and to some extent his workplace performance, they do not provide substantial support for finding

that the complainant would have been terminated on the basis of the concerns relating to his conflict with Mr. Gadish. Mr. Billings testified that firing the complainant was viewed as only a potential outcome by the attendees at the meeting, not the objective of the meeting. TR at 286. Ms. McKenney reviewed her notes of the meeting and testified that no one at the meeting stated that the complainant should be fired. She stated that they accepted her recommendation to deliver a formal verbal warning to the complainant regarding his behavior. TR at 850-856. Mr. Douglass testified that this verbal warning could if necessary be followed by a written warning and possible termination, but he stated that a course of action involving termination was not finalized at this March 2005 meeting. TR at 498-504.

This testimony indicates that the complainant would not have been terminated for the behavior that he exhibited to Mr. Gadish prior to this March 24, 2005 meeting, but that his supervisors agreed to warn the complainant about his behavior and to clearly set out their expectations for his future interactions with co-workers. Nor has BNI established that the type of behavior exhibited by the complainant in his conflict with Mr. Gadish generally resulted in the termination of an employee at the WTP. Accordingly, I find that BNI has not shown that the complainant's workplace conflict with Mr. Gadish would have resulted in his termination.

3. BNI Has Not Shown that It's February/March 2005 Ranking of the Complainant would have resulted in his Termination of Employment

BNI's basic argument is that the complainant and the same four co-workers were selected for lay off on three occasions in 2005, once through the Assignment Complete process and twice through the RIF process. It contends that these circumstances convincingly establish that in each instance, he and his coworkers were selected for lay off for legitimate business purposes. As discussed below, I do not believe that the evidence presented by BNI adequately substantiates this conclusion.

a. BNI Has Not Shown that its February 2005 Salary Ranking of the Complainant at the B-minus Level Reflected his Job Skills or Performance

At the Hearing, Mr. Douglass testified that because the complainant was recently hired, he did not attempt to evaluate his abilities and job skills for purposes of the February/early March 2005 reward for performance salary rankings. Rather, he stated that the

complainant and other new hires were inserted into the salary rankings "in the low Bs basically so that it doesn't help them or hinder them." TR at 530. Accordingly, there does not appear to have been an assessment by BNI officials of the complainant's job skills and job performance for purposes of this performance salary ranking.

BNI has established that it gave the complainant a B-minus rating and ranked him 18th out of 24 in his peer group during this February/March 2005 reward for performance rating process. An undated and untitled salary ranking document gives the complainant a B rating, a point rating of 6.7, and ranks him 12th out of 17 engineers. In a November 2005 e-mail, Mr. Douglass identified this document as the "peer rating" done on February 24, 2005. Complainant Ex. 13. At the Hearing, Mr. Anderson identified the document as his division's input into the plant-wide salary ranking process. TR at 745. Another undated document, entitled "2005 Salary Planning Program, Bechtel Systems Infrastructure, Inc.", lists the complainant with a B-minus rating and a point rating of 6. BNI Ex. 276. The peer ranking assigned to the complainant was 18 out of 24, and appears on the Assignment Complete list established by Mr. Anderson in late March 2005. The explanation provided by Mr. Anderson and Ms. Zorn for these changes is that such a reduction in grades and scores can occur when engineers from one division are rolled into a plant-wide peer group. Based on this evidence, I find that BNI has demonstrated that it gave the individual a B-minus rating and a peer group ranking of 18 out of 24 prior to his first protected disclosures on April 1, 2005. However, it has not shown that this rating and peer ranking was in any way related to his actual performance as an employee at the WTP.

b. BNI Has Not Shown that the Complainant's Selection for Termination by Assignment Complete was based on an Assessment of his Performance or Job Skills

With respect to the Assignment Complete process, BNI claims that the complainant was included in the group of engineers selected for Assignment Complete on March 29, 2005 on the basis of its February/early March 2005 reward for performance employee ranking and solely for legitimate business purposes. There is considerable testimony in the record supporting this position. Mr. Stewart testified that in March 2005 the WTP's project controls group had assessed its staffing needs and informed the C&I group headed by Mr. Anderson that it needed to reduce its staff by several

employees. TR at 1281. The testimony of Mr. Anderson indicates that he made the final decision in late March 2005 to terminate five C&I engineering positions by moving their assignment complete dates to May 5, 2005.18/ He stated that he informed Ms. Zorn, who on March 29, 2005 began the termination process by sending a memorandum to Linda McKenney in Human Resources. Complainant's Exhibit 84.

The testimony of Ms. Zorn indicates that the selection of employees for termination by Assignment Complete were made based primarily on the most recent employee rankings. She stated that the March 29, 2005 assignment complete selections relied on the reward for performance employee ranking of engineering employees by peer groups that was completed in the February to early March time frame. TR at 983-984. She also testified that because higher ranked employees in positions scheduled for an early termination date had the right to bump lower ranked employees, the employee whose positions were selected for Assignment Complete had to be the lowest ranked employees.

Documentary evidence also supports Ms. Zorn's testimony. Attached to her March 29, 2005 memorandum was a document entitled "Engineering Sort by Discipline, Grade, Performance." This document shows that although the complainant is ranked 18 out of 24 in his peer group, two of the peer group members who are ranked below him are not engineers. The employee ranked 19th is a technologist and the employee ranked 20th is a senior designer.

18/ Despite Mr. Anderson's testimony in this regard, other evidence indicates that changing an employee's Assignment Complete date generally is not an action which leads to termination. Mr. Anderson's own memorandum of November 2005 states that an employee's Assignment Complete date "is probably not a good indication that we wanted to terminate someone, only that we expected that some work would be completed in the near future." BNI Exhibit 44. Similarly, Ms. Zorn testified that Assignment Complete dates change frequently on the basis of project and staffing assessments, and that "[i]t did not mean that their career or their appointment with Bechtel was over" and possibly "they could transfer to other Bechtel assignments." TR at 953-954, 958-959. Thus, unlike the RIF initiated after the complainant's protected disclosures in April 2005, the record does not establish that the Assignment Complete process necessarily would have resulted in the complainant being terminated.

Complainant's Exhibit 84. Accordingly, the complainant ranking of 18 out of 24 in this peer group made him one of the five lowest ranking engineers and resulted in his selection for Assignment Complete.

Based on this testimony and evidence, I find that the complainant's selection for termination through the Assignment Complete process in late March 2005 relied on his ranking in the February/early March reward for performance employee rating. As discussed above, the complainant's actual performance and job skills were not assessed when he was inserted into the reward for performance ranking as a recently hired employee at the lower B level. Accordingly, BNI has not shown that the complainant was selected for termination by Assignment Complete based on his performance, or that his job performance would have placed him in the bottom third of employees in his peer group. The complainant appears to have been included in a staff reduction of engineering positions based on an arbitrary rating assigned to him as a new employee.

c. BNI Has Not Shown that It Would Have Terminated the Complainant by Assignment Complete

Finally, I find no merit in the assertion that because the complainant was selected for termination by Assignment Complete, BNI has established that it would have terminated him in the absence of his protected disclosures. The testimony of Mr. Anderson and Ms. Zorn indicates that the Assignment Complete process for the complainant and the other engineers scheduled for termination was halted shortly after Ms. Zorn sent her March 29, 2005 memorandum to Human Resources. The official assignment complete dates for the affected employees never were changed to May 5, 2005. Mr. Anderson stated that he made a decision to make all of the staff reductions required for his division at the WTP through the RIF process. Accordingly, I will examine whether BNI has established by clear and convincing evidence that it would have included the individual in its July 28, 2005 RIF in the absence of his protected disclosures.

4. Hearing Testimony Indicates that BNI Officials Considered the Complainant's Protected Disclosures in Selecting Him for the July 2005 RIF

Ms. Zorn testified that with respect to the selection process that resulted in the April 21, 2005 RIF notifications, BNI officials relied on the same February/March 2005 reward for performance

employee rankings that Mr. Anderson had used for his selecting C&I engineers for Termination by Assignment Complete. She stated that complainant's ranking of 18 out of 24 engineers in his peer group for the April 2005 RIF selection reflected his B minus rating in the February/March 2005 reward for performance ratings. TR at 978-1002. However, unlike the Assignment Complete process, the RIF selection process that occurred in April 2005 also involved evaluations of the complainant's performance and job skills by his supervising officials. Moreover, in early July 2005, the final selection for the RIF rejected use of the reward for performance rankings entirely and replaced them with a contemporaneous evaluation by employee supervisors. As discussed below, these April and July evaluations of the complainant's performance and job skills by his supervising officials appear to have been influenced by his protected disclosures.

The testimony of Mr. Douglass and Mr. Billings indicates that the complainant's supervisor and group leader discussed several aspects of the complainant's potential contribution to the WTP at their April meeting before selecting him for inclusion in the April 21, 2005 RIF notifications. BNI does not contest that this discussion took place. Mr. Douglass testified that the complainant was selected for the RIF at this April meeting because he was new on the project and was viewed as having no in-depth knowledge that would be difficult to lose, because the activities that he was working on were not activities that were critical at the time, and because of performance problems. TR at 532. The record of this proceeding does not provide strong support for Mr. Douglass' assertion that there was no anticipated need for the complainant's job skills and work activities. The complainant testified that after he was selected for the RIF, he was assigned to train another engineer who would remain at the PWS and continue to conduct FF testing. TR at 1235.

The April 2005 meeting involving the complainant's group leader and supervisor occurred very shortly after the complainant's April 1, 2005 disclosures to Mr. Douglass and Mr. Billings, which raises the likelihood that their assessments of the complainant may have been influenced by these disclosures. In fact, Mr. Billings testified that the complainant's position that the ABB system was the likely source of the communication problem between that system and the Foxboro transmitter was a significant consideration in selecting him for the RIF.

> Mr. Hall had demonstrated that he had some difficulties getting along with other members of the team and at that

> point he had also displayed what I guess I'd call a lack of engineering judgment in resolution of the Foxboro transmitter issue – those things combined together were limiting his ability to make useful contributions to the group going forward.

TR at 326.

The record in this proceeding indicates that the evaluation that led to the complainant's selection for the July 28, 2005 RIF was the IER Worksheet completed by Mr. Billings in early July 2005 and signed by Mr. Douglass on July 8, 2005. TR at 464, BNI Exhibit 146. At the Hearing, Mr. Billings confirmed that he rated the complainant using the worksheet and that his evaluation was

> sort of a confirmatory action, you know, with a structured worksheet to the - some of the discussions that we had had previously with Mr. Douglass.

TR at 327-328. The IER Worksheet completed by Mr. Billings awarded the complainant a total 66 out of a possible 145 points in the category of "Current/Sustained Performance"a total of 36 out of a possible 85 points in "Teamwork Leadership", and a total of 31 out of 70 in the category of "Skills, Qualifications & Values of Contributions". BNI Exhibit 146. Mr. Billings testified that he did not know how the rating he provided would be used by BNI Human Resources in selecting employees for RIF. TR at 328. However, he stated that he believed that employees with the lowest ratings were more likely to be selected for the RIF than employees with the highest ratings. TR at 465.

The IER Worksheet completed by Mr. Billings and signed by Mr. Douglass awarded the complainant less than half of the available points in all three of the categories for non-supervisory employees. In his closing argument, the complainant contends that he was rated the lowest of all engineers of his grade under the supervision of Mr. Douglass. Complainant's Closing Argument at 17. I have reviewed the other thirty eight IER Worksheets signed by Mr. Douglass (BNI Exhibit 142) and compared them to the IER Worksheet completed for the complainant. I find that the complainant received the very lowest rating of any of these employees, regardless of grade, in both the "Current/Sustained Performance" and the "Teamwork Leadership" categories, and that the complainant and one other employee received the lowest numerical rating in the "Skills, Qualifications & Values of Contributions" category. I conclude from this analysis that Mr. Billings gave the

complainant the lowest ratings of any of the employees that he graded on the IER Worksheet, and that these ratings also were the lowest numerical scores in these categories for all of the employees supervised by Mr. Douglass.

I reject BNI's assertion that a supervisor cannot manipulate an employees' rating because he or she cannot know what effect the subsequent weighting by HR will have on specific areas of the rating. Ms. Tuttle, the Manager of HR, testified that if the ratings assigned to an employee by his supervisor were consistently low, "it is reasonable to believe that [the employee] would fall in the lower totem rating." TR at 1057. She testified that, as a result of the ratings that the complainant received from his supervisor on his WTP IER Worksheet, and the weights assigned to the categories of that rating by the spreadsheet software, the complainant was totem ranked 16th in his peer group of 19 Grade 24, Engineer III employees. TR at 1065-1066. She stated that BNI determined the number of employees in the peer group who were needed for future work at the WTP, and they then released employees from the bottom of the list until that number was achieved. TR at 1066. She stated that in the complainant's peer group, the employees ranked 14 through 19 received RIF notices. TR at 1094. BNI Exhibit 279.

In light of this evidence, I conclude that BNI has not shown by clear and convincing evidence that it would have selected the complainant for the July 28, 2005 RIF in the absence of the protected disclosures that he made on April 1 and April 15, 2005. Mr. Billings' rating of the complainant placed him at the bottom of all three categories for non-supervisory employees on the IER Worksheet and gave him the very lowest ratings of any employees supervised by Mr. Douglass. These low ratings resulted in his final ranking of 16 in his 19 member plant-wide peer group, and his inclusion in the RIF. While Mr. Douglass, Mr. Billings and other BNI witnesses testified that the complainant exhibited some problems interacting with Mr. Gadish and may have lacked some computer skills, this evidence does not establish by clear and convincing evidence that the very low ratings that he was given by Mr. Billings and Mr. Douglass were accurate assessments of his performance, teamwork and skills.

In fact, the record indicates that Mr. Billings' opinion of the complainant's job performance was significantly influenced by the complainant's disclosures regarding the control system. Mr. Billings testified that his July 2005 rating of the complainant confirmed on a structured worksheet the assessment of the

complainant that took place at an early April 2005 meeting with Mr. Douglass. He stated that at that meeting the complainant's perceived lack of engineering judgment on the Foxboro transmitter issue was a significant factor in concluding that he should be selected for the RIF because his future contribution to the WTP would be limited. It therefore appears that the complainant's April 2005 disclosures regarding the ABB system significantly influenced Mr. Billings' and Mr. Douglass' decision to give the complainant ratings on his July 2005 IER worksheet that were the lowest of any given to Mr. Douglass' employees.

Finally, BNI has not shown that it evaluated the complainant at a consistently low level before and after his April 2005 protected disclosures. BNI asserts that the complainant and the same four engineers selected for termination by Assignment Complete in March 2005 also were selected for termination by RIF both in April 2005 and July 2005. However, I reject BNI's efforts to connect the complainant to this group of employees. Evidence in this proceeding establishes that the complainant, as a new employee, was arbitrarily inserted into the reward for performance employee ranking in February/early March 2005 and that this ranking served as the basis for the termination by Assignment Complete selections and the April 2005 RIF selections. There is no evidence that the complainant's job performance was ever evaluated prior to his April 1, 2005 protected disclosures. The other four engineers selected for termination by Assignment Complete presumably received reward for performance rankings based on their performance and would understandably continue to be evaluated near bottom of their peer group during the RIF selection process. However, the complainant's connection with this group appears to be based solely on his arbitrarily assigned reward for performance ranking, and does not indicate that he was consistently evaluated as a below average employee from February through July 2005.

I conclude that BNI has not shown that its highly negative assessment of the complainant would have occurred in the absence of his protected disclosures. The rating given to the complainant on the July 2005 IER Worksheet was the lowest rating signed by Mr. Douglass and resulted in the complainant being rated 16 out of 19 in his peer group, with employees rated 14 through 19 receiving RIF notices. (Testimony of Ms. Tuttle, TR at 1094, BNI Exhibit 279). I an not convinced that if the complainant had not antagonized his group leader and supervisor with his concerns about the operational problems with the control system, that he would have received this low rating and would have been selected for the RIF.

Under the standards of proof set forth in Part 708, I conclude that BNI has not demonstrated by clear and convincing evidence that the decision to select the complainant for its July 28, 2005 RIF would have occurred in the absence of the Complainant's April 2005 protected disclosures.

D. The Complainant is entitled to Relief under Part 708

I therefore will provide relief to the complainant for this retaliation. I will direct BNI to reinstate the complainant to a position at the WTP that is comparable to the one from which he was laid off. I further direct BNI to provide the complainant with the lost wages and other compensation that resulted from his being selected for the July 2005 RIF, and to reimburse him for reasonable legal fees and other expenses related to his Part 708 complaint.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Mr. Curtis Hall under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Bechtel National, Inc. (BNI) immediately shall reinstate Mr. Hall into his former position of employment at the Waste Treatment Plant (WTP) being constructed at the DOE's Hanford Site in Richland, Washington. In the alternative, BNI may place Mr. Hall in a comparable position of employment at the WTP.

(3) Mr. Hall shall produce a report that provides information on his earnings since July 28, 2005 and his litigation expenses (reasonable legal fees and other expenses related to his Part 708 Complaint). Mr. Hall's report shall be calculated in accordance with the Appendix.

(4) BNI shall produce a report that calculates the lost wages plus interest payable to Mr. Hall. The BNI's report shall be calculated in accordance with the Appendix.

(5) The BNI shall pay Mr. Hall's litigation expenses. The amount of this payment shall be in accordance with the report specified in paragraph (3) above.

(6) The BNI shall pay Mr. Hall lost wages plus interest. The amount of this payment shall be in accordance with the report specified in paragraph (4) above.

(7) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting Mr. Hall relief unless, within 15 days of receiving this decision, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: March 15, 2007