**May 21, 2008**

**DEPARTMENT OF ENERGY**

**OFFICE OF HEARINGS AND APPEALS**

**Initial Agency Decision**
**Motion To Dismiss**

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| Name of Case: | Richard L. Urie |
| Dates of Filing: | May 15, 2007<br>July 19, 2007 |
| Case Numbers: | TBH-0063<br>TBZ-0063 |

This Decision concerns a Complaint filed by Richard L. Urie (hereinafter referred to as "Mr. Urie" or "the Complainant") against Los Alamos National Laboratory (hereinafter referred to as "LANL" or "the Respondent"), his former employer, under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, LANL was a DOE contractor operating in Los Alamos, New Mexico. It is the Complainant's contention that during his employment with LANL, he engaged in protected activity and, as a consequence, suffered reprisals by LANL. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Urie is not entitled to the relief that he seeks.

## I. Background

### A. Regulatory Background

The DOE established its Contractor Employee Protection Program to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased facilities. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit retaliation by a DOE contractor against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—
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> (1) A substantial violation of any 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.

57 Fed. Reg. 7541, March 3, 1992, as amended at 65 FR 6319, February 9, 2000, codified at 10 C.F.R. § 708.5.

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. 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." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "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." *Id.*

**B. Factual Background**

The following facts are not in dispute. Mr. Urie is an experienced industrial hygienist who began working in LANL's Emergency Operations Division (EOD) in October 2003. He was the Team Lead for the Biological Emergency Support Team (BEST), which was a deployable air monitoring team that performed work for the U.S. Department of Homeland Security and other governmental organizations. During his tenure in EOD, the Complainant reported to William J. Flor, a group leader. During the period relevant to this case, Mr. Flor reported to Beverly A. Ramsey, the Acting EOD Director.

In the spring of 2005, Mr. Urie was transferred to the respondent's Health, Safety and Radiation Division (HSR). These employees were deployed, as needed, to do projects for other LANL offices. The complainant reported to Phillip Romero, who in turn reported to Barbara Hargis. Ms. Hargis' supervisor was John McNeel. During the period from February 6, 2006, until his departure from LANL in April 2006, Mr. Urie was detailed to Ms. Hargis. In May 2006, the Complainant began working for another company, Kellogg, Brown & Root, LLC (KBR). During his brief tenure with KBR, Mr. Urie worked on a project involving a LANL subcontractor, KSL Services Joint Venture (KSL). Mr. Urie left KBR in June 2006.

**C. Procedural Background**

On July 17, 2006, Mr. Urie filed a Part 708 Complaint with the Manager of the DOE's Office of Employee Concerns Program at the National Nuclear Security Administration Service Center in Albuquerque, New Mexico. LANL filed a response to this Complaint, conducted its own investigation, and then issued a report dated February 15, 2007. The Complaint was not resolved, and the Complainant requested that it be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Employee Concerns Program Manager forwarded the Complaint to OHA on February 22, 2007, and the Acting OHA Director appointed an investigator. The OHA investigator interviewed Mr. Urie and three LANL employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on May 15, 2007.

On that same day, the Acting OHA Director appointed me as the Hearing Officer in this case. Given the findings of the OHA investigator, discussed in Section D below, I requested that the parties submit pre-hearing briefs concerning whether Mr. Urie's Complaint should be dismissed. [1] The parties submitted these briefs on July 9, 2007. I conducted a three-day hearing in this case in Los Alamos, New Mexico, beginning on October 15, 2007. As more fully explained below, I dismissed a portion of the Complaint before taking testimony at the hearing. Over the course of the hearing, 12 witnesses testified. The Complainant introduced 22 exhibits into the record, and the Respondent introduced 58 exhibits. On January 22 and 23, 2008, respectively, the Respondent and the Complainant submitted written closing arguments, at which time I closed the record in the case.

**D. Mr. Urie's Complaint and the Report of Investigation**

As previously stated, Mr. Urie alleges in his Complaint that he made protected disclosures during his tenure with EOD. Specifically, he reported to LANL management: (1) gross misconduct, sexual harassment and fraud committed by a fellow LANL employee, (2) the failure of Mr. Flor to act upon Mr. Urie's request for a "safety stand-down," and (3) the intentional deletion of the Complainant's e-mails by Mr. Flor. Mr. Urie repeated these allegations on multiple occasions, most recently in an e-mail to LANL management on January 19, 2006.

In retaliation for making these disclosures, Mr. Urie alleges that LANL management: (1) failed to take action to stop sexual harassment and gross misconduct toward Mr. Urie, (2) cancelled training that he was to take part in, (3) failed to compensate him for 27 weekend and holiday days worked, (4) deleted a number of his e-mails, (5) did not return his security questionnaire until after several requests, (6) initially refused to transfer him from the EOD, (7) created a hostile working environment by failing to give him work, which eventually forced him to resign from LANL, (8) forced him to resign from a subsequent job by communicating to the subsequent employer that the Complainant was a whistleblower, and (9) gave a negative reference to a prospective employer. As relief for these alleged retaliations, the Complainant requests reinstatement, back pay, reimbursement of legal expenses, restoration of time toward retirement, and an opportunity for advancement. *See* July 15, 2006, letter from the Complainant to Eva G. Brownlow, DOE Employee Concerns Program.

After reviewing this Complaint, interviewing Mr. Urie and three LANL employees and examining a large number of documents, the OHA investigator concluded that Mr. Urie had disclosed a number of matters to LANL management which were "probably protected disclosures." ROI at 8. However, the investigator also concluded that "Mr. Urie has not shown, by a preponderance of the evidence, that the Contractor took the alleged adverse actions or, if the Contractor took the actions, the actions

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1/ Specifically, I asked them to address the issues of whether that portion of the Complaint relating to alleged retaliations that occurred prior to Mr. Urie's transfer to HSR in March 2005 should be dismissed as untimely, whether those retaliations are related to the post-March 2005 alleged retaliations or to the relief requested by Mr. Urie, whether LANL retaliated against Mr. Urie by withholding work assignments, whether his March 2006 resignation from LANL was "forced," whether LANL took retaliatory actions against the Complainant subsequent to his resignation and, if so, whether those actions were covered under the Part 708 regulations. *See* May 17, 2007 letter to Mr. Urie and to Pablo Prando, Counsel for LANL.

are relevant to the instant complaint." ROI at 9. With regard to the Respondent's alleged retaliations against the Complainant during his tenure in EOD, the OHA investigator opined that they "do not warrant further consideration" because "they have a tenuous relationship to the principal alleged retaliations (*i.e.*, the withholding of work and the related "forced" resignation from his position in HSR) and to the request for relief," and are time-barred. In this regard, the investigator noted that under 10 C.F.R. § 708.14, an employee has 90 days from the alleged retaliation to file a complaint, and that over a year had elapsed between the alleged retaliations that occurred prior to Mr. Urie's transfer from EOD in March 2005 and the filing of the Complaint. ROI at 10. With regard to the alleged retaliations that occurred after the Complainant's transfer to HSR in March 2005 (*i.e.*, the "forced" resignation from LANL in April 2006 caused by LANL's failure to assign him sufficient work and LANL's alleged negative references to two employers), the OHA investigator concluded that Mr. Urie had not established, by a preponderance of the evidence, that they occurred, or, if they did occur, that they were covered under the Part 708 regulations.

**E. LANL's Motion to Dismiss**

As previously mentioned, after reviewing the ROI, I requested that the parties submit briefs concerning whether Mr. Urie's Complaint should be dismissed. Considering LANL's brief as a Motion to Dismiss (Case No. TBZ-0063), I issued an oral ruling on this Motion at the beginning of the hearing. Hearing Transcript (Tr.) at 13-16. Specifically, I determined that LANL's Motion should be granted as to that portion of the Complaint pertaining to the alleged retaliatory actions that took place prior to Mr. Urie's transfer to HSR in March 2005. I concluded that earlier alleged retaliations had a "tenuous relationship to later alleged retaliations," including the primary claim of "forced," or constructive discharge, and "no meaningful relationship" to the requested relief. I reached these conclusions in part because the LANL management that allegedly retaliated against Mr. Urie during his tenure in EOD (*i.e.*, Mr. Flor and Dr. Ramsey) were not the ones who allegedly withheld work from Mr. Urie and allegedly forced him to resign from his position in HSR . I further found that "no useful purpose would be served by resolving those issues on a more complete record," and consequently, I dismissed that portion of the Complaint pertaining to the alleged retaliations prior to Mr. Urie's transfer to HSR in March 2005. Tr. at 14. [2]

However, I denied the Respondent's Motion with regard to that portion of the Complaint concerning the alleged constructive discharge of Mr. Urie by LANL in April 2006 and the related issue of whether LANL retaliated against the Complainant by withholding work assignments. I concluded that unresolved issues of fact remained regarding these claims, Tr. at 17, and that the goals of the

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2/ I also agree with the OHA investigator that this portion of the Complaint should be dismissed as untimely. Under § 708.14 of the regulations, complaints must be filed within 90 days of the date that the complainant knew, or should have known, of the alleged retaliation. Mr. Urie filed his Complaint on July 17, 2006, more than 16 months after the alleged pre-March 2005 retaliations. The Complainant has not presented any justification for this lengthy delay.

Part 708 Contractor Employee Protection Program would best be served by resolving these issues on a more complete record. [3] Tr. at 15-16.

I also declined to dismiss at that time the portion of Mr. Urie's complaint having to do with the alleged retaliations that occurred after the Complainant left the Respondent's employ. I observed that the question of whether post-employment alleged retaliations were covered under the Part 708 regulations appeared to be "a question of first impression in our Office," and I stated that I wanted "further time to consider the matter and to do it on a more complete factual record." Tr. at 16.

## II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Urie did make protected disclosures. However, I conclude that LANL did not retaliate against him. I therefore need not address the issue of whether the protected disclosures were a contributing factor to any retaliation, and I will accordingly deny the Complainant's request for relief.

### A. The Protected Disclosures

As previously discussed, an employee of a DOE contractor makes a protected disclosure when he or she reveals to that employer, a higher-tier contractor, a DOE official, a member of Congress, or any other government official with oversight authority at a DOE site, information that the employee reasonably believes reveals (i) a substantial violation of a law, rule or regulation; (ii) a substantial and specific danger to employees or to public health or safety; or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a).

Based on these standards, I find that Mr. Urie's January 19, 2006, memorandum to Mr. Romero and Mr. McNeel, in which he states that Mr. Flor knowingly and deliberately ignored a request for a safety stand-down, thereby jeopardizing the safety of his personnel, constitutes a protected disclosure. Complainant's Exhibit 15.

With regard to this allegation, the record shows that the Complainant requested this stand-down because he believed that LANL had not supplied some of its employees with equipment and training called for under guidelines promulgated by the Center for Disease Control that would properly protect the employees from possible exposure to biological or chemical hazards. Complainant's Exhibit 4. Given these guidelines and the Complainant's training and experience in this area, he clearly had a reasonable belief that this disclosure concerned a substantial and specific danger to LANL employees.

With regard to the other alleged disclosures in Mr. Urie's January 19, 2006, e-mail, I have examined them in detail and I find that none of the other matters raised by Mr. Urie rise to the level of a "protected disclosure" under 10 C.F.R. § 708.5(a).

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3/ For the same reasons, I also denied LANL's Motion for Partial Summary Judgement. Tr. at 16-17.

## B. The Alleged Retaliations

Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5.

In his Complaint, Mr. Urie alleges three post-March 2005 retaliations. First, he claims that LANL constructively discharged him from his position in April 2006. Second, he alleges that after his departure from LANL, Dr. Ramsey gave a negative reference to Dynamic Corporation, a company with whom Mr. Urie was seeking employment. Finally, the Complainant contends that he was constructively discharged from a position with a subsequent employer, KBR, because a LANL employee informed KBR that Mr. Urie was a whistleblower.

### 1. The Alleged Constructive Discharge

Mr. Urie claims generally that the Respondent created a hostile work environment by providing him with a substandard physical working environment, by not communicating with him, and by withholding work from him. I will address each of these claims in turn.

#### a. Substandard Physical Working Environment

Mr. Urie contends that he was forced to work under substandard physical conditions toward the end of his tenure in HSR. Specifically, he testified that after his return to LANL at the end of November 2005 from approximately six weeks of unpaid leave (during which he worked for KBR in Iraq), he found out that he had been moved from his office to a cubicle, that he had no trash can, and that his computer was "in pieces." Hearing Transcript (Tr.) at 187-189. These conditions continued for an unspecified period of time, and there is nothing in the record to contradict these claims. However, it does not appear that Phillip Romero, Mr. Urie's Group Leader, knew of the situation with the Complainant's computer, Tr. at 556-557, and there is nothing in the record to indicate that he knew about Mr. Urie's lack of a trash receptacle. Moreover, an e-mail sent by Mr. Urie from a LANL work station would seem to indicate that he had access to a working computer as of January 3, 2006, Tr. at 310, Respondent's Exhibit (Resp. Ex.) 14, and Ms. Hargis has stated that when Mr. Urie began working for her in February 2006, he was provided with a new computer. Resp. Ex. 32, tab 86H (Statement of Barbara Hargis).

#### b. Management's Lack of Communications with Mr. Urie

Second, the Complainant contends that LANL management was not communicating with him during this period. Tr. at 26. It does appear that after his return from Iraq at the end of November 2005, there was little or no communication from management to Mr. Urie until January 2006 despite at least one instance in which he complained to Mr. Romero that he needed work. Tr. at 555. However, it is also apparent that Mr. Urie did not have a working computer during this period, which, of course, would make it difficult to receive e-mails. Also, Mr. Romero explained that the pace of work at the laboratory tended to slow in the time leading up to the holidays, and he indicated that this was why he did not respond to Mr. Urie's communication about needing work. Tr. at 556. The record does indicate that Mr. Romero and Ms. Hargis did communicate with Mr. Urie to some extent after January 1, 2006.

Mr. Romero's communications with the Complainant in the early part of 2006 primarily concerned Mr. Urie's announced intent to resign from LANL for personal reasons, issues regarding time and attendance, and Mr. Romero's concern with Mr. Urie's personal problems. In a December 22, 2005, e-mail to Mr. Romero (with copies to Mr. McNeel and four other employees), Mr. Urie stated

> Friends, I have been at Los Alamos for five years now and find that I have failed miserably with my personal and career goals. Those of you that know me, understand that I really never fit well with government work. I respectfully submit my resignation. I will be in tomorrow to begin processing and follow up after the holidays. Please cancel my Q clearance processing - never felt right about the intrusions. I understand that my absenteeism of late is unaceptable [*sic*]. I beg your indulgence, as my family life is a disaster and I have been out of the home, trying to sort things out. It is very difficult to face anyone at this time.

Respondent's Exhibit 1.

In a January 3 e-mail, Mr. Urie wrote

> Folks, it has been a real pleasure to work with each of you. However, due to personal reasons, I have submitted my resignation and my last day will be January 20th, to allow for transitional needs. I plan to go back into private consulting (either NM or Colorado based), cauz [*sic*] despite all the talent here, the best boss I ever had was me! I apologize for the disruptions, as I had planned to make a go of it here, but circumstances beyond my control are in effect. I look forward to these last few weeks with you.

In an undated e-mail sent to Mr. Urie sometime between January 3 and January 9, 2006, Tr. at 559, Mr. Romero said

> We have been trying to get a! hold [*sic*] of you for your Time and Effort, please note I need to approve time for this past week by 9:00 and need your time. Thus, please call me or Arlene so we can enter your time, hope things are going okay with you and also did you get a chance to ever talk to Barbara Hargis and John McNeel.

On January 9, 2006, Mr. Urie responded

> Phil, I need to back out my time from last Thursday/Friday. As a fellow professional, I am placing myself on unfit for duty status due to depression - no exageration [*sic*]. Last week I was contacted by UC payroll and informed that the IRS is garnishing 95% of my take home pay effective immediately stemming from a 1995 business/divorce tax issue. In addition, if I am to terminate, the IRS will garnish my retirement/savings upon liquidation. In short, I am F'd. I hit the emotional wall and am seeking medical and legal help this week. I very much want to speak with John and Barbara, but frankly I need some time to regain some sense of control.

On that same day, Mr. Romero responded

> First hang in there. I know these are difficult times but rest assured I am here to help in any way I can. Please let me know how things are proceeding. In terms of your time I believe you've expended your vacation and sick leave which were charged to

> cover this past pay period. In addition I believe we had Arlene enter LWOP for a day or two but if we need to change it we can. Please call me so we establish a path forward for reporting your time in the immediate future, in addition you may want to talk with an HSR-2 fitness for duty coordinator or someone in the employee assistance program. In either case please take care of your self and let me know if there is anything we can do on this end.

Respondent's Exhibit 2. In an e-mail sent to Mr. McNeel the next day, Mr. Romero indicated that he had made "numerous attempts" to contact the Complainant.

> Not sure you got the opportunity to see the message from Rich Urie yesterday, after numerous attempts I finally connected with him via his home e-mail address. It appears he is not doing well and I am concerned, please note I responded to his message but it may be a good idea if you could send him a reply as well. As I mentioned I am concerned for his safety and I indicated to him that help is available from HSR-2 "FFD" or the "EAP" sources.

Respondent's Exhibit 49.

In a January 19, 2006, e-mail to Mr. Urie, Mr. Romero wrote

> Need to talk to you, hope things are okay. Specifically I need to ask you a couple of questions regarding time and effort and potential options based on your circumstances and desires. Again hope things are going okay and please call me as soon as you get this message. You can call me at home as well 455-3430 or work 667-8332.

Respondent's Exhibit 15.

At the hearing, Mr. Romero testified that he did not receive Mr. Urie's December 22 e-mail until after the holiday break in early January, and that the Complainant was then absent from the office "on various types of leave through most of January." On the "twenty-second or twenty-third," he "talked to Mr. Urie about potential other opportunities, and tried to get him back into the workplace in some productive manner." Tr. at 497. He did this, he said, because he didn't "want to lose a good resource," and he was concerned about the Complainant's well-being. Tr. at 564.

The Complainant's communications with Ms. Hargis were more limited in nature, as was the period of time that he reported directly to her. The record indicates that she met with Mr. Urie on January 23, 2006, to discuss the duties that she allegedly wanted him to perform. During the period from January 25 through February 3, Mr. Urie was on work-related travel and, on February 6, he began working under Ms. Hargis' direct supervision. Tr. at 695-696, Respondent's Exhibit 3. Approximately six weeks later, beginning on March 21, Mr. Urie took an extended "leave without pay," after which he left LANL. Tr. at 712, Respondent's Exhibit 3. During the period between February 6 and March 21, there is no evidence of any e-mails from Ms. Hargis to Mr. Urie. However, she stated that although she "didn't routinely have one-on-one meetings with Urie . . . I would sit with him on occasion . . . ." Statement of Barbara Hargis, Respondent's Exhibit 32. The record does not indicate what was discussed on these occasions.

In all, there was a lack of communication with the Complainant after he returned from Iraq in late November 2005 until January 2006. However, it is undisputed that the pace of work tended to slow

during the period leading up to the holidays, and the Complainant apparently did not have access to a working LANL computer during this period. I believe that these factors contributed to the lack of communications. During the period between January 2 and January 23, 2006, the record indicates that the Complainant was away from the office on various types of leave for fourteen days, making communications more difficult. Respondent's Exhibit 3. However, Mr. Romero was able to reach Mr. Urie on several occasions, as set forth above. Ms. Hargis' communications with Mr. Urie appear to have been limited primarily to her meeting with the Complainant on January 23, and it is the substance of that meeting that is central to the primary factor in the alleged hostile work environment: that toward the end of his tenure with the Respondent, LANL management, and particularly Ms. Hargis, withheld work from him, thereby forcing him to resign.

**c. Withholding of Work**

Mr. Urie's tenure in HSR of approximately one year was marked by periods of very heavy work and periods that were relatively "slow." Tr. at 270-277; 298-302. After his return from Iraq at the end of November 2005, however, and lasting until Mr. Urie went on leave on December 19th, it appears that the pace of work was not slow, but non-existent. Tr. at 141, 182, 189. The record also indicates that Mr. Romero was generally aware that Mr. Urie did not have sufficient work during this period. Tr. at 499, 555.

After the December 2005 holidays, as indicated above, the Complainant was on various types of leave on almost every working day between January 2nd and January 23rd. [4] After meeting with Ms. Hargis on the 23rd, Mr. Urie left on LANL-sponsored travel on January 25th, returning on February 3rd. Respondent's Exhibit 3. During at least a portion of this time, he was working "12 hr graveyard shifts." Respondent's Exhibit 17.

Upon his return, Mr. Urie's assignment under Ms. Hargis' supervision began. The two met on January 23rd to discuss the duties that Mr. Urie was to perform. The substance of that meeting is in dispute. Ms. Hargis testified that

> The assignment, the work that I needed to get done in terms of what I was trying to get done for the Laboratory, the Laboratory, in . . . some recent assessments, had received some deficiencies related to integrated work management. That's the way we get our work done at the lab.
>
> And one of the corrective actions that we had committed to Headquarters and others was that we would set up what we call and [*sic*] IWM Mentoring Program. So, that's Integrated Work Management mentors. So, what we did was we ran a pilot in C Division and in MST Division in which we assign some of our ES and H people into groups. And . . . their main job was to actually help the scientists and the researchers prepare their integrated work management documents to get through the process, and to do a better job of identifying hazards and controls.

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4/ During her testimony, she stated that she met with the Complainant on "January 20 or 23." However, Mr. Urie was absent from work, on "leave without pay" on January 20. Respondent's Exhibit 3.

> So, when I met with [Mr. Urie], what we talked about was . . . . This pilot had been successful, and we wanted to proliferate it across the laboratory. So, what we needed to do was to set up a formal description of . . . the training that was needed, and whether we needed a qualification, and to start reaching out to some of the mentors to get an understanding of what they were doing out there, and then to finally identify champions in other divisions that we could start linking with so we could actually spread it across the laboratory.

Tr. at 689-690. More specifically, she stated that "he started to work on the project, reviewing material and touching base with other folks." Memorandum of telephone interview with Ms. Hargis, dated April 25, 2007. Ms. Hargis testified that the material that he reviewed "was the integrated work management - - It was called the M300, and it was the requirement out in the laboratory on how people were to do work." Tr. at 690.

Mr. Urie's recollection of this meeting and its aftermath was substantially different. He testified that

> [w]hen I met with Hargis . . . she initially said, "Here's a leader," and I think it was the IWD thing . . . and it was all . . . roughed out, and she said, "Please look . . . this over. Make it . . . readable. You know, polish it and . . . give me your ideas."
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> And so I knocked it out . . . in about a week, four or five days. I . . . made changes electronically. I, I did physical changes, and then I sent her an e-mail with the changes, requesting feedback. "Would you like me to do an executive summary?" Because it was a big, complicated thing. And I said, "how do you feel about me extrapolating this thing?" And I didn't hear anything, so I put a sticky note on it with some comment and questions, and I walked up to her office and I put it in her in-box, and I left. And I never heard anything for two months, or nearly two months.

Tr. at 213. What is undisputed is that Mr. Urie was directed to review and "polish" a document. The record indicates that he did so, and placed it in her in-box on February 15, 2006, nine days after he began working for Ms. Hargis. *Id.*, Complainant's Exhibit 16.

**d. Analysis**

The OHA has previously found that a constructive discharge can form the basis for relief under Part 708. *See Richard Sena*, Case No. VBA-0042, November 1, 2001 (*Sena*). In that case, the OHA Director looked to federal cases brought under Title VII of the Civil Rights Act of 1964 for guidance in determining whether the Claimant in that case had established that a constructive discharge had occurred. [5]

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5/ Specifically, OHA cited *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995) (*Martin*) and adopted its holding that, in order to show a constructive discharge, a Claimant "must allege and prove two elements: (1) the intolerableness (hostility) of the working conditions, and (2) that the employer created the hostile environment in order to cause the employee to resign." *Sena, citing Martin*, 48 F.3d at 1354. However, in *Pennsylvania State*

(continued...)

In one such case, *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004) (*Suders*), the U.S. Supreme Court stated that "[t]he inquiry [as to whether a constructive discharge has occurred] is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 124 S.Ct. at 2351. Administrative agencies have also applied this "reasonable person" standard in determining whether "whistleblowers" have been constructively discharged in retaliation for their protected activities. *See, e.g., Heining v. General Services Administration*, 68 M.S.P.R. 513 (Merit Systems Protection Board, August 22, 1995) ; *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1998) (*Harris*) (working environment must be severely and pervasively hostile, one that a reasonable person would find abusive, and one that the Complainant perceives to be so). After reviewing these standards and the record as a whole, I find that Mr. Urie has failed to show, by a preponderance of the evidence, that his working conditions were intolerable. I further conclude that there is insufficient evidence to show that a "reasonable person" would have felt compelled to resign. With regard to the alleged intolerability of his working conditions, the record shows that Mr. Urie's environment in HSR was not severely and pervasively hostile, and that the conditions of which he complained at the hearing were remedied eventually by LANL management.

In fact, the evidence indicates that Mr. Urie was treated well and with compassion by Mr. Romero. As an initial matter, the only performance evaluation that Mr. Romero wrote for the Complainant, an undated one covering the period from August 2004 through July 2005, was a positive one. Respondent's Exhibit 47. Moreover, when Mr. Urie was experiencing personal difficulties in January 2006, as set forth above, Mr. Romero expressed his concern on multiple occasions and attempted to reach out to him to offer any assistance that he could. Mr. Romero's supportive posture is also reflected in the following exchange of e-mails, dated September 27, 2005. Mr. Urie wrote

> Phil, I continue to receive direct requests from the division office for special duties, which circumvent the standard chain of command through Jeff, Sean, etc. I am meeting with Jeanne Ball and Dan Cox this AM and thought I should suggest that they either run these through Sean/jeff or set me aside of that line management, so to stabilize reporting, auditing, and so forth. Any thoughts?

Mr. Romero responded, "Rich, I concur let me know their reaction and if I need to intercede on your behalf." Respondent's Exhibit 44. It is true that after Mr. Urie returned from a month-and-a-half in

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5/ (...continued)
*Police v. Suders*, 124 S.Ct. 2342 (2004), discussed in the body of this Decision, the U.S. Supreme Court cast serious doubt on the validity of *Martin*'s requirement that Claimants must prove that the employer created the hostile environment in order to cause the employee to resign. In describing the Complainant's burden of proof in a constructive discharge case brought under Title VII, the Court used an objective, "reasonable person" standard, with no mention of any requirement that the Complainant show that the employer created the hostile environment in order to force the employee to resign. *Suders*, 124 S.Ct. at 2351. Indeed, at least one federal court has found that *Suders* overruled this requirement. *Cecala v. Newman*, 532 F.Supp. 2d 1118, 1168. I will therefore apply the *Suders* standard in determining whether Mr. Urie was the victim of a constructive discharge.

Iraq, a "leave without pay" that was approved by Mr. Romero at Mr. Urie's request, Respondent's Exhibit 45, Tr. at 540-542, he experienced a lack of work and communications, and substandard working conditions during the period leading up to the December 2005 holidays. However, as previously explained, communications improved and the substandard conditions were corrected in the new year. The record further indicates that the lack of work was due to the impending holidays, with Mr. Urie receiving an assignment in January 2006 after his return from various types of leave. Respondent's Exhibit 3.

The record also does not support Mr. Urie's contention that working conditions under Ms. Hargis were so intolerable that a reasonable person would have felt compelled to resign. As an initial matter, I did not find credible the Complainant's contention that the only work arising out of the January 23rd meeting with Ms. Hargis was to review and "polish" a single document. In an e-mail sent on that day to Mr. Romero, Ms. Hargis and others, Mr. Urie said, in pertinent part,

> Phil/Alice; per our discussion last week, I have elected to continue as an employee of UC-LANL and pursue new duties within the HSR Division. Per your request, I have contacted the Q Clearance representative and he is checking on the status of my L/Q paperwork. I recieved [*sic*] a call today from P-21 (Ricki Lopez) and am responding to a request for a short IH evaluation, which will be completed by mid morning tomorrow.
>
> Regarding future work, given a choice in the matter, I believe I am well suited to perform the duties outlined by Barbara Hargis in the IWM Mentoring Program and request the assignment.

Respondent's Exhibit 16. The clear implication of this e-mail is that an assignment was offered, and accepted, that involved certain duties regarding the mentoring program. I do not believe that Mr. Urie would have used this language if the work assigned consisted solely of editing a single document. Ms. Hargis indicated that Mr. Urie was also assigned to contact other employees in furtherance of the purposes of the program, *see* Memorandum of telephone interview with Ms. Hargis, dated April 25, 2007, and I find this statement to be credible. The record does not indicate that Ms. Hargis withheld work from Mr. Urie.

Furthermore, I believe that a reasonable person in the Complainant's position, who was not intent on leaving LANL, would have informed Mr. Romero of his lack of work in the hope of receiving additional assignments. Indeed, the record indicates that during a 2005 lull in Mr. Urie's workload, the Complainant did inform Mr. Romero and another LANL manager, and additional work was assigned. Tr. at 276-277. However, Mr. Urie did not inform Mr. Romero that he was not receiving sufficient work from Ms. Hargis. Tr. at 566.

It is true that Ms. Hargis was made aware of "slack" in the individual's schedule several weeks before he left LANL on unpaid leave, and did not assign him additional work. Respondent's Exhibit 20, 21; Tr. at 711. However, Ms. Hargis explained, credibly, that she believed that Mr. Urie would be leaving LANL soon and that she did not have any short-term, "filler" work that she could assign him in the interim. Tr. at 711. Ms. Hargis' belief finds support in the Complainant's e-mail to her and to Mr. McNeel dated February 22, 2006.

> Barbara/John: I have not yet heard back from KBR on the vacancies I am under consideration for (ES&H Manager for Middle East Ops and Middle East IH),

> although I expect to be traveling to DC for a day in the near future for a final interview. I will let you know as soon as things solidify. If I should accept a position, *I hope to leave LANL on good terms and leave the door open for a possible return in a year.* In that regard, I am concurrently working on the manufacturing of equipment developed by LANL under an approved no conflict of interest status. Is an Entrepreneur Leave of Absence a possibility in view of the contract change?
>
> *Thank you for your patience, as my finances are largely driving my interest in Iraq.*

Respondent's Exhibit 18 (italics added). I find it difficult to believe that the Complainant would write of leaving LANL on good terms and possibly returning in a year if he was being subjected to a work environment that was so severely and pervasively hostile that he was being forced to resign. Instead, this e-mail clearly suggests that he was leaving for what he considered to be a better opportunity with KBR. Based on the foregoing, I find, by a preponderance of the evidence, that Mr. Urie was not the victim of a constructive discharge.

**2. The Alleged Post-Employment Retaliations**

As previously stated, the Complainant also alleges that LANL retaliated against him after his departure from the Lab. Specifically, he alleges that after his departure from LANL, Dr. Ramsey gave a negative reference to Dynamic Corporation (Dynamic), a company with which the Complainant was seeking employment. In addition, Mr. Urie claims that he was forced to resign from a subsequent position with KBR because a LANL employee informed KBR that Mr. Urie was a "whistleblower." I need not determine, at this juncture, whether post-employment retaliations such as those alleged here are covered by the Part 708 regulations, because, as explained below, there is clearly insufficient evidence to support these allegations.

**a. The Alleged Negative Reference**

With regard to the alleged negative reference, the record indicates that subsequent to Mr. Urie's departure from LANL, Diana MacArthur of Dynamic contacted Dr. Ramsey to obtain information on several former LANL employees for possible future employment at Dynamic. Tr. at 592, 629-630. Two of the employees had already found jobs, so the one remaining employee was Mr. Urie. Tr. at 603. Ms. MacArthur testified that she discussed the qualifications that she was looking for in a prospective employee, that Dr. Ramsey informed her that Mr. Urie had those qualifications, and that she did not say anything critical of the complainant. Tr. at 593, 600-601. Dr. Ramsey testified that Ms. MacArthur informed her about the types of people Dynamic was looking for, and that the only information she provided about Mr. Urie was who he was, what his duties had been at LANL, and that he was a Certified Industrial Hygienist. Tr. at 630.

The Complainant makes much of the fact that, during LANL's internal investigation of Mr. Urie's Complaint, Dr. Ramsey stated that she told Ms. MacArthur "to check references carefully just as she would normally do," Respondent's Exhibit 32, Tab K. Mr. Urie suggests that this statement, when considered in conjunction with the fact that the other former employees that Ms. MacArthur asked about were unavailable, was made by Dr. Ramsey in order to cause Ms. MacArthur to draw unspecified negative inferences about Mr. Urie that would eventually lead to his failure to get the job.

I do not agree. As an initial matter, the statement complained of is neutral on its face. When asked during the hearing if she believed that Ms. MacArthur had asked her, a friend, about the former LANL employees in order to obtain more detailed information, she explained that she did not believe so, "because you simply do not walk across that friendship line to talk about individuals. You've got to go through your due diligence from one corporation to another and check people's references in the appropriate way." Tr. at 632. Moreover, the fact that Ms. MacArthur, who was able to witness Dr. Ramsey's intonations and facial expressions, later invited Mr. Urie to travel at company expense back to Dynamic headquarters in the Washington, D.C. area for further interviews suggests that there were no negative connotations to Dr. Ramsey's remarks.

It is true that after interviewing with Dynamic headquarters officials, Mr. Urie testified, he was informed that the company "didn't have any openings." Tr. at 227. Then, approximately one year later, he added, he saw advertisements for positions with Dynamic at Johnson Space Center, and submitted an application. He got a call from Dynamic's HR Director stating that they wanted to fly him in for an interview. He informed the HR Director of his earlier interview with a specific Dynamic official in the Washington, D.C. area and said that he was very interested in interviewing, but that he did not want to repeat his earlier experience of flying out for an interview just to be told that no jobs were available. Mr. Urie then received an e-mail from the official he interviewed with in the Washington, D.C. area saying that there were no positions available. Tr. at 227-228.

However, Ms. MacArthur adequately and credibly explained these occurrences. She testified that she was informed by the Dynamic headquarters interviewing officials that the reason that Mr. Urie was not offered a job is because the position that he was seeking required a "Top Secret" security clearance, and he did not have a security clearance. Tr. at 594. She explained that she did not ask Mr. Urie whether he had such a clearance before she invited him to company headquarters for further interviews because she was not one of Dynamic's regular recruiters and was therefore "not a very good interviewer." Tr. at 609. She assumed that Mr. Urie already had a security clearance because of where he was working and the field he was working in. Tr. at 610. Regarding the positions at the Johnson Space Center, Ms. MacArthur testified that Mr. Urie was not hired because they were looking for "entry-level people; you know, just out of college, maybe a year or so, that type of experience." Tr. at 596. There is nothing in the record that would indicate that these explanations were mere pretexts, and I cannot conclude, based on these facts, that Dr. Ramsey's suggestion that Ms. MacArthur follow normal procedures in evaluating applicants was intended as some type of warning about Mr. Urie. I therefore conclude that LANL did not retaliate against the Complainant by giving him a negative reference.

**b. The Alleged Constructive Discharge from KBR**

Equally unavailing are the Complainant's claims that he was constructively discharged from a subsequent job with KBR, and that LANL should be held liable for this discharge. Specifically, he alleges that he was forced to resign from KBR because LANL informed KBR of the individual's status as a whistleblower, and a KBR official subsequently informed Mr. Urie that she didn't think that his employment with KBR "was going to work." Tr. at 233.

The Complainant explained that after his hiring in May 2006, he traveled from New Mexico to KBR's offices in Arlington, Virginia at company expense in order to begin working. While there, he said, he informed KBR that he might have trouble getting a corporate credit card from the

company's provider, American Express, because he owed them approximately $30,000 stemming from a failed business venture prior to his employment with LANL. KBR allegedly told Mr. Urie to apply anyway, and told him that they had other options if his application was denied. Mr. Urie then returned to New Mexico to move into a new house, but did not have sufficient funds to return to KBR. KBR became upset at Mr. Urie's failure to return and at difficulties that they had had in contacting him, he stated. Prior to his return to KBR, Mr. Urie learned that his application for a KBR American Express Card had been denied. When he returned the following week, he continued, Mr. Urie was told that his employment with KBR would not "work out" because of his credit problems. *See* memorandum of April 26, 2007 telephone conversation between Mr. Urie and Janet Freimuth, OHA Investigator. However, because KBR allegedly knew of his credit problems before his application was denied and indicated to him that such a denial would not be a problem, the Complainant contends that the real reason for his inability to retain the KBR position was that LANL management informed KBR that Mr. Urie was a whistleblower, that as a result, he was forced to resign from KBR, and that LANL should be held liable for this alleged constructive discharge.

These contentions fail for several reasons. First, the relevant case law in this area focuses on the actions of the employer whose allegedly hostile environment the employee is leaving, and not on those of any previous employer. *See, e.g., Suders, Harris, Sena.* The Complainant has not cited, nor am I aware, of any legal authority that would allow me to find LANL liable under a theory of constructive discharge for Mr. Urie's departure from KBR.

Second, the record does not support Mr. Urie's claim that his resignation was forced. In a June 12, 2006, e-mail from Mr. Urie to KBR senior management, he stated

> Ladies, so we are clear on recent events, I had no choice but to terminate in view of my home purchase and moving expenses compounded by an oversight by KBR to direct pay DC expenses and house me adjacent to the office, as promised. Mistakes were made by all and a few days would have allowed me to re-calibrate my funds and work with a clear focus.

Respondent's Exhibit 23. This e-mail strongly suggests that Mr. Urie resigned because of his recent expenditures and because of travel difficulties caused by his poor credit.

Third, even if his resignation was forced, there is nothing in the record to indicate that the reason given by KBR was a pretext, or that LANL management conveyed in any way to KBR that the Complainant was a whistleblower. Mr. Urie suggests that Randy Sandoval, a LANL manager, may have informed officials of KSL, a company involved in a partnership with KBR at LANL, about the Complainant's whistleblower status, and that KSL then conveyed this information to KBR. However, the only information produced by Mr. Urie in support of this theory is that during his brief tenure with KBR, he saw Mr. Sandoval in the vicinity of KSL's offices at the LANL site, Tr. at 232. Mr. Sandoval testified that he did not recall ever talking with anyone at KSL about Mr. Urie. Tr. at 735. There is nothing in the record that would indicate that LANL management was in any way responsible for the Complainant's departure from KBR.

Given the factors mentioned above, I do not need to address the issue of whether the Part 708 regulations cover allegations of post-termination retaliations. I will, therefore, grant the Respondent's Motion to dismiss this portion of Mr. Urie's Complaint.

## III. Conclusion

For the reasons set forth above, I conclude that although Mr. Urie did make protected disclosures, LANL did not retaliate against him. I therefore find that he is not entitled to any of the relief that he seeks.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Los Alamos National Laboratories on July 19, 2007 (Case No. TBZ-0063), is hereby granted with respect to that portion of Mr. Urie's Complaint concerning alleged retaliations that occurred after his resignation from the Respondent in April 2006, and is denied with respect to that portion of the Complaint concerning LANL's alleged constructive discharge of Mr. Urie.

(2) The Request for Relief filed by Richard Urie under 10 C.F.R. Part 708 is hereby denied.

(3) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the Initial Agency Decision, in accordance with 10 C.F.R. § 708.32.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: May 21, 2008