December 9, 2008

DECISION AND ORDER OF
THE DEPARMENT OF ENERGY

Initial Agency Decision

Names of Petitioners:	Jonathan K. Strausbaugh Richard L. Rieckenberg
Date of Filing:	February 1, 2008
Case Numbers:	TBH-0073 TBH-0075

This Initial Agency Decision involves two whistleblower complaints, one filed by Jonathan K. Strausbaugh (Case No. TBH-0073) and the other filed by Richard L. Rieckenberg (Case No. TBH-0075) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Both complainants were employees of KSL Services, Inc. ("KSL" or "the contractor"), a contractor providing technical services on the site of the DOE Los Alamos National Laboratory (LANL) in Los Alamos, New Mexico, where they were employed until June 14, 2007. In their respective complaints, Mr. Strausbaugh and Mr. Rieckenberg contend that they made protected disclosures to officials of KSL and LANL and that KSL retaliated against them in response to these disclosures. Mr. Strausbaugh seeks back pay and benefits from the date of his suspension, reinstatement, and the expunging from his personnel record of any negative references to his suspension and termination. Mr. Rieckenberg similarly seeks back pay and benefits from the date of his suspension, reinstatement (or nine months of severance pay if reinstatement is not practicable), and a formal letter from KSL clearing his personnel record of any evidence of his suspension or termination.

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

On August 16, 2007, Mr. Rieckenberg filed a complaint of retaliation against KSL with the local DOE Employee Concerns Program Office. On August 30, 2007, Mr. Strausbaugh filed his complaint of retaliation against KSL with the same office. In their complaints, Mr. Rieckenberg and Mr. Strausbaugh contend that they made certain disclosures to officials of KSL and LANL, and that KSL terminated their employment in response to these disclosures. After attempts at informal resolution failed, the complaints were transferred to OHA, where an investigator was appointed. Because the issues, key witnesses and evidence in the two cases were virtually identical, the OHA investigator conducted a joint investigation and addressed both complaints in a single Report of Investigation (ROI).

On February 1, 2008, OHA issued its joint ROI and I was appointed the Hearing Officer in the cases on the same day. The ROI concluded that Mr. Strausbaugh and Mr. Rieckenberg had met their respective burdens of demonstrating that they made protected

disclosures regarding the discovery of uncontrolled asbestos, i.e., asbestos that had not been remediated and exposure to which was potentially hazardous, and that those disclosures were a contributing factor to their termination of employment with KSL. The OHA investigator also concluded that KSL had provided significant evidence in support of its position that it would have terminated the complainants even in the absence of their protected disclosures. On March 12, 2008, I scheduled a hearing in the case to be held on May 14, 2008. On April 2, 2008, the complainants filed a Motion to Compel Discovery. After considering the Motion, the underlying discovery requests and objections, and KSL's response to the Motion, I granted the Motion in part, requiring KSL to produce certain documents in advance of the hearing. *Jonathan K. Strausbaugh*, 30 DOE ¶ 87,002, Case No. TBD-0073 (April 16, 2008).

I convened the hearing in these cases on May 14 and 15, 2008. Due to the extensive testimony and the contentiousness of the proceeding, I was unable to conclude the hearing over the two-day period. At the request of the attorneys, I re-convened and concluded the hearing on June 23-25, 2008. Both parties submitted exhibits. Mr. Strausbaugh and Mr. Rieckenberg presented 134 exhibits into the record, which are numbered Exhibit 1 through Exhibit 134, and KSL submitted 27 exhibits, which are designated as Exhibit A through Exhibit AA. The complainants testified on their own behalf, and both they and KSL presented numerous KSL and LANL employees and former employees as witnesses, representing both management and non-management. The parties submitted post-hearing briefs on July 9, 2008. I received the final installments of the transcript on August 11, 2008, at which time I closed the record in this case.

As discussed below, after carefully reviewing the documentary and testimonial evidence in this case, I have determined that Mr. Strausbaugh and Mr. Rieckenberg engaged in protected conduct, and that KSL retaliated against them by terminating them on June 14, 2007. I have also concluded that KSL failed to meet its evidentiary burden in this case. Accordingly, I have ordered that KSL provide relief to both parties.

C. Factual Background

The complainants were employed by KSL at the DOE's Los Alamos site. Mr. Rieckenberg was employed by KSL from November 2005 to June 14, 2007, the date on which he was terminated. Mr. Strausbaugh was employed by KSL from July 2005 to the same date of termination. KSL is responsible for the maintenance of the TA-3 steam distribution system, a 58-year-old steam piping system. The TA-3 system was scheduled for an extended 30-day shutdown, also known as an outage, in order to undergo extensive maintenance, beginning on May 30, 2007. Exhibit (Ex.) 46. Mr. Rieckenberg was the Utilities, Electric, and Steam Branch (UESB) Manager from May 2006 to February 2007, when he was relieved of that position and appointed the Project Leader for the planned steam system outage. Mr. Strausbaugh was hired as the UESB Steam Distribution Engineer in November 2005 and, in June 2006, was given the additional position of Steam Distribution Superintendent. Mr. Rieckenberg and Mr. Strausbaugh had the primary responsibility for planning and coordinating the steam system shutdown.

The TA-3 steam system is composed of pipes passing through the ground that lead from the steam plant to other buildings and facilities that use the steam for various purposes, such as heat, sterilization, and food preparation. The system also comprises a large number of manholes, which are below-ground, open-topped pits, covered with gratings, through which the pipes pass. The manholes permit laborers and pipefitters access to critical portions of the steam system for purposes of maintenance and repair. Nevertheless, large stretches of the steam system are not easily accessible as they are buried in the ground. It was widely known among steam system professionals and laborers at Los Alamos that asbestos had been employed in the construction of the TA-3 steam system, as that was standard practice in systems built during that era. *See, e.g.*, Transcript of Hearing (Tr.) at 1150, 1725-26, 1863. Asbestos was commonly used in piping insulation, valves, and gaskets. It was also widely known that a large-scale remediation project was conducted in the early 1990s to abate the asbestos in the TA-3 steam distribution system manholes. *Id.* at 262-63, 280. In March 2007, KSL announced that it would no longer perform asbestos abatement work, but rather would engage a contractor, Eberline, to perform such work in the future. Ex. 7. According to Mr. Strausbaugh, KSL management had indicated to him that KSL's parent company had recently been involved in an asbestos lawsuit and wanted to distance itself from that business. Tr. at 536.

On May 31, 2007, shortly after the TA-3 steam system shutdown began, members of a crew performing maintenance work in one or more of the manholes found a substance they suspected was asbestos.[1] Mr. Strausbaugh was informed of the discovery of the substance. Work was suspended in the manholes in which the suspicious substance had been found. Joan Taylor, the KSL safety engineer assigned to the shutdown, collected samples of the suspect substance, and brought them to a LANL laboratory for analysis. Later the same day, the results of the testing confirmed that uncontrolled asbestos had in fact been identified, and work was suspended in all of the manholes of the TA-3 steam system.

On May 31, 2007, Mr. Strausbaugh informed Mr. Rieckenberg about the presence of asbestos in the manholes. Tr. at 557 (testimony of Strausbaugh), 980 (testimony of Rieckenberg). He informed others as well, including his supervisor Ted Torres, and Jerome Gonzales, LANL Gas and Steam Engineer, Steven Long, LANL Operations Manager for Utilities, and Richard Nelson, LANL Project Manager for the shutdown. *Id.* at 557-58. Over the course of the following days, Mr. Rieckenberg in turn notified several individuals in his KSL chain of command and at LANL of the same discovery. Those notified included Thomas Hay, KSL Utilities Director and Mr. Rieckenberg's supervisor, and Steven Long and Richard Nelson. *Id.* at 983; *see also* Ex. 10 ("TA-3 Steam Shutdown Status Report #3 – Asbestos found in Manholes").

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[1] The testimony given at the hearing regarding the details of what transpired on May 31, 2007, and over the course of the next two weeks was highly contested and internally inconsistent. I need not resolve those discrepancies. The facts that I present here are uncontested and are those upon which I rely in reaching my decision.

On the morning of June 5, 2007, KSL's General Manager, David Whitaker, tasked Laura Jenkins, Labor Relations Administrator, and B.J. Tedder, Human Relations Generalist (the KSL investigators), to conduct an investigation of the management abilities of Mr. Rieckenberg, Mr. Strausbaugh, and Aaron Osborne, a foreman associated with the shutdown. *Id.* at 58-59 (testimony of Jenkins); Ex. 114. Mr. Whitaker indicated that the investigation was to focus on two incidents: that supervisors had condoned an unsafe working environment by ignoring a concern about the possibility of asbestos in an area and permitting employees to work there, and that Mr. Osborne created a hostile work environment by using foul language. *Id.* at 60.

During the afternoon of the same day, Steven Long of LANL chaired a critique of the May 31 asbestos incident at the shutdown. According to Mr. Long, the purpose of the critique was to assess what went wrong and to assign corrective actions to responsible individuals; it was not to ascribe fault to any party. Tr. at 348-49. In attendance at the critique were Mr. Rieckenberg, Mr. Strausbaugh, Mr. Whitaker, Keith Trosen, the KSL Deputy Manager, and Mr. Hay. *Id.* at 571 (testimony of Strausbaugh), 1013 (testimony of Rieckenberg). Immediately after the critique, the complainants were suspended without pay pending an investigation of the incident involving the discovery of uncontrolled asbestos in the manholes, and escorted off the premises.

After interviewing the three subjects of the investigation and six other individuals on June 8 and 11, 2007, ranging from Mr. Rieckenberg's chain of command to Joan Taylor, the safety engineer, and two shutdown crew members, the KSL investigators recommended that the complainants be subject to discipline ranging from a minimum of 5 days suspension to a maximum of termination. Ex. 114 at 0437. They presented the results of their investigation to Mr. Whitaker, Mr. Trosen, Mr. Hay, Michael Goodwin, KSL Director of Human Relations, and perhaps others at a meeting on June 13, 2007. Tr. at 1314 (testimony of Hay). The KSL investigators left the meeting after their presentation and, following a discussion among the remaining participants, Mr. Whitaker made the decision to terminate both complainants. *Id.* at 1315.

On June 14, 2007, Thomas Hay presented Mr. Rieckenberg and Mr. Strausbaugh with termination letters. The termination letters issued to the complainants are identical, save for the name of the addressee. Each lists the company's reasons for terminating the employee, based on the "result of the fact-finding hearings [of] June 8-11, 2007":

> On numerous occasions during the planning and execution of the 2007 Steam System Outage, you created a hostile environment where employees were intimidated to the point of not being able to discharge their duties. You overlooked key safety concerns which ultimately placed other employees in harm's way. Many aspects of the outage were left unplanned or were poorly planned, leading to the inefficient use of craft manpower and threatening KSL's ability to meet budget and schedule targets. These actions indicate a lack of leadership skills which endanger other employees and jeopardize the Company's goals.

Exs. 1, 2. The letters further stated that the above actions constituted "unacceptable behavior which violates Company policy. KSL senior management has lost confidence in your ability to lead others in your control." *Id.*

II. ANALYSIS

A. Whether the Complainants Engaged 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 [10 C.F.R.] § 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. *See Joshua Lucero*, 29 DOE ¶ 87,034, Case No. TBH-0039 (November19, 2007); *Ronald Sorri*, 23 DOE ¶ 87,503, Case No. LWA-0001 (December 19, 1993). 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 Lucero*, 29 DOE at 89,180 (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

In his Part 708 complaint, Mr. Strausbaugh alleged that he made disclosures protected under Part 708 when he reported the discovery of suspected uncontrolled asbestos in TA-3 steam system manholes to Mr. Rieckenberg and Mr. Gonzales on May 31, 2007. Strausbaugh Complaint at ¶ O. At the hearing, Mr. Strausbaugh testified that he telephoned his KSL supervisor, Mr. Rieckenberg, as soon as he learned that material suspected of containing asbestos had been found, and telephoned both Mr. Rieckenberg and Mr. Gonzales, a LANL gas and steam engineer involved with the shutdown, when he learned that the test results were positive for asbestos. Tr. at 865-67. Mr. Strausbaugh also described in his complaint the briefings he provided to Mr. Rieckenberg over the following days concerning the presence and mitigation of uncontrolled asbestos in the manholes. Strausbaugh Complaint at ¶¶ R, U, V. At the hearing, both complainants testified that Mr. Strausbaugh met with, and provided significant input to, Mr. Rieckenberg over the next several days to assist Mr. Rieckenberg in preparing several documents, described below, that Mr. Rieckenberg e-mailed to managers at KSL and LANL. *Id.* at 558, 566, 569, 573 (testimony of Strausbaugh), 1006, 1012 (testimony of Rieckenberg).[2]

In his Part 708 complaint, Mr. Rieckenberg alleged that he made protected disclosures when he reported the discovery of uncontrolled asbestos in TA-3 steam system manholes

[2] Mr. Rieckenberg also testified that Mr. Strausbaugh disclosed concerns about the possibility of asbestos-contaminated water run-off emanating from TA-3 steam system at the June 5, 2007, critique, which was attended by KSL managers and LANL managers and project directors. *Id.* at 1014. As set forth below, I need not address whether this alleged disclosure is protected conduct under 10 C.F.R. § 708.5.

to his chains of command at both KSL and LANL on May 31, 2007. Rieckenberg Complaint at ¶ 7. He also described in his complaint three reports that he authored, with Mr. Strausbaugh's assistance, concerning the status of, and possible safety concerns associated with, the shutdown in the wake of the discovery of uncontrolled asbestos. He e-mailed two of these reports to several supervisors and officials associated with the shutdown, including Mr. Trosen and Mr. Hay of KSL and Messrs. Long, Nelson and Gonzales of LANL. Rieckenberg Complaint at ¶¶ 11, 15. *See* Exs. 10, 12. He further claimed in his complaint that he made additional protected disclosures when he raised the idea that asbestos may have been present in the manholes, but had gone undetected for many years. *Id.* at ¶¶ 13, 15. *See* Exs. 10 (to Hay only), 12 (to Trosen, Hay, Long, Nelson, Gonzales, and others). At the hearing, Mr. Rieckenberg testified that on May 31, 2007, he notified Mr. Hay, Mr. Long, and Mr. Nelson by telephone that uncontrolled asbestos had been discovered in steam system manholes. Tr. at 983. These individuals and the additional addressees of the shutdown status reports (Exhibits 10 and 12) are KSL superiors and officials of a higher-tier contractor at the Los Alamos National Laboratory.

Each of these disclosures described above was made to one or more superiors within the complainants' company—Mr. Strausbaugh to Mr. Rieckenberg, a KSL manager, and Mr. Rieckenberg to Mr. Hay, and in some instances to Mr. Trosen as well. In addition, Mr. Strausbaugh made at least one of his disclosures to Mr. Gonzales, an engineer of a higher-level contractor. Mr. Rieckenberg made all but one (Ex. 11) of his disclosures to LANL managers, specifically Mr. Long and Mr. Nelson, and, in one instance, to Mr. Gonzales as well. All of the disclosures described above relayed information regarding the discovery and management of uncontrolled asbestos, a substance exposure to which can cause significant health problems. Based on the evidence before me, I find that Mr. Strausbaugh and Mr. Rieckenberg reasonably believed that the subject disclosures communicated a "substantial and specific danger to employees or to public health or safety." 10 C.F.R. § 708.5(a)(2).

KSL argued at the hearing that the complainants' disclosures did not "reveal" a "substantial and specific danger to employees or to public health or safety," and therefore are not protected under Part 708. The contractor's rationale for this contention is that these disclosures in fact did not reveal any information to any recipient of the disclosure of which the recipient was not yet aware, because in at least several instances the recipients of the disclosures had already been informed of the same information through other sources. I find this argument to be without merit. We have considered such a restricted interpretation of a protected disclosure in the past, and have rejected it. Ruling on a Motion to Dismiss, an OHA Hearing Officer determined that a protected disclosure need not contain unique information not known to the recipient. "Imposing the interpretation [the contractor] suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns." *META, Inc.,* 26 DOE ¶ 87,504 at 89,015, Case No. VWZ-0007 (October 23, 1996). Such an interpretation would not further the policy behind the Part 708 regulations of encouraging "employees of DOE contractors and subcontractors

to make their employers or the DOE aware of concerns about health, safety, mismanagement and unlawful or fraudulent practices without fear of employer reprisal." *Id.* After carefully considering all the evidence, I find that the complainants have established by the preponderance of the evidence that the disclosures described above are protected conduct as defined in 10 C.F.R. § 708.5.[3]

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

Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an 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. The complainants allege that KSL retaliated against them by terminating their employment on June 14, 2007. KSL does not challenge the fact that it discharged both employees on that date, but contends that it was not an action taken in retaliation for any disclosures they made.

In order to prevail in a Part 708 action, the complainants must show, by a preponderance of the evidence, that the protected disclosures or conduct were a contributing factor in the retaliation against them. 10 C.F.R. § 205.29. In prior decisions of the Office of Hearings and Appeals, we have decided 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 at 89,053-54, Case No. VWA-0014 (February 5, 1997) (quoting *Sorri*, 23 DOE ¶ 87,503 at 89,010).

Throughout the hearing, KSL contended that Mr. Whitaker was the individual who made the decision to terminate the complainants' employment. *See, e.g.*, Tr. at 1568 (testimony of Whitaker). KSL also contended that he had no actual knowledge of Mr. Rieckenberg's and Mr. Strausbaugh's disclosures, because neither complainant had addressed any of his disclosures to Mr. Whitaker. The totality of the evidence certainly

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[3] On several occasions throughout this proceeding, Mr. Rieckenberg attempted to amend his complaint to include other disclosures he believes constituted protected conduct under 10 C.F.R. § 708.5, including a number he raised in a submission filed after the first two days of the hearing, styled as a "Motion to Amend Complaint to Conform to Evidence and Testimony to Include Additional Disclosures." Because I have determined that Mr. Rieckenberg has met his burden with respect to making the protected disclosures he claimed in his complaint, I need not reach the issues of whether any of Mr. Rieckenberg's later-alleged disclosures constituted protected conduct under 10 C.F.R. § 708.5 and whether amending his complaint to include such disclosures would unfairly prejudice KSL in the proceeding. *See David L. Moses*, 30 DOE ¶ 87,007 at 89,058 n.11, Case No. TBH-0066 (September 3, 2008).

supports those facts. Nevertheless, the contractor does not prevail in its argument that these facts should disqualify the disclosures from being considered a contributing factor in Mr. Whitaker's decision to discharge Mr. Rieckenberg and Mr. Strausbaugh. The evidence clearly establishes that Mr. Hay and Mr. Trosen, who constituted the chain of command between Mr. Rieckenberg and Mr. Whitaker, were aware of the disclosures at issue in this proceeding. Mr. Rieckenberg spoke to each of them directly and sent two status reports to them regarding the discovery and management of uncontrolled asbestos on the first full day of the TA-3 steam system shutdown. *See* Exs. 10, 12. Mr. Hay and Mr. Trosen could easily see that Mr. Rieckenberg had disclosed his concerns to LANL officials as well, because several were listed as addressees of the same status reports. Finally, both Mr. Hay and Mr. Trosen attended the June 5, 2005 critique, chaired by Mr. Long, LANL official, at which both Mr. Rieckenberg and Mr. Strausbaugh presented their perspective on these matters.[4] Mr. Hay and Mr. Trosen, then, had actual knowledge of the disclosures, and Mr. Whitaker, the decision-maker, did not. I turn now to whether Mr. Whitaker had constructive knowledge of the disclosures.

A complainant can demonstrate constructive knowledge by establishing that the individual making the adverse personnel decision was influenced by persons with knowledge of the protected conduct. *Jagdish C. Laul,* 28 DOE ¶ 87,006 at 89,050, Case No. VBH-0010 (September 1, 2000) (and cases cited therein). In this case, Mr. Hay and Mr. Trosen had actual knowledge of the complainants' disclosures, and they advised Mr. Whitaker during the June 13, 2007, meeting at which he reached his decision to terminate the complainants. Mr. Whitaker testified that after the KSL investigators presented their findings regarding Mr. Rieckenberg and Mr. Strausbaugh at the meeting, "we had a discussion as to the nature of the findings, and what action, as a management team, we should take regarding those findings." Tr. at 1567-68; *see also id.* at 1743-44 (testimony of Trosen). Following that discussion, Mr. Whitaker decided to terminate the employment of Mr. Rieckenberg and Mr. Strausbaugh. *Id.* at 1568. As a consequence of that meeting, Mr. Whitaker benefited from the opinions and advice of his management team, including Mr. Hay and Mr. Trosen, and their actual knowledge of the disclosures can be imputed to Mr. Whitaker as constructive knowledge. I therefore find that Mr. Whitaker had constructive knowledge of the complainants' protected disclosures when he decided to terminate their employment on June 13, 2007.

I further find that that there was temporal proximity between their protected disclosures and Mr. Whitaker's decision to terminate their employment. "[T]emporal proximity" between a protected disclosure and an alleged reprisal is sufficient to establish the required element in a prima facie case for retaliation. *See Casey von Bargen,* 29 DOE ¶ 87,031 at 89,167, Case No. TBH-0034 (November 2, 2007) (stating that a showing that protected activity occurred proximate in time to the adverse personnel action is sufficient for complainant to meet the contributing factor test); *Dr. Jiunn S. Yu,* 27 DOE ¶ 87,556, Case No. VBH-0028 (April 7, 2000). Mr. Strausbaugh's and Mr. Rieckenberg's earliest

[4] The evidence is inconclusive as to whether Mr. Whitaker attended this critique or any portion of it. Even assuming he did not attend it at all, Mr. Hay's and Mr. Trosen's knowledge of the complainants' disclosures at the critique are sufficient under this analysis, as set forth below.

disclosures occurred on May 31, 2007. Mr. Whitaker made his decision to terminate their employment on June 13, 2007, just two weeks later. The proximity of those two dates is sufficient in itself to draw the inference that the disclosures were a contributing factor in the termination.

In its closing argument, however, KSL contends that, under these particular circumstances, temporal proximity is not sufficient to establish that the complainants' disclosures were a contributing factor in the decision to terminate their employment. KSL's attorneys argue that in a 1998 decision, OHA concluded that it would be unreasonable to rely on temporal proximity to establish that the protected conduct was a contributing factor in the alleged retaliatory action by the contractor. KSL Post-Hearing Brief at 12 (citing *Carlos M. Castillo*, 27 DOE ¶ 87,505, Case No. VWA-0021 (February 2, 1998). I have reviewed *Castillo* and have determined that the rationale applied in that case is inapplicable here. Mr. Castillo had raised a safety concern with his employer. A day later, he was terminated. The evidence in the record, however, was "overwhelming in support of the finding that Castillo was disruptive at safety meetings and confrontational with . . . management over union/work jurisdiction issues despite repeated warnings from [his employer] and his own union to desist in this behavior." *Castillo*, 27 DOE at 89,048. While I recognize that safety issues formed the basis for the protected disclosures in both *Castillo* and the present cases, the facts in these cases are entirely different. The evidence in this record supports a finding that Mr. Rieckenberg and Mr. Strausbaugh were respectful toward management at all times, even during technical and financial disputes, the stuff of normal business conduct.

I conclude that the complainants have established by a preponderance of the evidence that their protected disclosures were a contributing factor to their termination.

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

Section 708.29 of the governing regulations states that once a complaining employee has met the burden of demonstrating that conduct protected under 10 C.F.R. § 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 at 89,163. If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the complainant's protected conduct was a contributing factor in the company's alleged act of retaliation.

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, Case No. TBH-0047 (June 20, 2008) (quoting *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007)).

1. The Strength of the Reason for the Personnel Action

The first factor I will consider, following the analysis set forth in *Patterson*, is the strength of KSL's reason for terminating the complainants, excluding their protected disclosures. The termination letters set out the company's stated reasons for termination. Exs. 1, 2. But for the name of each addressee, the letters contained identical language, holding Mr. Rieckenberg and Mr. Strausbaugh equally and identically culpable for the presence of a safety hazard, uncontrolled asbestos, on a worksite at the start of an important maintenance project which, due to their poor planning and lack of concern for safety, placed workers in harm's way. They were also held responsible for creating a hostile work environment in which employees were so intimidated that they could not discharge their duties.

Mr. Hay, who signed the termination letters for KSL, offered the following factual bases for the company's grounds for terminating the complainants. He testified that the letters' reference to overlooking "key safety concerns" was based solely on their reliance on anecdotal evidence that the manholes were free from asbestos due to abatement. Tr. at 144-45. He also testified that the letters' reference to aspects of the shutdown being "left unplanned or poorly planned" represented two concerns that revealed themselves after the complainants had been suspended: that necessary parts had not been ordered, and that the complete plan for restarting the steam system had not been reduced to paper. *Id.* at 146. Finally, Mr. Hay testified about the statement in the termination letters that "[o]n numerous occasions," Mr. Rieckenberg and Mr. Strausbaugh "created a hostile work environment where employees were intimidated to the point of not being able to discharge their duties." Mr. Hay testified that the "numerous occasions" were planning meetings, and that the "employees" were Ms. Taylor and Mr. Lujan, the safety engineers. *Id.* at 134. According to Mr. Hay, Mr. Rieckenberg informed them that there was no asbestos in the manholes after they raised the issue. *Id.* at 136. Ms. Taylor and Mr. Lujan then proceeded to conduct the necessary inspections and produce the certifications within the scope of their duties. *Id.* at 138. Mr. Hay testified that Ms. Taylor had reported to him that she felt she was working in a hostile environment when she was working with the maintenance crew, who would not "listen to her" and used "vulgar and offensive language" in her presence, but "not so much Mr. Rieckenberg and Strausbaugh, but the Foreman and the crew." *Id.* at 140.

Several witnesses, including Mr. Hay, testified that Mr. Rieckenberg and Mr. Strausbaugh, like their employer, were safety-oriented. *Id.* at 159 (testimony of Hay), 279 (testimony of Nelson). Mr. Nelson further testified that he was present at most if not all of the planning meetings, which Mr. Hay identified as the numerous occasions of

hostile work environment, and he observed no atmosphere of intimidation. *Id.* at 279. Mr. Gonzales testified that he had worked with the steam systems at LANL since the mid-1980s and had participated in the steam system asbestos abatement project. *Id.* at 263, *see also id.* at 170-72 (testimony of Hay), 279-80 (testimony of Nelson). He further testified that it was not reasonable to anticipate the presence of uncontrolled asbestos in the TA-3 steam system manholes, because none had been encountered in hundreds of entries into those manholes in the years since the abatement. *Id.* at 264-66. Both Mr. Gonzales and Mr. Nelson were among the 10 or 12 members of the planning team for the shutdown. *Id.* at 292 (testimony of Nelson). Mr. Gonzales also clarified that Mr. Rieckenberg and Mr. Strausbaugh's plan had provisions for encountering asbestos in gaskets and other specific items, where asbestos had been found in the past; it had no provisions for uncontrolled asbestos, which was what was encountered on May 31, 2007. *Id.* at 265. All members on the planning team had significant experience in safety and steam system shutdowns, yet none raised a concern about uncontrolled asbestos as they planned the shutdown. *Id.* at 294 (testimony of Nelson). Mr. Nelson also testified that after Mr. Rieckenberg and Mr. Strausbaugh were no longer working on the shutdown, the new team had difficulty locating the necessary parts. He added, however, that, for the most part, the parts had been ordered and delivered to the site, but due to the lack of an organized storage area, could not be easily found. *Id.* at 282-83. Finally, regarding Ms. Taylor's complaint that the work crew's use of obscene language created a hostile work environment, testimony revealed that Mr. Rieckenberg and Mr. Hay had offered to address the situation, but Ms. Taylor informed them that she would handle the situation herself. *Id.* at 159 (testimony of Hay), 1850-51 (testimony of Taylor).

The evidence before me strongly suggests the bases for KSL's stated grounds of termination were in fact rather weak. I find that Mr. Rieckenberg and Mr. Strausbaugh were reasonable to conclude from their discussions with experienced LANL officials and maintenance workers, as well as from the steam system's history of asbestos abatement and hundreds of subsequent manhole entries, that uncontrolled asbestos should not have been encountered in the manholes in the course of the maintenance project. I also find that the additional stated grounds for termination, poor planning and creation of a hostile work environment, are not strongly supported by the evidence. The weakness of the stated reasons for the terminations of Mr. Rieckenberg and Mr. Strausbaugh does not contribute to a finding in the company's favor.

2. The Strength of a Motive to Retaliate

In applying the second factor, the strength of any motive to retaliate for the protected disclosures, I find no evidence of any such motive on the part of Mr. Whitaker or his managers. The complainants presented evidence at the hearing that in March 2007, KSL announced that it would no longer perform its own asbestos abatement work, but rather would engage a contractor to perform such work. Ex. 7. Moreover, Mr. Strausbaugh testified that KSL's parent company had recently been involved in an asbestos lawsuit and wanted to distance itself from that business. Tr. at 536. The fact that uncontrolled asbestos was discovered during a maintenance project two months after this announcement likely caused KSL management a great deal of concern, but I fail to see

that the announcement or its aftermath gave rise to a motive for KSL to retaliate against the complainants for making their protected disclosures. Their disclosures related to the fact that uncontrolled asbestos had been discovered and, in the case of Mr. Rieckenberg, that there may be long-range consequences for exposed employees. Their disclosures did not concern the contract in place to perform asbestos work, nor were they in any way critical of Mr. Whitaker, Mr. Trosen, Mr. Hay, or KSL, either of which topics may have given Mr. Whitaker or his managers a motive to retaliate. Under these circumstances, I find no evidence that the KSL officials recommending and deciding the personnel action had any motive to retaliate against the complainants for their protected disclosures. *See Carr v. Soc. Security Admin.*, 185 F.3d 1318, 1326 (Fed. Cir. 1999) (those with motive to retaliate "not 'agency officials' recommending discipline").

3. Evidence of Similar Action Against Similarly Situated Employees

The third factor set forth in *Kalil* is whether there is any evidence that the employer took similar action against similarly situated employees. Following the June 5, 2007, critique of the May 31, 2007, discovery of uncontrolled asbestos in the TA-3 steam system manholes, Mr. Whitaker placed Mr. Rieckenberg and Mr. Strausbaugh on suspension pending a fact-finding investigation. Tr. at 1563; *see also id.* at 1408 (testimony of Martin Dominguez, KSL Manager of Labor and Employee Relations: "investigative leave pending investigation," citing Ex. H). At about the same time, Mr. Whitaker and Mr. Dominguez gave Ms. Jenkins and Ms. Tedder, the KSL investigators, direction concerning the investigation they were tasked to perform. *Id.* at 1401-02. The KSL investigators presented their findings at a June 13, 2007, meeting of Mr. Whitaker, Mr. Trosen, Mr. Hay, and others, during which Mr. Whitaker consulted with his managers and decided to terminate the employment of Mr. Rieckenberg and Mr. Strausbaugh.

The evidence in the record clearly indicates that KSL did not follow its own procedures regarding the termination of the complainants. The company's Performance Improvement and Disciplinary Action for KSL Employees provides that a "fact-finding hearing . . . will be conducted for disciplinary actions that could reach the level of suspension or termination and where a preliminary investigation raises questions of fact." Ex. H at § 5.2.4.1. The policy defines a "fact-finding hearing" as "a formal meeting of the appropriate Supervisor, the employee, a representative of the Labor/Employee Relations Department and any witnesses deemed appropriate." In these cases, only an investigation was conducted, although as the investigative report indicates, the recommended discipline for Mr. Rieckenberg and Mr. Strausbaugh included the possibility of termination. Ex. 114 at 0437. KSL representatives testified that no formal "fact-finding hearing" was held concerning the complainants. Tr. at 85 (testimony of Jenkins), 1426, 1436 (testimony of Dominguez).

Mr. Dominguez, testified, however, that KSL need not follow its own policy when terminating employees. He testified at the hearing that KSL is free to select which, if any, of its discipline procedures it wished to apply to a given employee. *Id.* at 1407. In these cases, for example, although no fact-finding hearing was convened, KSL nevertheless relied on a matrix of disciplinary penalties, attached to its disciplinary

policy, to determine the range of penalties that applied to the charges against the complainants. Ex. H at K001431. Moreover, in its closing statement, KSL pointed out that the policy "does not limit the Company in taking any actions regarding an employee if the Company determines it is appropriate under the circumstances." Ex. H at § 2.0. It also contends that, as at-will employees, Mr. Rieckenberg and Mr. Strausbaugh could have been terminated at any time and for any reason not prohibited by statute.

While KSL may be technically correct, its position does not support a finding that it has taken similar action regarding similarly situated employees. Moreover, the evidence in the record establishes that KSL could not demonstrate that it had treated similarly situated employees in a manner similar to the treatment of Mr. Rieckenberg and Mr. Strausbaugh. Mr. Dominguez testified that three supervisors had been terminated for safety-related issues about two years ago, and others had been disciplined in other manners for safety-related issues. Tr. at 1456. He could not, however, recall sufficient details to distinguish between those who were terminated and those who were not. *Id.* Nor could he recall whether those who were terminated were given fact-finding hearings before their respective terminations. *Id.* at 1457-58. Mr. Whitaker testified that, in arriving at his decision to terminate Mr. Rieckenberg and Mr. Strausbaugh, there was no precedent to follow regarding the treatment of similarly situated employees. *Id.* at 1569, 1622.

KSL has not met its burden of showing, by clear and convincing evidence, that it would have taken the same action against Mr. Rieckenberg and Mr. Strausbaugh had they not made their protected disclosures. The company has demonstrated that it believed it had grounds for terminating the complainants, as set forth in the termination letters. But that demonstration does not satisfy the heavy burden that Part 708 places on the employer. After examining the evidence in this case in light of the factors set forth in *Kalil*, I am not convinced that KSL's stated grounds for terminating the complainants were particularly strong, nor that the company treated similarly situated employees in a similar manner. It has demonstrated, at best, what action it could have taken, pursuant to its discipline policy, against Mr. Rieckenberg and Mr. Strausbaugh. However, it has not shown, as it must, what action it would have taken against them in the absence of protected conduct, let alone by clear and convincing evidence. I therefore find that KSL has not presented clear and convincing evidence that it would have terminated Mr. Rieckenberg and Mr. Strausbaugh absent their protected disclosures.

III. CONCLUSION

In the foregoing Decision, I have found that Mr. Rieckenberg and Mr. Strausbaugh have established by a preponderance of the evidence that they engaged in protected conduct when they made oral disclosures regarding safety concerns to individuals in their chains of command and others employed by a higher-level contractor, and that these disclosures were a contributing factor to an act of retaliation. I have further found that KSL has not presented clear and convincing evidence that it would have taken the same actions at

issue absent the protected conduct. Therefore, I find that the complainants are entitled to relief under Part 708.[5] After I receive documentation from the parties, as set forth in the Order below, I will direct KSL to reimburse the complainants' legal fees for this proceeding, to remove any negative information regarding their suspension and termination from their respective personnel files and notify each complainant in writing that such removal has been performed, to reinstate them to their positions or place them in equivalent positions (or provide nine months of severance pay if re-employment is not practicable), and to reimburse them for back pay and benefits starting from the date of their suspension, offset by any income earned from employment during that same period.

Mr. Rieckenberg and Mr. Strausbaugh shall submit a calculation in support of their claims for back pay and benefits to KSL. As for their litigation expenses, attorney fees in Part 708 cases are generally calculated using the "lodestar" methodology described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *See Sue Rice Gossett*, 28 DOE ¶ 87,028 (2002); *Ronald A. Sorri*, 23 DOE 87,503 (1993), *affirmed as modified*, 24 DOE 87,509 (1994); 10 C.F.R. § 708.36(a)(4). I will direct Mr. Rieckenberg and Mr. Strausbaugh to submit a calculation of attorney fees with evidence supporting the hours worked and the rates claimed. *See Sue Rice Gossett*, 28 DOE at 89,227 (citing *Webb v. Board of Education of Dyer County, Tennessee*, 105 S. Ct. 1923, 1928 (1985)).

Reinstatement is an equitable remedy. There is no evidence in the record that the positions occupied by Mr. Rieckenberg and Mr. Strausbaugh, with similar compensation levels, exist at this time. An equitable remedy cannot put the complainant in a worse position than the position that he currently occupies. When so ordered, KSL should review all currently available vacancies in order to determine if positions comparable to the complainants' former positions exist, at comparable levels of compensation, for which they qualify. If there are such comparable positions, and if Mr. Rieckenberg and Mr. Strausbaugh are in agreement, KSL shall place Mr. Rieckenberg and Mr. Strausbaugh in those positions.

This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by the affected NNSA element, official or employee and by each affected contractor.

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[5] As stated above, Mr. Strausbaugh seeks back pay and benefits from the date of his suspension, reinstatement, and the expunging of any negative references to his suspension and termination from his personnel record. Mr. Rieckenberg similarly seeks back pay and benefits from the date of his suspension, reinstatement (or nine months of severance pay if reinstatement is not practicable), and a formal letter from KSL clearing his personnel record of any evidence of his suspension or termination. *See* Memoranda of OHA Investigator's Interviews with Complainants in Case Nos. TBI-0073 (Strausbaugh) and TBI-0075 (Rieckenberg).

It Is Therefore Ordered That:

(1) The relief sought by Jonathan K. Strausbaugh (Case No. TBH-0073) and Richard L. Rieckenberg (Case No. TBH-0075) under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Within 15 days of receipt of this Initial Agency Decision, Mr. Rieckenberg and Mr. Strausbaugh shall submit to KSL Services, Inc., and to the Hearing Officer a report containing a detailed calculation of their attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision. The fees shall be calculated using the lodestar approach. The report shall also contain a calculation of their respective claims for back pay and associated benefits from the date of their suspension, offset by any income earned from employment during that same period.

(3) Within 15 days of its receipt of the report described in paragraph (2) above, KSL shall submit a responsive document to Mr. Rieckenberg and Mr. Strausbaugh and to the Hearing Officer. Should the parties elect to seek mediation to resolve the remedial phase of these cases, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

(4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of the issuance of a Supplemental Order with regard to remedy in these cases, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: December 9, 2008