September 3, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: David L. Moses

Date of Filing: October 2, 2007

Case Number: TBH-0066

This Initial Agency Decision involves a whistleblower complaint filed by Dr. David L. Moses ("Moses" or "the complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant was an employee of UT-Battelle, LLC, the firm employed by DOE to manage and operate the Oak Ridge National Laboratory (ORNL), where he was employed as a Senior Program Manager for ORNL's Nuclear Nonproliferation Program until May 2007. On February 23, 2007, he filed a complaint of retaliation against UT-Battelle with the DOE Office of Employee Concerns. In his complaint, Moses contends that he made certain disclosures to officials of UT-Battelle and DOE and that UT-Battelle retaliated against him in response to these disclosures. The complainant seeks monetary damages based upon his failure to receive a salary increase and his subsequent loss of employment.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purposes are to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices, and to protect those "whistleblowers" from consequential reprisals by their employers. 10 C.F.R. Part 708. Under the regulations, protected conduct includes:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals –
>
> (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; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would-
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5.

Part 708 sets forth the proceedings for considering complaints of retaliation. The DOE's Office of Hearings and Appeals (OHA) is responsible for investigating complaints, holding hearings, and considering appeals. See 10 C.F.R. §§ 708.21-708.34.

B. Procedural Background

Moses filed a complaint ("Complaint") with the DOE's Oak Ridge Diversity Programs and Employee Concerns Office (DOE/OR) on February 23, 2007. DOE/OR provided a copy of the Complaint to UT-Battelle, after which Moses and UT-Battelle agreed to attempt to resolve the matter through mediation. After the parties failed to resolve the complaint through mediation, DOE/OR informed Moses that he had the option to request either a hearing or an investigation followed by a hearing. Moses requested that the Complaint be forwarded to OHA for an investigation and hearing.

The OHA investigator interviewed Moses and other ORNL employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on October 2, 2007. On that same day, the OHA Director appointed me as the Hearing Officer in this case. On October 18, 2007, I requested that the parties submit statements discussing the ROI and specifying "the parts of the document with which you agree and those parts of the document with which you disagree." E-mail from Steven Goering, OHA, to Alan M. Parker, UT-Battelle, and David Moses, *et al.* (October 18, 2007).

On October 24, 2007, UT-Battelle filed Motion to Dismiss a portion of the Complaint as untimely filed. After considering the Motion, and replies and cross-replies thereto, I granted the Motion in part, dismissing the complaint as to one of the alleged acts of retaliation. Letter from Steven Goering, OHA, to Alan Parker, UT-Battelle, and David L. Moses (November 5, 2007).

I subsequently convened a hearing in this case in Oak Ridge, Tennessee, over a three-day period from December 11-13, 2007. Both parties submitted exhibits. UT-Battelle presented exhibits into the record which were numbered Exhibit 1 through Exhibit 22, and Moses submitted exhibits lettered Exhibit A through Exhibit Q. UT-Battelle presented eight ORNL management employees as witnesses. Moses testified on his own behalf, and also called an ORNL management employee as a witness. On January 29, 2008, I reconvened the hearing for purposes of taking the testimony of one additional witness, a DOE official, called by the individual. The parties submitted post-hearing briefs on March 20, 2008.

C. Claim of Attorney-Client Privilege Regarding Certain Hearing Exhibits

Two of the exhibits submitted at the hearing, Exhibit 22 and Exhibit A, were provided by UT-Battelle with portions redacted based upon a claim of attorney-client privilege.[1] On March 26, 2008, I ordered that UT-Battelle submit to me unredacted copies of Exhibit A and Exhibit 22 for *in camera* review and a decision as to whether the redacted information is protected under the attorney-client privilege. Letter from Steven Goering, OHA, to Alan Parker, UT-Battelle (March 26, 2008). I allowed the parties until no later than April 25, 2008, to file arguments regarding the applicability of the attorney-client privilege, after my receipt of which I closed the record in this case.

In its brief, UT-Battelle argues that "the federal common law on the attorney-client privilege should be applied" in this case, and cites the following elements of the privilege as set forth by the U.S. Court of Appeals for the Sixth Circuit:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir. 1998); UT Battelle's Motion and Brief for a Protective Order to Protect Attorney-Client Privilege Communications (April 18, 2008) at 2.

I agree with UT-Battelle that the federal common law of attorney-client privilege is applicable in this case. The Part 708 regulations provide that, while "[f]ormal rules of evidence do not apply, . . . OHA may use the Federal Rules of Evidence as a guide; . . ." 10 C.F.R. § 708.28(a)(4). The Federal Rules of Evidence state that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.[2]

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[1] Exhibit A was a document submitted by Moses that he had obtained from UT-Battelle.

[2] The Merit Systems Protection Board, in cases under the Whistleblower Protection Act, and the Department of Labor, under whistleblower authority analogous to the DOE's under Part 708, have both applied the federal common law in interpretations of the attorney-client privilege. *See, e.g., Grimes v. Dep't of Navy*, 99 M.S.P.R. 7, 12 (2005) (decision of Merit Systems Protection Board); *Willy v. Coastal Corp.,* No. 98-060, 2004 WL 384741, at *20 (2004) (decision of Department of Labor Administrative Review Board); *Welch v. Cardinal*

Though this office has not previously ruled on the application of the attorney-client privilege in the context of a Part 708 proceeding, we have addressed this issue in cases arising under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In those cases, applying the federal common law as to the privilege, we have found that the privilege "covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts." *Washington Electric Cooperative/Downs Rachlin Martin PLLC,* 29 DOE ¶ 80,264 (2006) (citing *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977)) (citation omitted).

Under the interpretation of the courts in both *Reed* and *Mead,* the attorney-client privilege protects facts communicated by a client to his or her attorney. *Reed,* 134 F.3d at 355-56 ("communications . . . by the client"); *Mead*, 566 F.2d at 254 (privilege "covers facts divulged by a client to his or her attorney"). The court in *Mead* found that the privilege also "covers opinions that the attorney gives the client based upon those facts . . . in order to protect the secrecy of the underlying facts." *Mead*, 566 F.2d at 252, 254. Thus, the privilege protects "communications by the lawyer to his client," but only to the extent that "those communications reveal confidential client communications." *U.S. v (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984).

With these principles in mind, I have reviewed the material that UT-Battelle has claimed are protected by the attorney-client privilege. I find that certain of the material, specifically that marked "Attorney-Client Privilege 0001" in Exhibit 22, is protected by that privilege, but that the remainder of the information redacted from the two exhibits in this case is not so protected. The information I find is not protected consists of communications by counsel for UT-Battelle that I cannot find would reveal confidential facts communicated by the client, UT-Battelle, to its counsel. Unless UT-Battelle files a notice of appeal by the fifteenth day after its receipt of this initial agency decision, a copy of the information that I have found is not protected will be released to the complainant.

D. Factual Background

Moses, immediately prior to his filing his complaint, was Senior Program Manager for Nuclear Nonproliferation Programs at ORNL. Moses' whistleblower complaint is based on disclosures made in 2004 and 2005 in various messages (all by e-mail with the exception of one sent by facsimile transmission) he sent to DOE and/or ORNL officials and to a French government official regarding DOE contracting practices, and allegations made in 2006 about wasteful spending relating to a research project to use Low Enriched Uranium and Molybdenum to fabricate both proliferation-resistant research reactor fuel and targets to produce a radioactive isotope, Molybdenum-99 (Mo-99).

Bankshares Corp., No. 2003-SOX-15, 2003 WL 25316943, at *4 (2003) (decision of Department of Labor Office of Administrative Law Judges).

1. Messages from March 2004 through March 2005 and Concerns Raised by DOE Regarding Moses' Communications

In 2004 and part of 2005, Moses was the ORNL Lead Program Manager on DOE's Fissile Materials Disposition Program (FMDP),[3] a program sponsored by the National Nuclear Security Administration's (NNSA) Office of Fissile Materials Disposition (NA-26). During this period, Moses sent various e-mails to DOE officials, including Norman Fletcher, an NNSA employee who was Moses' point of contact at NA-26, and Robert Boudreau, who replaced Fletcher as Moses' NA-26 point of contact in February 2005. Ex. 1. These e-mails referenced, among other things, possible violations of the "Anti-Bribery and Books & Records provisions of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-2," the Federal Acquisition Regulations (FAR), and the Department of Energy Acquisition Regulations (DEAR).[4]

On February 27, 2005, Moses sent a message by facsimile to Bruno Sicard (Sicard), a French representative to a multi-national effort to modify Russian VVER-1000 reactors. In the message, Moses stated that Rosenergoatom (REA), a Russian quasi-governmental firm, would not give ORNL cost and effort proposals to do work. Moses stated that, without such proposals, ORNL would be unable to create contracts that "comply with federal contracting requirements avoiding the appearance of violations of the Foreign Corrupt Practices Act." Ex. 1; Electronic Mail from David Moses to Richard Cronin, OHA (May 8, 2007) (containing full text of Moses' message to Sicard).

After learning of Moses' facsimile message to Sicard, Boudreau spoke with Dr. Lawrence J. Satkowiak, Director of ORNL's Nuclear Nonproliferation Office, to whom Moses had reported since August 2004. Boudreau expressed "concerns about [Moses] continuing to lead the Fissile Material Disposition Program," referencing Moses' message to Sicard and Moses' previous e-mails, a copy of which Boudreau e-mailed to Satkowiak. Tr. at 372.

Satkowiak discussed these concerns with Moses and decided, with Moses' agreement, that Brian Cowell, who worked for Moses, would replace Moses as FMDP Lead Program Manager, and Moses would continue to work as a Senior Advisor to the program. *Id.* at 148-49. According to Satkowiak, though DOE was "incensed" at Moses for contacting Sicard, DOE officials agreed with this new arrangement because Cowell would replace Moses as the point of contact between DOE and ORNL on matters related to the FMDP. *Id.* at 270-71.

On April 4, 2005, Satkowiak issued a memorandum announcing Cowell and Moses' new roles. Ex 2. The same day Moses sent a copy of the memorandum along with the following e-mail to Sterling Franks, an NNSA employee at the DOE's Savannah River facility:

> The reward for complaining about Norman Fletcher's ill treatment of my staff, complaining about his attempts to defraud the US government with pay-off

[3] The FMDP is a project to assist in the disposal of weapons-grade plutonium in the United States and in Russia. ORNL and Moses were working to support this project.

[4] These e-mails are described in greater detail in the October 2, 2007, ROI. As discussed below, UT-Battelle has conceded that these e-mails contained disclosures protected under Part 708. Hearing Transcript (Tr.) at 13-14.

> contracts to skim money to his friends in the Rosenergoatom International Department, and my telling our reputed French partners on VVER-1000 modifications that they need to make sure that their often expressed concerns about delays in contracting caused by Norman's promises to his REA buddies are communicated to Mr. Boudreau.

Ex. 3. Franks, concerned that the message referenced possible violation of law, forwarded the message to Kenneth M. Bromberg, Acting Assistant Deputy Administrator for Fissile Material Disposition, NNSA, on April 11, 2005. *Id.*

On April 12, 2005, Bromberg sent an e-mail message to Satkowiak stating, in relevant part, "Given his unhappiness with my staff and his unsupported allegations, I think it's time to remove David from any and all work on the Department's plutonium disposition program. I would appreciate if you would advise me what action Oak Ridge National Laboratory plans to take." *Id.* Bromberg again asked Satkowiak in an April 25, 2005, e-mail what actions were being taken with respect to Moses. *Id.* On April 26, 2005, Satkowiak responded by e-mail that Moses had been removed from "all NA-26 duties and assignments." He also stated that he had counseled Moses about his statements and that he had been "reassigned" to another activity unrelated to FMDP and NA-26. *Id.* The same day, Bromberg replied to Satkowiak's e-mail, stating, "At this point, I just want him off any of the work that NA-26 is sponsoring." Ex. 3. Also in April 2005, Moses provided to Satkowiak an 11-page document reiterating his concerns about, among other things, what he described as "[i]rregular/illegal subcontracting direction" by DOE, again referencing the Foreign Corrupt Practices Act. *See* E-mail from David Moses to Richard Cronin, OHA (May 22, 2007) (attaching copy of 11-page document); Tr. at 704-710.

2. September 6, 2006, E-mail

After Moses' removal from all work sponsored by NA-26 in April 2005, Satkowiak tried to find a project for Moses to work on. Satkowiak asked Moses to work with Jeff Binder to see if they could find work for ORNL in the DOE's Reduced Enrichment for Research and Test Reactors (RERTR) program sponsored by the NNSA's Office of Global Threat Reduction (NA-21).[5] Moses began working on a project that sought to use a LEU and molybdenum foil target in a nuclear reactor to produce Mo-99 for medical purposes. One significant problem in this process was the migration of the uranium atoms from the foil (because of heat and the fission of uranium atoms) to the aluminum casing which held the foil.[6]

[5] The RERTR program seeks to develop the technology necessary to enable the conversion of civilian nuclear reactors to utilize low enriched uranium (LEU) instead of high enriched uranium (HEU).

[6] Such migration would produce problems in removing the LEU and molybdenum foil to process the newly created Mo-99. Initially, a nickel barrier was used to prevent uranium atoms from migrating to the aluminum casing that held the uranium and molybdenum foil target. Using nickel as a barrier to prevent diffusion of uranium to the aluminum casing which held the foil created a problem since the nickel would itself become radioactive. One radioactive isotope of nickel, Ni-63, produced in the process had a half-life of 103 years and another, Ni-59, had a half life of 76,000 years. Consequently, use of nickel as a barrier would create a significant radioactive waste problem.

Moses developed an idea to mitigate this problem using a diffusion barrier made of a specific aluminum-and-silicon alloy instead of nickel. On September 1, 2006, Moses shared his idea via an e-mail addressed to Charlie Allen at the University of Missouri Research Reactor Center (MURR) and George Vandergrift at Argonne National Laboratory (ANL). Ex. M.

On September 6, Moses and Allen exchanged two further e-mails regarding Moses' idea, each of which was also addressed to Vandergrift. *Id.* On the same day, Vandergrift sent an e-mail to Moses and Allen in a response to Moses' idea, stating that "Ni [nickel] foil is a fission-recoil barrier and must be there or foil will bond to target walls during irradiation. Al [aluminum] barrier will work but will not dissolve in nitric acid." *Id.* Moses became upset with Vandergrift's response and sent another e-mail to Vandergrift and Allen later on September 6, 2006, stating in part:

> What you call a "fission recoil barrier" to prevent the aluminum clad foil from bonding to the U-Mo target is what Atomics International (AI) called a diffusion barrier in its testing work in the late 1950s and early 1960s . . . . with U-Mo fuel clad with aluminum using a nickel diffusion barrier to prevent the interdiffusion of uranium and aluminum. . . . Don't you guys in the RERTR Program at ANL ever do any literature research? I had assumed that you picked nickel because of the earlier AI work in using it as a diffusion barrier between uranium-molybdenum and aluminum. Who came up with this "fission recoil barrier" terminology as opposed to diffusion barrier? Does calling it by a new name make it a new discovery? Much of the work in the 1950s and 1960s focused on correlating thermally/temperature-induced diffusion with fission-induced diffusion mechanisms.
>
> It truly amazes me from reading the papers in the RERTR annual meetings starting in about 1997-1998 that you in the LEU Mo-99 target production development work were exploring options for "fission recoil barriers" while the LEU fuel development activities at ANL, without apparently ever talking to you all in Mo-99 target work, worked diligently on U-Mo LEU fuel forms with aluminum matrix and clad without realizing the need for a diffusion barrier between the U-Mo and the aluminum. Apparently, neither side talked to each other or listened to each other's presentation at the RERTR annual meetings or did their literature research for precedential R&D work like every graduate student at a top-flight university (such as Missouri) must surely be taught to do.
>
> . . . .
>
> I find that ANL and now ANL-INL have indeed made this into not only a full-employment science program but a bad science program principally consisting of doing lots of high-priced work that leads to a rediscovering of that which should have been recognized or known by a decent and diligent literature search back in 1997-1998. How much taxpayer money has been wasted since 1998 to now on this bad science?

My apologies for possibly being overly dramatic in making my points.

Id. Moses' September 1 e-mail, and each of the subsequent September 6 e-mails from Moses, Allen, and Vandergrift, were also copied to, among others at ANL and ORNL, Satkowiak, Ralph Butler, Director of MURR, and Parrish Staples, Moses' point of contact at NA-21. *Id.*

When Satkowiak came to work on September 7, he found that Butler had left a voice mail message telling Satkowiak, "you've got a problem. Better look at your e-mail." Tr. at 281-82. Upon reading Moses' September 6 e-mail, Satkowiak "was kind of stunned at the language. . . . It was the, the unprofessional manner; the, the, the way he was treating colleagues; and the fact that he was doing it in what I considered a public forum." *Id.* at 282.

Over the next few days, Satkowiak contacted some of the individuals on the e-mail's distribution list "to get their read on it" and found that "they were surprised he used that tone." *Id.* at 285. None of the feedback he received touched upon the technical issues Moses raised in his e-mail. *Id.* On September 8, Satkowiak also forwarded a copy of the e-mail to his supervisor, Dana Christensen, Associate Laboratory Director for Engineering and Science. *Id.* at 286. Christensen thought the e-mail "sounded very unprofessional. It sounded like a ranting-and-raving type of e-mail about concerns, and [Satkowiak] brought it to me because of the extensive distribution list that was on the e-mail." *Id.* at 604.

After several discussions with his management and with Katherine Finnie, an ORNL Human Relations official, *id.* at 289, Satkowiak met with Moses and Finnie on September 15, 2006. Ex. J (minutes of meeting taken by Finnie). At the meeting, Satkowiak told Moses that he would be suspended with pay, during which time he would not have access to the ORNL computer system. *Id.* at 3. Moses remained on administrative leave with pay for one week, from September 18 through September 22, 2006. Tr. at 294, 303.

By a memorandum dated September 22, Satkowiak issued a "disciplinary written warning" to Moses in which he characterized Moses' September 6 e-mail as having a "highly insulting, completely unprofessional and totally unacceptable tone toward colleagues in a collaborative program that involves efforts by ORNL and scientists from other national laboratories. Regardless of any merit to your technical points, you demonstrated egregiously poor judgment in deciding to communicate your observations in the manner you chose." Ex. E. Noting that ORNL had placed Moses "in a position of considerable responsibility," Satkowiak stated that Moses failed to demonstrate the "tact and skillful communication strategies" his job demanded. *Id.* Finally, Satkowiak stated that he did "not want to inhibit any efforts" to bring to light "concerns regarding fraud, waste and abuse," but that "insulting and belittling colleagues is unacceptable." *Id.* On September 24, 2006, Moses sent an e-mail to the recipients of his September 6 e-mail expressing his "sincerest apologies for the tone and substance of the e-mail . . . ." Ex. 11.

During the week of September 25 through September 29, 2006, Satkowiak traveled to DOE Headquarters for several meetings, and intended to talk to Parrish Staples and the DOE official to whom Staples reported, Nicole Nelson-Jean, the director of DOE's Office of North and South American Threat Reduction within NA-21. Tr. at 312. Staples was not in his office when

Satkowiak arrived, and while he was in a hallway speaking to another DOE official, Nelson-Jean saw Satkowiak, grabbed his arm and said "Larry, I need to talk to you right now." *Id.* at 313.

Satkowiak and Nelson-Jean then met in Nelson-Jean's office. Satkowiak testified that he told Nelson-Jean that he hoped she had seen Moses' written apology, and described Moses as an "incredibly bright guy" and a "great nuclear engineer" and that "it would be an asset to keep him on the [RERTR] program." *Id*. at 313-14; *see* Transcript of January 29, 2008 Hearing Testimony of Nicole Nelson-Jean (Nelson-Jean Tr.) at 12 (corroborating Satkowiak's testimony that he offered support for Moses in their meeting and recommended that he continue working on the RERTR program). Nelson-Jean responded that she no longer wanted Moses working on the program, and Satkowiak asked that this direction be provided to him in writing. Tr. at 314-16.

On September 27, 2006, Nelson-Jean sent an e-mail to Satkowiak in which she stated: "I am writing in Reference to Dr. David Lewis Moses and his participation in the GTRI Conversion Program (RERTR). As I have discussed with you in detail, the GTRI Conversion Program will no longer support, financially or otherwise, the participation of Dr. Moses in the program." Ex. C.

On October 5, 2006, Satkowiak sent a memorandum to Moses referencing Nelson-Jean's September 27 e-mail, and stating that Moses' "position as a Senior Program Manager within the Nuclear Nonproliferation Programs is predicated upon your ability to develop/manage projects/programs and build/maintain healthy and productive DOE sponsor relationships. In addition, one of the key performance expectations for all band 4 researchers at ORNL is to secure funding for their time." Ex. D. The memorandum stated that Satkowiak would continue Moses' employment "until the end of November to allow you time to find other funding within the laboratory. During this time period your main focus will be securing funding. In addition, I will provide you with miscellaneous assignments within the laboratory." *Id.* Finally, the memo stated that if, "at the end of November you have not located funding sponsorship, your employment with ORNL will be terminated for your failure to meet the performance requirements of your job." *Id.*

Satkowiak and Finnie met with Moses on November 5, 2006 to discuss his progress in obtaining funding, at which time Satkowiak was "very hopeful" as it "sounded like he had some leads." Tr. at 334; Ex. 13 (minutes of meeting taken by Finnie). On January 25, 2007, Satkowiak completed Moses' 2006 Performance Assessment, in which he rated Moses as "Not Fully Contributing." Ex. B. In a January 29, 2007, e-mail to Finnie, Satkowiak stated that "[a]t David's performance review we discussed his situation. I agreed, in light of the continuing resolution, to continue to fund him until the end of February giving him additional time to find other funding sources." Ex. 14.

On February 2, 2007, Satkowiak issued a Performance Improvement Plan (PIP) to Moses. Ex. 15. The PIP described as "performance to be improved" Moses' "behavior [that] led to a loss of funding by NA-20 sponsors"[7] and listed as goals to "[e]xhibit professionalism in all written and verbal communication" and "secure funding to fully cover employee labor so no longer

[7] NA-20 is the office of the NNSA's Office of Defense Nuclear Nonproliferation, within which are seven program offices, including NA-21 and NA-26.

dependent on NNP [ORNL Office of Nuclear Nonproliferation] funding." *Id.* The document noted that Moses "was initially given 2 months of NNP funding to secure funding. This was extended 3 more months with a new end date of February 28, 2007." *Id.* Finally, the plan further required "[w]eekly detailed, status reports, first one due February 9, 2007, documenting progress toward acquiring alternate funding. It should identify the date/time, project/program manager, source of funds, amount funding, and percentage covered." *Id.*

On February 23, 2007, Satkowiak sent Moses an e-mail reminding him about the requirement for weekly reports in the PIP, Ex. 5 at 2, as he had received no such report as of that date. Tr. at 347. Moses responded the same day by e-mail with a one paragraph summary of his current progress in finding funding, to which Satkowiak responded by e-mail, also the same day, thanking him for the information, but telling him that his response did not "contain the detail requested in the signed PIP, see text below. We would like to have a short meeting Monday morning to review your prospects in detail. Please come prepared with the details in writing." Ex. 5 at 1-2. On February 25, Moses sent an e-mail with a more detailed report attached, stating that he had "enough work to carry me into March but not much beyond." Ex. 5 at 1.

After receiving this e-mail and concluding that he had provided Moses enough time to secure funding, Satkowiak consulted Katherine Finnie to see what his options were. Tr. at 350. Finnie suggested the possibility of submitting Moses' case to an ORNL Suspension/Termination Review Committee (STRC). *Id.* at 350-51. Satkowiak decided on this course of action, and recommended to the STRC that Moses be terminated due to lack of funding. *Id.* at 352.

The STRC was composed of three ORNL "Level 1" managers: Dana Christensen, the Level 1 manager above Moses and Satkowiak, Lori Barreras, ORNL's Director of Human Resources, and Reinhold Mann, ORNL's Associate Laboratory Director for Biological and Environmental Sciences, who served as the "neutral" Level 1 manager on the STRC. *Id.* at 470-71.

The STRC met on March 12, 2007. According to the minutes of that meeting, Satkowiak and Finnie presented the facts of Moses' case, after which the members of the committee discussed whether Moses had been given an adequate period of time to find funding. Ex. A at 2-3. Satkowiak indicated that Moses had become eligible for early retirement as of the end of January 2007. *Id.* at 2. The minutes reflect the committee's decision that Satkowiak discuss with Moses the option of taking early retirement, and that if he did not elect retirement, Satkowiak had the committee's approval for termination. *Id.* at 3. Satkowiak met with Moses a "couple of days" after the STRC meeting, and offered him the opportunity to choose retirement in lieu of termination. Tr. at 363. A "day or so later" Moses informed Satkowiak that he was choosing to retire, which he did, effective May 31, 2007. *Id.* at 30, 363.

II. Analysis

A. Did Moses Engage in Protected Conduct?

Under the regulations governing the DOE Contractor Employee Protection program, the complainant "has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under

Section 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. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, 29 DOE ¶ 87,034 at 89,180 (2007) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

As noted above, Moses' alleged protected disclosures fall into two discrete categories: (1) those made in 2004 and 2005 regarding DOE contracting practices; and (2) those made in 2006 alleging wasteful spending relating to a research project to use Low Enriched Uranium and Molybdenum to fabricate both proliferation-resistant research reactor fuel and targets to produce Mo-99.

1. 2004-2005 Disclosures Regarding DOE Contracting Practices

During the pre-hearing telephone conference held in this matter on November 20, 2007, I asked Moses to specifically identify the disclosures he made that he is alleging were protected under Part 708. With respect to the first category of disclosures, Moses identified 17 e-mail messages, the first on January 10, 2004, and the last on April 4, 2005. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).[8] UT-Battelle agrees that Moses' communications during this period regarding DOE contracting practices included disclosures protected under Part 708. Tr. at 13-14. Thus, I find that Moses' disclosures during this period were protected,[9] with the exception of Moses' facsimile transmission to French official Bruno Sicard, since in order to be protected under Part 708, a disclosure must be made "to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct

[8] On November 21, 2007, I sent a copy of this memorandum to Moses and UT-Battelle, asking them to notify me if they found any errors or omissions in the document. The parties noted no omissions in response to my message, and the only errors noted were regarding the names of two ORNL personnel. E-mail from Steven Goering, OHA, to Alan M. Parker, UT-Battelle, and David Moses, *et al.* (November 21, 2007); E-mail from David Moses to Steven Goering, OHA, and Alan M. Parker, UT-Battelle, *et al.* (November 25, 2007) (noting "two minor changes with names of personnel"). In this regard, I note Moses has previously stated that he communicated concerns to the DOE Office of Inspector General in August 2005, September 2005, and September 2006. Electronic Mail from David Moses to Richard Cronin, OHA (October 8, 2007). However, during the pre-hearing conference, Moses did not identify these communications as disclosures that he was alleging to be protected under Part 708. In any event, there is no evidence in the record that the ORNL officials responsible for taking the personnel actions against Moses that are alleged to be retaliatory had actual or constructive knowledge of these communications at the time of the personnel actions. Had Moses alleged that his communications to the IG included protected disclosures, he would have had to prove that these officials had such knowledge of the communications in order to meet his burden of showing that they were contributing factors to the personnel actions taken against him. *See infra* Section II.B.

[9] Included in the communications I find to be protected is the 11-page document Moses provided to Satkowiak in April 2005, as discussed in Section I.D.1 above. Though Moses did not specifically identify this as an alleged protected disclosure during the pre-hearing conference, I do not find that UT-Battelle would be prejudiced by my consideration of this communication as a protected disclosure. First, UT-Battelle has already agreed that Moses' communications regarding alleged illegal contracting practices were protected under Part 708. Tr. at 13-14. Further, the Report of Investigation in this case specifically discussed this document as an alleged protected disclosure. ROI at 8-9.

of operations at a DOE site, your employer, or any higher tier contractor, . . ." 10 C.F.R. § 708.5(a).[10]

2. September 6, 2006, E-mail

With respect to the second category of disclosures, during the pre-hearing conference Moses identified his September 6, 2006, e-mail as an alleged protected disclosure. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007). The OHA Investigator in this case concluded that the September 6 e-mail was a disclosure protected under Part 708. ROI at 9. This conclusion was based in part on a stipulation by UT-Battelle that (1) it would have been reasonable for Moses to believe that a literature search should have been conducted concerning fission recoil barriers and that such a literature search would have identified a solution to the research problem concerning the barrier; and (2) the potential savings in research costs that could have been achieved if a proper literature search had been conducted in a timely manner would have ranged from "$100,000 to several hundred thousand dollars." *Id.* (citing E-mail from Jeff Guilford, Counsel, UT-Battelle to Richard Cronin, Assistant Director, OHA (August 7, 2007)).

In its statement discussing the Report of Investigation, UT-Battelle took issue with the OHA Investigator's conclusion, first because the September 6 e-mail "was not directed at a DOE official or other individual described in Section 708.5(a)," and second, because "the purpose of the email was to berate colleagues on what Dr. Moses believed to be an unprofessional approach to scientific research rather than to make protected disclosures to company or DOE officials." UT-Battelle's Statement Discussing the Report of Investigation at 5 (November 19, 2007).

I find both of these arguments to be without merit. The Part 708 regulations includes as protected conduct the disclosure of information "to a DOE official" or the individual's "employer, . . ." 10 C.F.R. § 708.5(a). UT-Battelle's argument rests on the fact that Moses' September 6 e-mail was addressed to individuals at MURR and ANL, while others, including Satkowiak and DOE official Parrish Staples, received the e-mail by virtue of being included on the "cc:" line. It is clear, however, that the September 6 e-mail was received by Satkowiak and Staples, and that therefore the information contained in the e-mail was "disclosed to a DOE official" and to Moses' "employer," and UT-Battelle offers no basis for reading an additional requirement into Section 708.5(a) that the information be primarily "directed at a DOE official or other individual described in Section 708.5(a)."

Neither does Section 708.5(a) require that information be disclosed with a particular purpose or intent. The DOE made this explicit when, in revising Section 708.5(a) to remove the requirement that a disclosure be made "in good faith," it stated that it "did not intend to place the employee's state of mind into issue." Criteria and Procedures for DOE Contractor Employee Protection Program, 65 Fed. Reg. 6314, 6317 (February 9, 2000). Even under the previous

[10] Moses contends that because, in his message to Sicard, he "encouraged" Sicard to discuss his concerns with DOE official Robert Boudreau, and Sicard provided a copy of Moses' message to Boudreau, his message to Sicard should be treated as a protected disclosure made through a "third-party conduit" to a DOE official. Letter from David Moses to Steven Goering, OHA (November 29, 2007). Moses offers no support from the plain language of the Part 708 regulations or from prior Part 708 cases for such an interpretation of 10 C.F.R. § 708.5(a), and I find none.

wording of Section 708.5(a), the OHA Director held that, "in evaluating whether a person has made a disclosure in good faith, the person's motivations for making the disclosure are irrelevant." *Diane E. Meier*, 28 DOE ¶ 87,004 at 89,041 (2000).

Finally, at the hearing in this matter, counsel for UT-Battelle acknowledged that "Moses did believe there was a gross waste of funds, and I think he reasonably believed that there was gross waste of funds. . . ," but then raised the issue of whether, in the September 6 e-mail, a "statement of gross waste of funds had been made. It only asks a question, and there is never, in the communication trail, an answer to the question, or any declaration thereafter." Tr. at 494. However, the Part 708 regulations do not require that an employee make an affirmative declaration that a "gross waste of funds" has occurred in order to qualify for protection from retaliation. Rather, Section 708.5(a) merely requires that a disclosure be of "information" that the employee "reasonably believes reveals," among other things, "gross waste of funds, . . ." 10 C.F.R. § 708.5(a).

In this case, there is no dispute that Moses reasonably believed that there was a gross waste of funds, ROI at 9; Tr. at 494, and I find that it would have been reasonable for Moses to assume that his September 6 e-mail conveyed his belief and the basis thereof. In the e-mail, after explicitly expressing his belief, which UT-Battelle has acknowledged was reasonable, that there should have been a "literature research for precedential R&D," Ex. M, Moses concludes by characterizing the RERTR program as "a full-employment science program . . . principally consisting of doing lots of high-priced work that leads to a rediscovering of that which should have been recognized or known by a decent and diligent literature search," and then asks, in what is by all appearances a rhetorical question, "How much taxpayer money has been wasted since 1998 to now on this bad science?" *Id.*

After considering the arguments raised by UT-Battelle, I conclude that Moses' September 6, 2006, e-mail did disclose, to a DOE official and to his employer, information that he reasonably believed revealed a gross waste of funds, and that therefore the September 6 e-mail included a disclosure protected under Part 708.[11]

B. Whether Protected Activity Was a Contributing Factor in an Act of Retaliation

In order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that the protected activity was a contributing factor to a retaliatory action taken against him. Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an

[11] During the pre-hearing conference, Moses identified four other disclosures pertaining to the RERTR program, made prior to the September 6, 2006, e-mail, that he contends are protected under Part 708. Memorandum of Pre-Hearing Telephone Conference (November 20, 2007). In addition, at the hearing in this matter, Moses characterized two other documents, also predating his September 6 e-mail, as being protected disclosures. Tr. at 69, 73, 107; Ex. F; Ex. G. As I have already found Moses' September 6 e-mail contained a protected disclosure, and I find below that Moses has met his burden of showing that this protected disclosure was a contributing factor in the alleged retaliatory actions at issue in this case, I need not consider whether these earlier disclosures are also protected under Part 708. For the same reason, at the pre-hearing conference I found that it would not be necessary to take the testimony of five witnesses proposed by Moses as to the validity of his concerns pertaining to the RERTR program "as UT-Battelle has conceded that disclosure protected as to the substance . . . ." Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).

action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the disclosure of information." 10 C.F.R. § 708.2. At the pre-hearing conference, Moses identified the following actions by ORNL as alleged retaliations:

1. The September 2006 decision to place him on one week of paid administrative leave, without access to his work computer;

2. The denial of a merit increase based upon his fiscal year 2006 performance assessment;

3. The March 2007 decision to offer him the choice of termination or early retirement.

Memorandum of Pre-Hearing Telephone Conference (November 20, 2007).[12]

Regarding UT-Battelle's decision to place Moses on a week of paid administrative leave, UT-Battelle presented the hearing testimony of Katherine Finnie, a Senior Resource Manager in ORNL Human Relations. Tr. at 423. Ms. Finnie testified that administrative leave is not considered a "disciplinary action" within ORNL's Human Resources system, and that Moses lost no pay, benefits, or seniority as a result of the action. *Id.* at 427-28. Citing this testimony, UT-Battelle argues in its post-hearing brief that this action "did not constitute an act of 'retaliation' as that term is used in 10 C.F.R. § 708.2" as it "was not a 'negative action with respect to the employee's compensation, terms, conditions or privileges of employment.'" UT-Battelle Brief at 32 (quoting 10 C.F.R. § 708.2).

First, the definition of retaliation in Section 708.2 is clearly not limited to a "negative action with respect to the employee's compensation, terms, conditions or privileges of employment." Rather, such an action is provided in the text only as an example of an "action . . . taken by a contractor against an employee with respect to employment." 10 C.F.R. § 708.2.

Moreover, in his testimony, Satkowiak stated that, as a result of Moses' September 6, 2006, e-mail, his "recommendation for discipline was let David sit at home, think about what he did, and then have him come back to the office after, after a week." Tr. at 295. Thus, Satkowiak saw the administrative leave as "discipline," and whether or not ORNL officially regarded it as such,[13] this was clearly an "an action . . . taken by" UT-Battelle "against" Moses "with respect to employment." 10 C.F.R. § 708.2. In addition, though Finnie testified that the denial of Moses' access to his official e-mail was "pretty much standard procedure when a person went on administrative leave pending an investigation . . . of improprieties," Tr. at 428, this action was clearly a negative one with respect to the "terms, conditions, or privileges" of Moses employment. 10 C.F.R. § 708.2. Therefore, both of these actions would fall within the definition of "retaliation" under Section 708.2, if taken as a result of his disclosures. *Id.*

[12] Moses did not identify the September 22, 2006, written warning as an alleged retaliation. In any event, I note that ORNL HR official Katherine Finnie testified at the hearing that the written warning is no longer in Moses' personnel file. Tr. at 434.

[13] When asked whether "suspension with pay" is considered by ORNL to be a "disciplinary action," Satkowiak responded, "I don't know. Is it?" *Id.*

I find that in this case the placement of Moses on paid administrative leave, particularly when viewed in conjunction with the denial of access to his work computer, was an action taken by UT-Battelle against Moses with respect to his employment, even though it had no effect on his compensation.

1. Whether Protected Disclosure in Moses' September 6, 2006, E-mail Was a Contributing Factor in the Alleged Acts of Retaliation

In prior decisions, OHA has found that:

> A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action."

Charles Barry DeLoach, 26 DOE ¶ 87,509 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993).

a. Administrative Leave and 2006 Performance Assessment

The record indicates that Lawrence Satkowiak took the first two personnel actions alleged to be retaliatory on September 15, 2006 (the placement of Moses on administrative leave without access to work computer) and January 25, 2007 (Moses' 2006 performance assessment). Satkowiak was copied on Moses' September 6, 2006, e-mail, and became aware of the e-mail the following day. Thus, Satkowiak took these two personnel actions within eight days, and five months, respectively, of when he gained actual or constructive knowledge of the protected disclosures contained in Moses' September 6 e-mail. Based solely on the temporal proximity between the e-mail and these two alleged retaliations, I find that a reasonable person could conclude that Moses' protected disclosure in the September 6 e-mail was a factor in both of these two personnel actions. *Luis P. Silva*, 27 DOE ¶ 87,550 (2000) (eight months sufficiently proximate in time); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999) (eight months); *Robert Gardner*, 27 DOE ¶ 87,536 (1999) (six months); *Frank E. Isbill*, 27 DOE ¶ 87,513 (1999) (six months).

b. Decision to offer Moses Choice Between Termination and Early Retirement

As for the last alleged retaliation, the members of the STRC, Lori Barreras, Dana Christensen, and Reinhold Mann, decided at their March 12, 2007, meeting to offer Moses the choice between early retirement and termination. Ex. A. Prior to the meeting, ORNL HR official Katherine Finnie compiled a notebook for purposes of the meeting that was provided to each member either the day of or the business day prior to the meeting. Tr. at 499, 560, 577. Included in the notebook was a copy of Moses' September 6, 2006, e-mail. Ex. 22 at Tab "2006 E-Mails".

Although neither Barreras nor Mann testified as to any specific recollection of having read the September 6 e-mail, and both recalled the notebook being referenced as background material regarding Moses' loss of funding, Tr. at 560, 579, I find that the inclusion of the September 6 e-

mail in the notebook was sufficient to provide both Barreras and Mann at least constructive, if not actual, knowledge of Moses' September 6, 2006, protected disclosure.

This finding is further supported by the minutes of the March 12, 2007, STRC meeting, which includes a statement that "Kathie [Finnie] and Larry [Satkowiak] reviewed the 'Synopsis of Issues and E-Mail communication 2004-2006.'" Ex. A. This synopsis was also included in the notebook prepared for the STRC meeting, and contains the following regarding Moses' September 6, 2006, e-mail:

- 9/6/2006 (9:44 PM) Moses > Vandergrift et. al

  > "what you call a "fission recoil barrier" to prevent the aluminum clad foil from bonding ….is what Atomics International (AI) called a diffusion barrier in its testing work in the late 1950's and early 1960's...Don't you guys...ever do any literature research? ...My word, INL,-ANL, has rediscovered what Oak Ridge and Hanford knew in the late 1940's....made into a bad science program principally consisting of doing lots of high priced work that leads to rediscovering of that which should have been recognized or known by a decent and diligent literature search….how much tax payer money has been wasted since 1998 to now on this bad science?

Ex 22 at 11 (ellipses in original). There is no evidence in the record that either Barreras or Mann were aware of the September 6 e-mail prior to being provided a copy of the STRC meeting notebook. However, Dana Christensen, the third member of the STRC, clearly had previous knowledge of the contents of the September 6 e-mail, as Satkowiak testified that he forwarded a copy of the e-mail to Christensen on September 8, 2006, Tr. at 286, and Christensen recalled reading it. *Id*. at 603-04.

Thus, all three officials responsible for deciding that Moses would be offered the choice between termination and retirement had either actual or constructive knowledge of the contents of Moses' September 6 e-mail, Barreras and Mann first gaining that knowledge either the business day prior to or the day of the meeting at which they made the decision, and Christensen first being made aware of the September 6 e-mail approximately six months prior to the meeting. Based solely on this temporal proximity, I find that a reasonable person could conclude that Moses' protected disclosure in the September 6 e-mail was a contributing factor in the STRC's decision.[14]

[14] Though it is common in cases applying the "temporal proximity" analysis to measure the proximity between the date of the protected disclosure and the personnel action at issue, the standard itself is silent as to how the "period of time" is to be measured and, as has been noted by the OHA Director in a prior Part 708 Appeal decision, "[a]pplying a reasonable-person standard to this issue requires considering the circumstances of each case." *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 at 89,300 (2000). Thus, for example, in a case where a protected disclosure was made to the DOE Inspector General, the Hearing Officer considered the proximity in time between the point at which the official taking the action became aware of the protected disclosure (as opposed to the date of the disclosure itself) and the personnel action at issue. *Elaine M. Blakely*, 28 DOE ¶ 87,039 at 89,273 (2003), *aff'd*, 28 DOE ¶ 87,043 (2004).

2. Whether Protected Disclosures in Moses' 2004 and 2005 Communications Were Contributing Factors in the Alleged Acts of Retaliation

a. Administrative Leave and 2006 Performance Assessment

Of the disclosures during 2004 and early 2005 that I find above to be protected, the most recent is the 11-page document that Moses provided to Satkowiak in April 2005. As noted above, Satkowiak took the first two alleged retaliatory actions on September 15, 2006 (the placement of Moses on administrative leave without access to work computer) and January 25, 2007 (Moses' 2006 performance assessment). Thus, Satkowiak took these two actions approximately 17 months and 21 months after the most recent protected disclosure from the 2004 to 2005 period. Based solely on these facts, I do not find that a reasonable person could conclude that the April 2005 disclosure, and those that preceded it, were contributing factors in these two personnel actions. *Donald Searle*, Case No. TBU-0079 (July 28, 2008) (twelve months between protected conduct and alleged retaliation "an unusually extended period of time" which does not amount to "even a perfunctory showing of a contributing factor").

Thus, Moses must rely on other evidence in order to meet his burden of establishing, by a preponderance of the evidence, that his protected disclosures from 2004 and 2005 were contributing factors in the two actions. With regard to Satkowiak's September 15, 2006, decision to place Moses on administrative leave, Moses offers no evidence that would establish this, and I find none.

As for the 2006 Performance Assessment, Moses cites the following statement by Satkowiak in the assessment: "Mr. Moses has repeatedly demonstrated his inability to interact professionally with our NNSA/NA-20 sponsors." Ex. B at 3. Satkowiak testified at the hearing that this statement referred to events with respect to both NA-21 in 2006 and NA-26 in 2005. Tr. at 42-43. Nonetheless, as discussed below, the preponderance of the evidence in the record supports a finding that Satkowiak's statement regarding Moses' "inability to interact professionally" referred not to Moses' disclosure of information regarding DOE contracting practices in 2004 and 2005, but rather to the manner in which he raised those issues.

Satkowiak testified that, after Moses began to report to him in the summer of 2004, he got involved in " a limited sense" in the issues being raised by Moses in 2004, and that he supported Moses in reporting those concerns. *Id.* at 263-64. When asked at the hearing whether Satkowiak and UT-Battelle "fully supported" him in making his concerns known to DOE in 2004, Moses responded, "I presume so. I really didn't discuss a lot of this with Dr. Satkowiak." *Id*. at 143. It appears therefore that Satkowiak was aware that Moses was raising concerns at the time he completed his first Performance Assessment of Moses on January 25, 2005. Ex. 22, "Performance Reviews" Tab at 1. Yet, in that assessment, Moses received the highest possible rating of 6, and Satkowiak commended Moses for doing an excellent job . . . during what, at best, could be described as a difficult year." *Id.* at 15. Satkowiak further cited Moses' ability to act "as a buffer between the frustrations of junior technical staff and the sponsors, whose motivations are sometimes politically driven rather than guided by logic, . . ." *Id.*

Moses' 2005 Performance Assessment, for the year ending September 30, 2005, was completed on February 7, 2006, after the events of early 2005 leading to Moses' loss of funding from NA-26. Satkowiak gave Moses a rating of 4 out of a possible 6. Ex. 22, "Performance Reviews" Tab at 1. However, the only negative comments in the assessment reference not the fact that Moses raised issues, but the manner in which he raised them: "Mr. Moses' relationship with NA-26 has been tumultuous during the past year. Although I agreed with many of the issues raised by David, I found his approach to address the issues lacking in the finesse necessary in these delicate situations." *Id.* at 9.

Indeed, the testimony of Satkowiak, and more importantly Moses, indicates that Satkowiak supported Moses in his continued communications with DOE officials throughout 2005, both before the loss of NA-26 funding, and afterward, when he began to work with, and raise concerns with, NA-21 officials in his new work for ORNL on the RERTR program. Tr. at 161-62, 171-72. Specifically with regard to the issues relating to NA-26, Satkowiak testified that he raised at least some of the issues set forth in the 11-page document Moses provided to him in April 2005 in a meeting with DOE officials in Washington later in the spring, one of the purposes of which was to try to convince DOE officials to restore NA-26 funding for Moses. *Id.* at 706-709. Satkowiak's support of Moses' communications after he was no longer funded by NA-26 is further reflected in the following exchange between counsel for UT-Battelle and Moses:

> Q. . . . You began raising these [RERTR] issues in 2005?
> A. Um-hum.
> Q. And you sent e-mails to Dr. Satkowiak. Does he take any action against you?
> A. No.
> Q. Does he criticize you because you've raised these issues?
> A. No.
> Q. Did he continue to support you while you raised these issues?
> A. Yes.

Tr. at 171,72. Satkowiak's support continued, according to Moses' testimony, through the summer of 2006, prior to the September 6, 2006, e-mail. *Id.* at 175-76.

Given this context, I cannot find that Satkowiak's reference in Moses' 2006 Performance Assessment to unprofessional interactions is sufficient to prove, by a preponderance of the evidence, that Moses' 2004 and 2005 disclosures were contributing factors to the rating Moses received on that assessment.

b. Decision to offer Moses Choice Between Termination and Early Retirement

I found in Section II.B.1.b above that the three members of the STRC, who decided that Moses would be offered the choice between termination and retirement, had either actual or constructive knowledge of the contents of Moses' September 6 e-mail, based upon the inclusion of the e-mail in the notebook compiled for the purpose of the March 12, 2007, STRC meeting. I find the same

is true for the protected disclosures contained in Moses' e-mail communications of 2004 and 2005, which were also included in the notebook. Ex. 22 at Tab "2005 E-Mails," Tab "2004 E-Mails." Also, as in the case of the September 6 e-mail, Moses' e-mail communications in 2004 and 2005 are summarized in the "Synopsis of Issues and E-Mail communication 2004-2006" contained in the notebook, the summary of the 2004 communications presented under the heading "Issue - Moses alleges DOE mismanagement of contracts; ineffectiveness of sponsor, (Fletcher) bribery, corruption, DOE'S lost credibility, conflict of interest" and the 2005 communications under the heading "Issue - DOE has handled subcontracts inappropriately, improper management - particularly on the part of Norman Fletcher." Ex. 22 at 6-9. Specifically included in the synopsis, among other things, is Moses' reference to possible violations of the Foreign Corrupt Practices Act. *Id.* at 6. Further, there is no evidence that the three committee members were aware of Moses' 2004 and 2005 protected conduct prior to receiving the notebook either on the day of the meeting or the business day preceding it. Based on the close proximity in time between when these three officials gained knowledge, either actual or constructive, of Moses' 2004 and 2005 protected disclosures, and the date of the STRC's decision, I find that a reasonable person could conclude that those disclosures were contributing factors in that decision.

In sum, for the reasons set forth above, I find that Moses has not established, by a preponderance of the evidence, that his protected disclosures in 2004 and 2005 were contributing factors in either his placement on administrative leave on September 15, 2006, or his 2006 Performance Assessment and the resulting lack of a merit increase in 2007. However, I find that Moses has established by a preponderance of the evidence that the September 6, 2006, disclosure was a contributing factor in the decision to place him on administrative leave and in his 2006 Performance Assessment, and that both the 2006 disclosure and Moses' protected disclosures in 2004 and 2005 were contributing factors in the decision by the STRC to offer Moses the choice between retiring or being terminated. Thus, the burden shifts to UT-Battelle to prove by clear and convincing evidence that (1) Satkowiak would have placed Moses on administrative leave and given Moses the same rating on his 2006 Performance Assessment in the absence of his September 6, 2006 protected disclosure, and (2) that the STRC would have reached the same decision to offer Moses the choice between retiring and being terminated in the absence of both his 2004 to 2005 protected disclosures and his September 6, 2006, protected disclosure.

C. Whether the Contractor Would Have Taken the Same Actions in the Absence of the Protected Disclosures

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor's retaliation, "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. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, 29 DOE ¶ 87,031 at 89,163 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant's protected conduct.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified several factors that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees . . . ." *Dennis Patterson*, 30 DOE ¶ 87,005 at 89,040 (2008) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

1. Whether Satkowiak Would Have Placed Moses on Administrative Leave in the Absence of His September 6, 2006, Protected Disclosure

As an initial matter with regard to this issue, I note the Part 708 regulations protect, among other things, the disclosure of certain "information." 10 C.F.R. § 708.5. It is therefore the disclosure of particular information contained in a communication that is protected, not the communication in its entirety. Thus, in the present case, I have found above that Moses' September 6, 2006, e-mail *contained* information the disclosure of which is protected under Part 708, not that the e-mail as a whole is protected.

This distinction is of particular importance in the present case, since there is little doubt that had Moses not sent the September 6 e-mail, he would not have been placed on administrative leave on September 15, 2006. That, however, is not the issue before me. Rather, the proper question in the present case is whether Satkowiak would have placed Moses on administrative leave had Moses' September 6 e-mail not contained information the disclosure of which is protected under Part 708. The Federal Circuit's 2007 decision in *Kalil*, cited above, and its 2006 decision in *Greenspan v. Department of Veteran Affairs*, are helpful to my analysis in this regard. *Greenspan v. Dep't of Veteran Affairs*, 464 F.3d 1297 (Fed. Cir. 2006).

In *Greenspan*, the agency issued a letter of reprimand to an employee doctor after his statement to an agency executive at a meeting, basing its decision on its characterization of the statement as "unfounded" and "defamatory." *Id.* at 1305. The court found that the discipline was improper, as the charges were "anchored in the protected disclosures themselves."

In *Kalil*, however, the court rejected an interpretation of *Greenspan* advanced by the employee that "once a disclosure qualifies as protected, the character or nature of that disclosure can never supply support for any disciplinary action." 479 F.3d at 825. Thus, after setting forth the factors listed above that "may be considered," the court in *Kalil* held that "the character of the disclosure itself supplie[d] clear and convincing evidence that the Agency met its burden of proof." *Id.*

Applying the analysis of *Kalil* and *Greenspan* to the present case, I turn to the first of the three factors set forth in those cases, the strength of the employer's reason for the personnel action excluding the whistleblowing. Here, the only contemporaneous evidence of the basis for the decision to place Moses on administrative leave is the notes of the September 15, 2006, meeting between Moses, Satkowiak, and ORNL HR official Katherine Finnie. Ex. J. These notes begin with Satkowiak's statement that the September 6 e-mail created "a very sensitive situation the

next day" and mentions "[c]alls from [Parrish] Staples and [Ralph] Butler," two of the recipients of the e-mail. *Id.* at 1. Moses responds by discussing the merits of the issues raised in the e-mail, and characterizing it as a "[f]raud, waste, and abuse accusation." *Id.* Satkowiak immediately responds that " [r]eporting fraud, waste and abuse not the problem. It was the wording." *Id.* Moses later states, "Technically what we said is correct," to which Satkowiak responds, "I assume you are correct." *Id.*

The notes include Satkowiak's statement that Moses' "job as a senior program manager is to think about the bigger picture. How do we get things done without jeopardizing funding?" and that the problem was not "what was said but what was implied. Personal. When emotional no e-mail is good advice." *Id.* at 2. Finally, Satkowiak's states that his boss, Dana Christensen, viewed

> this very seriously. New to lab. Main concern is with reputation to lab. As a consequence will go ahead and suspend you with pay pending further investigation. Compromised lab.
>
> David: By pointing out fraud, waste and abuse?
>
> Kathy [Finnie]: No. By the manner in which you did this report.

Id. at 3.

From these notes, it is clear that in the present case, unlike in *Greenspan*, Satkowiak's objection to Moses September 6 e-mail was not "anchored in the protected disclosures themselves." *Greenspan*, 464 F.3d at 1305. In fact, again in contrast to the contention of the agency in *Greenspan* that the employee's allegations were "unfounded," Satkowiak explicitly stated in the September 15 meeting that he assumed what Moses alleged was "correct." Ex. J at 1.

Further, as the court held in *Kalil*, the "character of [a] disclosure itself" can "suppl[y] clear and convincing evidence" in support of a employer's personnel action. 479 F.3d at 825. Here, Satkowiak and Finnie made clear in the September 15, 2006, meeting that they saw the problem as the "wording" and the "manner" of Moses' e-mail, not any report of waste, fraud, or abuse. Examples of the tone of Moses' September 6 e-mail, longer portions of which are quoted above, can be found in statements such as:

- Don't you guys in the RERTR Program at ANL ever do any literature research?
- Who came up with this "fission recoil barrier" terminology as opposed to diffusion barrier? Does calling it by a new name make it a new discovery?
- Apparently, neither side . . . did their literature research for precedential R&D work like every graduate student at a top-flight university (such as Missouri) must surely be taught to do.

- [W]e were privileged to hear from ANL's Dr. Hofman how INL-ANL has "rediscovered" the magic properties of silicon when added to aluminum to arrest the interdiffusion of uranium and aluminum. My word, INL-ANL has rediscovered what Oak Ridge and Hanford knew in the late 1940s and Knolls Atomic Power Laboratory (KAPL) and the UKAEA-Harwell studied in more detail along with ORNL in the 1950s.

The court in *Greenspan* made clear that disclosures do not lose protection when they are "stated in a blunt manner." 464 F.3d at 1299. Thus, in this case, had Moses' September 6 simply expressed his reasonable beliefs in a way that was direct and straight to the point, even if those beliefs touched on uncomfortable truths, it would be difficult for UT-Battelle to claim that Satkowiak would have taken the same action in the absence of protected disclosures.

However, *Greenspan* makes equally clear that "wrongful or disruptive conduct is not shielded by the presence of a protected disclosure, . . ." *Id.* at 1305. As is evident from the excerpts above, Moses' e-mail went well beyond being merely blunt, and became sarcastic and gratuitously insulting to his fellow scientists. The September 15 meeting notes indicate that Satkowiak considered the possible negative repercussions of this behavior, telling Moses that he needed to "think about the bigger picture. How do we get things done without jeopardizing funding?" Satkowiak's concern was understandable, given Moses' loss of NA-26 funding the previous year. In short, Moses' e-mail was not only rude in tone, but gave Satkowiak good reason to be concerned that it would be disruptive in its consequences, a concern that was proven to be well-founded when NA-21 decided later that month that it could no longer fund Moses' work. Accordingly, in applying the first factor set forth in *Kalil*, I find strong reasons for Satkowiak's decision completely apart from Moses' protected activity.

In applying the second factor, the strength of any motive to retaliate for the whistleblowing, I find no evidence of any such motive on the part of Satkowiak, such as would be the case if Moses' protected disclosures were in any way critical of Satkowiak or ORNL. Rather, the targets of Moses' allegations were officials at other DOE laboratories and at DOE Headquarters. *See Carr v. Soc. Security Admin*, 185 F.3d 1318, 1326 (Fed. Cir. 1999) (those with motive to retaliate "not 'agency officials' recommending discipline").

As for the third factor, UT-Battelle offers no evidence of similar action taken against other ORNL employees situated similarly to Moses, though it would not be surprising if there were no such employees, given the nature of Moses' actions that resulted in his placement on administrative leave. In any event, it is clear under the Federal Circuit's application of these factors that an employer can meet its clear and convincing evidentiary burden despite the lack of such evidence. *Kalil*, 479 F.3d at 825 (finding clear and convincing evidence based upon "character of [the] disclosure itself"); *Carr,* 185 F.3d at 1326-27 (upholding finding of clear and convincing evidence where lack of evidence of similar action against similarly situated employees).

Based on all of the above considerations, I find that UT-Battelle has proven by clear and convincing evidence that Satkowiak would have place Moses on administrative leave on September 15, 2006, in the absence of the protected disclosure in his September 6, 2006, e-mail.

2. Whether Satkowiak Would Have Given Moses a "Not Fully Contributing" Rating on His 2006 Performance Assessment in the Absence of His September 6, 2006, Protected Disclosure

In considering whether UT-Battelle has shown by clear and convincing evidence that Moses' 2006 Performance Assessment rating of "Not Fully Contributing" would have been the same in the absence of his September 6, 2006, disclosure, I again turn to the three factors set forth in *Kalil*. Regarding the first factor, the strength of the employer's reason for the personnel action, the only contemporaneous evidence of the basis for the rating is found in Satkowiak's summary comments in the 2006 Performance Assessment:

> Mr. Moses has repeatedly demonstrated his inability to interact professionally with our NNSA/NA-20 sponsors. This is unacceptable as a senior program manager within the Nuclear Nonproliferation Program office who has as a primary function interfacing with the sponsor. As a result he has been asked to find "other" funding outside of NNP Office funding. On October 4, 2006, Mr. Moses was directed to secure this funding by the end of November, however, I extended this deadline until the end of February understanding the difficulty of the task given the general funding uncertainty associated with the continuing resolution.

Ex. 22, "Performance Reviews" Tab at 5.

In Section II.B.2.a above, I found that Moses had not met his burden of proving that his 2004 and 2005 disclosures were contributing factors to the 2006 Performance Assessment, in part because, though the Performance Assessment clearly references Moses' communications in 2004 and 2005, Satkowiak was referring to the manner in which Moses raised issues regarding DOE contracting practices in 2004 and 2005, not to the disclosure of this information, *per se*. For the same reasons discussed therein, although the proximity in time between Moses' September 6, 2006, disclosure and the 2006 Performance Assessment provided sufficient circumstantial evidence to prove the disclosure was a contributing factor in the performance assessment, the direct evidence in the record supports a finding that Satkowiak's statement as to Moses' "inability to interact professionally" in the performance assessment was based not upon the disclosures contained in Moses' September 6 e-mail, but rather to the manner in which the e-mail presented those disclosures.

Thus, as with Satkowiak's understandable concern regarding the character of Moses' September 6 e-mail as expressed in the September 15, 2006, meeting, Satkowiak's criticism of Moses' "inability to interact professionally" in the 2006 Performance Assessment is evidence of the strength of Satkowiak's reason, completely apart from any protected activity, for rating Moses as "Not Fully Contributing." The same is true of Satkowiak's comments in the assessment regarding Moses' lack of funding, since by the time of the assessment, DOE had removed Moses from NA-21 funding, presenting Satkowiak with the same problem he faced when Moses was removed from NA-26 funding in April 2005. Indeed, the problem had become even worse, as two of the primary sources of potential funding for Moses, NA-21 and NA-26, were now effectively off-limits. Tr. at 241-49 (testimony of Satkowiak regarding possible sources of DOE-

sponsored funding). Given these circumstances, with regard to the 2006 Performance Assessment, "the strength of the . . . reason for the personnel action excluding the whistleblowing," *Kalil,* 479 F.3d at 824, is clearly evident.

Regarding the second factor to be considered, I have already found above that there is no evidence that Satkowiak had any motive to retaliate against Moses for his September 6, 2006 disclosure by placing him on administrative leave. The lack of any such motive is just as relevant here as to Satkowiak's decision to rate Moses "Not Fully Contributing" on his 2006 Performance Assessment.

Applying the third factor set forth in *Kalil* to Satkowiak's 2006 rating of Moses, I note that UT-Battelle again offers no evidence of similar action against similarly situated employees. However, for the same reasons set forth in the preceding section regarding the placement of Moses on administrative leave, I find that this lack of evidence does not necessarily preclude UT-Battelle from meeting its clear and convincing evidentiary burden regarding the 2006 Performance Assessment.

Considering all three relevant factors, I find it most significant that Satkowiak's reason for the rating he gave Moses on his 2006 Performance Assessment was stronger still than the basis he had for placing Moses on administrative leave in September 2006. By January 2007, when Satkowiak completed the assessment, Moses' September 6, 2006, e-mail had resulted in the loss of his funding from NA-21, and had therefore seriously disrupted Moses' ability to do his job. I note here that the first of the three "Objectives" set forth in the 2006 Performance Assessment was to "Manage the ORNL [RERTR] Program," Ex. 22, "Performance Reviews" Tab at 3, a task made impossible by the loss of NA-21 funding. The second objective, "Technical and program management support to the NNPO," is described as serving as "Senior Program Manager," including by "Providing customer interface," with Moses' performance to be measured by whether he is "judged responsive and responsible by the Director [Satkowiak], his senior management, his outside sponsors, and his peers in serving the needs of the office and in advancing the programs' agendas and growth." *Id.* at 4. These two objectives together accounted for 75 percent of the weight of his assessment. Satkowiak testified as follows regarding the basis for his "Not Fully Contributing" rating of Moses:

> [Y]ou can be winning a race, but if you trip and fall and come in, or don't even finish coming in at the end of, at the end of the race, all of the hard work that you did during the race is very, is, is nice, but . . . because he lost his funding, and essentially soured that relationship with NA-21, he failed to meet the objectives that he agreed to.

Tr. at 339-40.

Based upon the evidence regarding the strength of Satkowiak's reason for the 2006 Performance Assessment, and the lack of any apparent retaliatory motive for Satkowiak's action, I find that UT-Battelle has proven by clear and convincing evidence that Satkowiak would have rated Moses "Not Fully Contributing" on his 2006 Performance Assessment in the absence of any protected disclosure in his September 6, 2006, e-mail.

3. Whether the STRC Would Have Decided to Offer Moses the Choice Between Retiring and Being Terminated in the Absence of Both His 2004 and 2005, and September 6, 2006, Protected Disclosures

Regarding the decision of the STRC to offer Moses the choice between retirement and termination, I find that all three of the factors set forth in *Kalil* support a conclusion that the STRC would have reached the same decision in the absence of Moses' protected disclosures, for the reasons set forth below.

Moses acknowledged at the hearing that, after NA-21 decided in September 2006 that it would no longer fund Moses, it was his responsibility to find other funding. Tr. at 206-07.[15] Satkowiak testified that, while Moses was trying to find direct funding from, for example, a DOE sponsor such as he had previously from NA-26 and NA-21, he was able to fund Moses' employment from an "indirect account," which was funded by a "tax" on the direct funding his office receives from all DOE NA-20 offices, including NA-26 and NA-21. *Id*. at 325-26. This was of some concern to Satkowiak, since using this account meant that NA-21 and NA-26 would still be funding Moses, albeit indirectly and to a much smaller degree. *Id.* at 326; *see also id.* at 506-13 (testimony of ORNL Director of Accounting regarding charging of employee time as indirect versus direct cost).

As noted above, five months after Moses' loss of funding from NA-21, Moses stated in a February 25, 2007, e-mail to Satkowiak that he had "enough work to carry me into March but not much beyond." Ex. 5 at 1. Moses, responding affirmatively to questions from counsel for UT-Battelle, acknowledged that he didn't "have in place adequate long-term funding" and that the "prospects were very poor." Tr. at 223. Satkowiak testified credibly that he was, at this point, "disappointed. I thought, I thought this would have done it. I thought he would have, would have been able to find the, the funding that he needed to find. . . . It put me at a, in a position where I had to make a bad, a difficult decision." Tr. at 348. After consulting with ORNL HR official Katherine Finnie, Satkowiak decided to initiate an STRC review of Moses' case, with the recommendation that Moses be terminated.

The minutes of the March 12, 2007, STRC meeting reflect a discussion as to whether five months was a "reasonable" amount of time within which Moses could be expected to find funding, with the conclusion that it was reasonable. Ex. A at 2. The minutes further indicate that Satkowiak's superior and STRC member Dana Christensen sought and received confirmation

[15] The October 5, 2006, memorandum Satkowiak issued to Moses, discussed in section I.D.2 above, stated that "[u]ntil further notice, you are no longer permitted to have direct contact of any manner, including personal, email and verbal, with our DOE/NNSA NA-20 sponsors." *Id.* At the hearing, Moses stated that the effect of the memorandum was that "he was not allowed to market though NA-20, period." Tr. at 67. However, Moses did not take issue with the testimony of Satkowiak that Moses could have inquired as to funding opportunities from NA-20 through one of "Customer Interface Managers" within ORNL's Nuclear Nonproliferation Program Office (NNPO). Ex. 7 (NNPO organization chart). Satkowiak testified that he "just didn't want David, being as enthusiastic as he is, I didn't want him running up to DOE without engaging the Customer Interface Managers, because it puts them in a, in a very difficult position, because they don't know what's going on in their own area." Tr. at 252; Ex. 8 (August 8, 2005 e-mail from Satkowiak designating specified NNPO employees as Customer Interface Managers). In fact, Moses testified that he talked to at least two of the Customer Interface Managers in his attempt to find funding. Tr. at 126-27, 252-53.

that Satkowiak's recommendation for termination was "based on the lack of success in attracting funding to do work . . ." *Id.* at 3. The hearing testimony of all three committee members, and others in attendance, confirmed that Moses' lack of funding was the primary focus of the meeting. *See, e.g.,* Tr. at 63, 359-60 (testimony of Satkowiak), 448-49 (Finnie), 474-75, 563-63, 565 (Barreras), 572-73, 582-84 (Mann), 618-20 (Christensen).

The minutes also reflect that following statements at the meeting:

> Larry [Satkowiak] discussed that . . . [Moses'] behavior has been more out-of-the-box, and sponsors do not want to deal with him. David must have good customer relations to do his job; but he has alienated the Washington DOE offices. This is of great concern and could impact whether DOE Washington will want to work with ORNL in general.
>
> . . . .
>
> Larry discussed that he was trying to find a spot for David to land – apparently the Washington offices talk to one another, and no one wanted to work with David. Larry said that David is a talented individual, but people are afraid of what he might do to their program. Kathie [Finnie] discussed David's fraud, waste, and abuse concerns and that the fact that he voiced his concerns was not a problem – it was the manner in which he did it.

Ex. A at 2. These excerpts could be read to reflect a discussion of something other than Moses' lack of funding. However, read in context, their connection to the funding issue is clear, as an explanation of why Moses' lost funding and how the opinion of certain DOE officials might affect his ability to obtain funding in the future.

Thus, applying the first factor set forth in *Kalil*, the strength of the reason for the personnel action, the record as a whole, with respect the STRC's decision and the events leading up to it, clearly supports a finding that the reason for the decision was Moses' lack of funding. Further, the undisputed fact that five months had passed since Moses' loss of NA-21 funding and that prospects for future funding were dim certainly is evidence of the strength of the reason for the committee's decision.

As for the strength of any motive on the part of the STRC committee to retaliate against Moses for his protected activity, there is no direct evidence of any such motive since, as discussed above, the targets of Moses' protected disclosures were officials at DOE headquarters and at other DOE laboratories, not ORNL in general or any of the committee members in particular.

In finding a lack of retaliatory motive, I have considered the evidence in the record that after STRC committee member Dana Christensen first read Moses' September 6, 2006, e-mail a few days after it was sent, Christensen wanted to take an action against Moses stronger than putting him on administrative leave and issuing a written warning. Finnie testified that she recalled Christensen being "quite angry that a person of your stature and your background could write an inflammatory e-mail such as that." Tr. at 672. Satkowiak testified that Christensen "was

disturbed that a professional at the laboratory would act like that in a public forum. So, yeah, he was upset. And, yeah, he . . . said something like, 'Why don't we get rid of the guy? Why, why are we keeping this trouble-maker?'" *Id.* at 696-97. Finnie and Satkowiak both testified that, after they had proceeded to discuss Moses' "value to the program" and the fact the he was "sincerely sorry," Christensen agreed with the recommendation of Finnie and Satkowiak for the less severe action that was ultimately taken. *Id.* at 672-73, 697. However, this same testimony indicates that Christensen's anger was not based upon the substance of Moses' protected disclosure, but rather the "inflammatory" nature of the e-mail, and whether there "was going to be a problem with [the DOE] customer." *Id.* at 672, 697; *see also id. at* 623-28, 632-36 (testimony of Christensen). I therefore do not consider this testimony to be evidence of Christensen's motive to retaliate against Moses for his protected activity.

Finally, regarding the third factor set forth in *Kalil*, UT-Battelle submitted a document at the hearing which it contends shows that it has taken similar action against other ORNL employees similarly situated to Moses. Ex. 17. ORNL HR official Katherine Finnie testified at the hearing that she compiled this document using information she had gathered regarding ORNL employees "who would be expected to form their own funding; that is, Researchers, Senior Researchers, and Program Managers . . . who experienced an immediate loss of major funding, and they were charging to the indirect account greater than 50 percent in the last six months of their employment." Tr. at 450, 451. According to Finnie's testimony, the document reflects information regarding nine ORNL employees so situated who were ultimately terminated, and indicates the length of time between when the employee lost direct funding and the date the employee was terminated, the length of time ranging from zero to seven and one-half months, and averaging approximately three and one-half months. Ex. 17; Tr. at 462-63.

In addition, Reinhold Mann, ORNL's Associate Laboratory Director for Biological and Environmental Sciences and one of the three members of the STRC, testified regarding another employee who appears to have been similarly situated to Moses with respect to loss of funding. That employee was, according to Mann, a "pioneer" in the field of cryobiology at the laboratory in the late 1990s. Tr. at 575. Mann received guidance that there would no funding for cryobiology at the laboratory in fiscal year 1998. *Id.* at 574. He testified that ORNL gave the employee approximately five or six months to obtain other funding, but ultimately ended his employment when he was unable to do so. *Id.* at 576.

In comments on the Report of Investigation that Moses submitted to the OHA investigator, he refers to two other ORNL employees that he contends should be considered as similarly situated to him vis-à-vis lack of funding. Ex. 21. At the hearing, UT-Battelle presented the testimony of the ORNL officials for whom these two individuals worked.

The testimony of one of the officials, the Director of ORNL's Nuclear Science and Technology Division, described how one of the employees at issue was hired by ORNL for the purpose of doing "program development," and was paid from indirect funds that were budgeted into his division's overhead account for that specific purpose. Tr. at 518-19.

The other official, for whom the second ORNL employee at issue worked, was at the time the Director of ORNL's Engineering, Science and Technology Division (ESTD). *Id.* at 537. He

testified to "second-hand" knowledge that the employee was removed from her position as Director of ORNL's Energy Efficiency and Renewable Energy Programs at the request of the DOE, after which she became the ESTD Deputy Director. *Id.* at 540. The ESTD Director testified that this employee, in her new Deputy Director position, was paid from "indirect" funds, and was not asked to "develop her own direct funding," though by the time she left ORNL approximately 13 months later, she was working on climate change programs that allowed her charge about half of her time to direct funds. *Id.* at 541-43.

Based on the testimony of these two officials, I do not find either of the employees at issue to have been similarly situated to Moses. Although there is evidence that one of the employees in question was removed from her position at the request of DOE, neither appears to have been in a position similar to Moses, who does not dispute that his position as a "band 4 researcher" required him to secure direct funding for his time. *Id.* at 208; Ex. D.

Considering all of the relevant factors as applied to the evidence discussed above, I am convinced that, given Moses' lack of funding and his lack of prospects for future funding, the STRC would have decided to give Moses the choice between retirement and termination, regardless of whether he had engaged in any activity protected under Part 708. Therefore, I find that UT-Battelle has proven, by clear and convincing evidence, that the STRC committee would have reached the same decision in the absence of Moses' protected disclosures in 2004, 2005, and September 2006. [16]

IV. Conclusion

In the present case, there is no dispute that Moses' communications resulted in a loss of DOE funding support of Moses twice, from NA-26 in April 2005 and from NA-21 in September 2006. The record further reflects that UT-Battelle was not responsible for DOE's decisions, and that in fact Moses' supervisor Satkowiak attempted in both instances to keep Moses working on the DOE-funded programs. Tr. at 267-68, 312-16. On this point, Moses offered the following testimony:

> I know that in this discussion it has been brought out that Larry [Satkowiak], you know, tried his best to keep me employed, but I do stay very concerned about the Contractor's responsibility to initiate investigations when disclosures are made, whether they have responsibilities under [DOE Order 442.1A and 221.1] to either pursue a concern when a legitimate concern about fraud, waste, abuse, abuse of authority, mismanagement arise, other than just

[16] Moses asked questions at the hearing regarding whether the STRC considered offering Moses part-time employment as an alternative to the action it took. Tr. at 478-79, 667-67. Although Moses has not argued that the STRC should have offered him this additional option, I note here the testimony of ORNL HR official Barreras that part-time status would customarily be requested by the employee, *id.* at 481, and the testimony of Moses that he did not request it because it "didn't occur to me to request it, and it wasn't offered as an option." *Id.* at 667. Further, Satkowiak testified that if Moses "was part-time, he'd still have the same requirement to be funded or not." *Id.* at 737. Finally, I note that since retiring, Moses has worked as a subcontractor for ORNL at a higher hourly rate than he earned as an ORNL employee. *Id.* at 668-70. In any event, the issue before me is not whether UT-Battelle should have offered Moses another alternative to retirement or termination, but rather whether it would have taken the action it did take in the absence of Moses' protected disclosures.

> going, talking to the Program Office and have them say, "Well, there's nothing there," because to the best that I can determine, both in the NA-26 disclosure and the NA-21 disclosure, these were just summarily dismissed by Headquarters.
>
> There was no investigation, either by the Lab or by the Headquarters, of the substance of the disclosure.

Tr. at 233-34. It is clear from this and other testimony by Moses that he believes DOE removed him from NA-21 and NA-26 funding in retaliation for his protected disclosures, and that UT-Battelle did not fulfill what Moses believes was the contractor's obligation to "initiate investigations" or otherwise "pursue" the substance of concerns raised by its employees. *See, e.g.,* Tr. at 18.

However, whether the DOE took actions against Moses in retaliation for disclosures is not an issue within the scope of Part 708. *See Ronald E. Timm,* 28 DOE ¶ 87,015 (OHA lacks jurisdiction to consider Part 708 complaint filed against DOE). The ultimate issue in this case is whether *UT-Battelle's* actions were taken in retaliation for Moses' protected disclosures. In this regard, whether UT-Battelle is obligated by legal authority other than Part 708 to initiate investigations regarding the substance of a protected disclosure or raise these concerns to higher levels within the DOE is, again, not an issue in this case. Finally, Part 708 does not provide a forum for a consideration of the merits or validity of the substance of a protected disclosure, beyond the issue of whether the complainant "reasonably believed" that the information revealed is of such a nature that the disclosure would qualify for Part 708 protection. Once the complainant has met this burden, as Moses did in the present case, and proven that the disclosure was a contributing factor in the action taken against him, the only remaining issue is whether the contractor would have taken the same action absent the disclosure. For the reasons set forth above, after careful consideration of the record,[17] I find that UT-Battelle, faced with a set of circumstances out of its control, took actions that I am convinced it would have taken had it faced the same circumstances in the absence of Moses' protected disclosures. I will, therefore, deny the present complaint.

It Is Therefore Ordered That:

(1) The complaint filed by Dr. David L. Moses under 10 C.F.R. Part 708, OHA Case No. TBH-0066, is hereby denied.

(2) An unredacted copy of Exhibit A and the portion of Exhibit 22 marked "Attorney-Client Privilege 0002" will be released to the Complainant unless UT-Battelle files a notice of appeal by the fifteenth day after its receipt of the initial agency decision.

[17] In Section I.B above, I found certain information UT-Battelle redacted from two of the exhibits submitted at the hearing to be protected under the attorney-client privilege. I note here that, were I to consider as evidence all of the information that was redacted from the two exhibits, included that which I find is privileged, I would reach the same relevant legal conclusions and the same ultimate decision as I do without considering as evidence any of the privileged material.

(3) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after the party's receipt of the initial agency decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: September 8, 2008