November 9, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Himadri K. Das

Dates of Filing: April 16, 2010

Case Number: TBH-0089

This Decision concerns a Complaint filed by Himadri K. Das against RCS Corporation, his former employer, and Parsons Infrastructure and Technology Group, Inc. (Parsons), under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. RCS is professional staffing company that identifies and hires personnel for its clients. At all times relevant to this proceeding, Parsons was a DOE contractor operating in Aiken, South Carolina, and was a client of RCS. RCS hired Mr. Das to provided his services to Parsons as a mechanical engineer. Mr. Das contends that during his placement with Parsons, he engaged in protected activity and, as a consequence, suffered reprisal by RCS and Parsons. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for legal and other expenses. As discussed below, I have concluded that Mr. Das is not entitled to the relief that he seeks.

I. Background

A. Regulatory Background

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

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—
>
> (1) A substantial violation of any law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority.

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

An employee who believes that he or she has suffered retaliation for making such disclosures may file a complaint with the DOE. It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets this burden of proof, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." *Id.*

B. Factual Background

The following facts are not in dispute. Parsons contracted with the DOE to construct a salt waste processing facility (SWPF) at the DOE's Savannah River Site. An SWPF processes nuclear waste. Mr. Das is a mechanical engineer with over 25 years of experience who was hired by RCS as a Senior Pipe Stress Engineer in March 2008. He was assigned to Parsons's SWPF project, to perform calculations for the Pipe Stress Group of the Engineering Mechanics Group, during the Enhanced Final Design stage of preparing for the construction of the SWPF. Mr. Das understood that the assignment would last between nine and 12 months, and would end when Parsons no longer needed his services on the project. At all times relevant to this proceeding, the Pipe Stress Group was headed by Calvin Hughes. P.E. Mr. Hughes reported to James Somma, P.E., Engineering and Design Manager for the SWPF. Ted Niedbalski was the coordinator of the Pipe Stress Group. In that role, Mr. Niedbalski distributed the work assignments in the group and served as a resource. Shortly after Mr. Das began working in the Pipe Stress Group, Mr. Niedbalski selected him to be a "checker," who was responsible for ensuring that calculations performed by other members of the Pipe Stress Group conformed to the established piping design guidelines.

In November 2008, Mr. Das was checking stress calculation J-00875, which covered a length of piping that branched off from a larger pipe, or "header line." The stress calculation for that header line, J-00473, had been performed by DMJM, an outside company that Parsons had contracted to perform a number of the pipe stress calculations. In May 2008, Calculation J-00473 had been approved by Mr. Hughes and entered into Parsons's Document Control System, an electronic repository of completed and approved pipe stress calculations. In a cursory review of the J-00473 stress calculation, Mr. Das noticed a number of problems, including very large piping loads (volume demands) on the pipe under analysis and the fact that those loads appeared to have not yet been approved by the Pipe Support Group, the team responsible for reviewing the design for fastening the pipes to the structure.

On November 24, 2008, Mr. Das sent an e-mail to Mr, Hughes, with a copy to Mr. Somma, in which he related that he found "serious quality and safety" problems with the J-00473 stress calculation and reported that other DMJM calculations had likewise been of poor quality. He

asked that management develop a "corrective action plan to deal with this and other technical issues" in his group. Parsons Ex. 36.

On December 16, 2008, Mr. Hughes informed Mr. Das that his last day of work would be December 18, 2008. On December 17, 2008, Mr. Das asked for, and was granted, an appointment to speak with Mark Breor, the project manager of the SWPF. In that meeting, Mr. Das brought to Mr. Breor's attention a number of concerns that Mr. Das believed needed to be addressed before the construction phase of the SWPF began. On December 18, 2008, RCS terminated Mr. Das's employment, having been informed by Parsons on December 16, 2008, that December 18 would be his last day of work on the SWPF project.

C. Procedural Background

On January 15, 2009, Mr. Das filed a Part 708 Complaint with the Director of the DOE's Office of Civil Rights at its Savannah River Operations Office. Parsons filed a response to this complaint. The Savannah River Employee Concerns Program attempted to mediate the complaint on August 31, 2009, but those efforts failed. Mr. Das requested that his complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Director forwarded the complaint to OHA on October 7, 2009, and the OHA Director appointed an investigator.

The OHA investigator interviewed Mr. Das and other current and past Parsons employees and contractor employees and reviewed a large number of documents before issuing a Report of Investigation (ROI) on April 16, 2010. In the ROI, the OHA investigator concluded that, regarding his November 24, 2008, disclosure, "Mr. Das reasonably believed that the technical issues he had identified needed to be resolved before moving forward safely with the construction of the SWPF." Report of Investigation at 8. The investigator also observed that Mr. Hughes, whom the investigator found to have taken the adverse personnel action against Mr. Das, had actual knowledge of the disclosure. *Id.* at 9.

On April 16, 2010, the OHA Director appointed me as the Hearing Officer in this case. I conducted a two-day hearing in this case in Aiken, South Carolina, beginning on July 14, 2010. Over the course of the hearing, eight witnesses testified. Mr. Das introduced 25 exhibits into the record, Parsons introduced 64 exhibits, and RCS introduced four exhibits. On September 1, 2010, the parties submitted written closing arguments, at which time I closed the record in the case.

D. Mr. Das's Complaint and the Report of Investigation

Mr. Das alleges in his complaint that he made a number of protected disclosures during his tenure with the Pipe Stress Group. First, he alleges that he had identified 12 technical issues, specified in the complaint, that he considered to be related to safety or an inappropriate use of funds. In general, they concerned the lack of technical guidelines and the fact that Parsons had approved a number of stress calculations that he felt were incomplete. He voiced his concerns regarding these issues at weekly meetings of the Pipe Stress Group during the months of April through July 2008. Mr. Das raised later concerns about the J-00473 stress calculation and other

calculations done by DMJM in an e-mail to Mr. Hughes and Mr. Somma. Parsons Ex. 36. In that e-mail, he wrote that he found "a serious quality and safety problem" with J-00473 and expressed his concern that work performed by DMJM "may create safety concerns in [the] future." *Id.* In his complaint, he stated that the incomplete and inaccurate stress calculations did not comply with Parsons's project procedures and that the poor quality of DMJM calculations demonstrated an "inappropriate use of funds." In retaliation for making these disclosures, Mr. Das alleges, Mr. Hughes, his Parsons supervisor, informed him that his last day of work would be December 18, 2008, due to a lack of DOE funding. As relief for these alleged retaliations, Mr. Das requests back pay, reimbursement of costs and expenses, including legal expenses, and any other relief deemed necessary, as well as a commitment by Parsons that it addresses all of the technical issues that he raised in his complaint.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Mr. Das made protected disclosures, and that his November 24, 2008, disclosure was a contributing factor in his termination. However, because Parsons and RCS would have taken the same action in the absence of any disclosures, I conclude that Mr. Das is not entitled to the relief that he seeks.

As an initial matter, I must address the roles of the two respondents in this proceeding. RCS was Mr. Das's employer: it extended an offer of employment to Mr. Das to work as a Senior Pipe Stress Engineer. RCS Ex. B. The offer of employment specified that he would be providing services to Parsons at its SWPF project in accordance with a service agreement between RCS and Parsons. RCS Ex. A. While not Mr. Das's nominal employer, Parsons controlled his work assignments (through Mr. Niedbalski, himself a non-Parsons employee), provided his work environment and resources, and supervised his day-to-day activities. The purpose of Part 708 is to "provide procedures for processing complaint by employees of DOE contractors alleging retaliation by their employers for" making protected disclosures. 10 C.F.R. § 708.1. Both RCS and Parsons meet the definition of "contractor" set forth in Part 708: Parsons is a party to a "contract with DOE to perform work directly related to activities at DOE-owned or –leased facilities," in this case, the construction of the SWPF, and RCS is a party to a subcontract under a contract of the type described above. *See* 10 C.F.R. § 708.2. Although both companies are contractors for Part 708 purposes, all disclosures were made to Parsons personnel. None was made to RCS, Mr. Das's employer. Nevertheless, RCS terminated Mr. Das, after Parsons advised it of its determination that December 18, 2008, would be Mr. Das's last day of work. Because RCS was not a party to the proceeding before the issuance of the Report of Investigation, and because I determined that RCS was Mr. Das's actual employer despite his close relationship with Parsons, I requested that Mr. Das amend his complaint to include RCS as a respondent. RCS then asked to be dismissed from the proceeding, on the grounds that it had no role in the decision that led to Mr. Das's termination. RCS Prehearing Brief (June 1. 2010).

We have addressed this matter in earlier decisions. In a case presenting similarly complex employment circumstances, the complainant, like Mr. Das, was an employee of a subcontractor that provided staffing services to a higher-tier contractor, but he made his disclosures to the higher-tier contractor. *Jimmie L. Russell,* Case No. VBH-0017 (July 18, 2000).[1] All of the retaliatory actions Mr. Russell alleged were taken by the higher-tier contractor, with the exception of his termination from employment with the subcontractor. Under those circumstances, the Hearing Officer in that case determined that both the subcontractor and the higher-tier contractor were appropriate parties to the proceeding. He also stated that if the actual employer were dismissed from the proceeding, he believed he would lack the authority to take any remedial action against the higher-tier contractor, "whose liability under Part 708 appears to be based on the 'subcontract under the contract.'" *Id.* Because Mr. Das requested relief that would require remedial actions by both RCS and Parsons, and because Parsons's potential liability under Part 708 stems from its contract with RCS, it was proper to maintain both companies as respondents to Mr. Das's complaint.

A. The Protected Disclosures

As previously discussed, an employee of a DOE contractor makes a protected disclosure when he or she reveals to that employer, a higher-tier contractor, a DOE official, a member of Congress, or any other government official with oversight authority at a DOE site, information that the employee reasonably believes reveals (i) a substantial violation of a law, rule or regulation; (ii) a substantial and specific danger to employees or to public health or safety; or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). The test of "reasonableness" is an objective one, *i.e.,* whether a reasonable person in the complainant's position, with his level of experience, could believe that his disclosure met any of the three criteria set forth above. *Frank E. Isbill*, Case No. VWA-0034 (1999).

1. Complaints Raised in Weekly Staff Meetings

Mr. Das maintains that he raised a number of safety issues during weekly staff meetings of the Pipe Stress Group held in the months of April through July 2008. In his complaint, he outlines 12 technical issues that he allegedly raised in those meetings. There is no evidence in the record of specific dates on which he brought up these concerns. At the hearing, Mr. Das testified that he continually raised a concern that, despite Parsons's own procedures and desktop instruction—a set of guidelines for processing pipe stress calculations in his group—pipe stress calculations were being approved and entered into the Document Control System (DCS) without being subjected to review by pipe support engineers. Transcript of Hearing (Tr.) at 101. He had heard that construction on the SWPF was about to begin, and without the input from the pipe support group, the plans were incomplete and could require substantial revision before they could be considered complete and reliable for construction. *Id.* at 106-08. In his complaint, Mr. Das stated that his concerns were not addressed at the meetings. Instead, he was told that they would be "taken care of later." At least one witness recalled that Mr. Das had voiced the above concern during at least one weekly meeting. *Id.* at 258. The witness himself had raised the same

[1] Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at http//www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

concern, because he had never before encountered a process in which pipe stress and pipe support calculations were not performed simultaneously, to achieve safety, quality and cost savings. *Id.* That witness named three other staff members who raised similar issues. *Id.* at 271, 273.[2] Mr. Hughes and Mr. Somma attended some or all of the weekly meetings. *Id.* at 99, 259, 689. I will assume for the sake of argument that Mr. Das raised his stated concerns in the presence of Mr. Hughes or Mr. Somma, both Parsons employees.

The issue to be decided is whether Mr. Das reasonably believed that the disclosures he made at one or more of the weekly meetings constituted (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. Mr. Das contends in his complaint that all three criteria apply to these disclosures. Because I conclude that a reasonable person in Mr. Das's position, with his level of experience, could have believed that Parsons's posting of incomplete pipe stress calculations to the DCS was a gross waste of funds, I need not decide whether Parsons's action posed a substantial and specific danger to employees or to public health and safety or constituted a substantial violation of a law, rule, or regulation.

Parsons argues that reserving the finalization of pipe stress calculations until the construction stage of a facility like the SWPF, rather than completing them at the design stage, is not a gross waste of funds. Mr. Niedbalski testified that, in his opinion, it was not a waste of money to perform pipe stress calculations with generic information during the Enhanced Final Design stage for which Mr. Das was employed, and then revisit those calculations at a later stage; in fact, he argued, that approach saved money. Tr. at 558-59. Mr. Somma also expressed his opinion, based on 30 years of experience, that it is not unusual to perform pipe support calculations after pipe stress calculations have been completed. *Id.* at 707. He acknowledged that that approach might require revisiting the pipe stress calculations a second time, if design changes involved equipment changes or rerouting of pipes, but he believed that such an approach was not a waste of funds. *Id.* at 707-09. Mr. Hughes testified that pipe stress and pipe support calculations were to be reconciled at a later stage of the project, after the design was 90% completed. *Id.* at 618-21; *see* Parsons Ex. 2. In fact, Parsons had informed the DOE that pipe stress analysis would continue during the construction stage, and the DOE had approved the approach. Tr. at 623; *see* Parsons Ex. 10.

The relevant question, however, is not whether funds would actually be wasted because the pipe stress calculations were not completed, in conjunction with the pipe support calculations, before the SWPF project entered the construction stage. It is rather whether Mr. Das *could reasonably have believed* that the procedure Parsons was following would lead to a gross waste of funds. I find that such a belief was reasonable.

As stated above, Mr. Das has over 25 years of experience in pipe stress analysis. *Id.* at 41. In his testimony, he referred to a Parsons directive entitled "Intradiscipline Checking, Procedure No. PP-EN-5005, one of a series of Parsons SWPF Project Procedures, which describes the checker's responsibilities. *Id.* at 63; *see* Parsons Ex. 24. He further testified that his understanding was that the Savannah River Site Engineering Practices Manual,

---

[2] Mr. Nieldbalski testified that "[c]oncerns were mentioned" about the DMJM calculations in particular at those meetings, but he could not recall whether it was Mr. Das or others who raised them. *Id.* at 573.

WSRC-IM-95-58, applied to his group's work. He maintained that one part of that manual, entitled "Application of ASME B31.3," clearly contemplated that pipe stress analysis required coordination with and input from pipe support analysis. Tr. at 68; *see* Das Ex. F. He stated that checking whether the pipe loads, as calculated in the pipe stress analysis, are reasonable or excessive loads on the pipe supports is a critical element in pipe stress analysis. Tr. at 85. One witness, with 30 years of experience in the field, concurred that pipe stress and pipe support analysis are generally performed in tandem. *Id.* at 258. In fact, while testifying that there is no serious flaw in performing pipe stress and pipe stress support during the construction stage, Mr. Niedbalski stated his preference that both pipe stress and pipe support calculations be completed before that stage. *Id.* at 581.

Furthermore, Parsons's desktop instruction, which was circulated to all members of the Pipe Stress Group, contains a flowchart that indicates that pipe stress and pipe support calculations would be prepared roughly concurrently. Das Ex. M at Attachment B. During Mr. Das's tenure at the Pipe Stress Group, the desktop instruction was not formally a company procedure, as it was in draft form and subject to modification. *Id.* at 598 (testimony of Niedbalski). Nevertheless, according to Mr. Niedbalski, who created the document, its contents were to be followed as guidance, and Attachment B was the "way we would normally proceed." Tr. at 595. A co-worker in the Pipe Stress Group testified that pipe stress calculations were uniformly entered into the DCS without any pipe support review of them. *Id.* at 218-19. The co-worker further testified that at an earlier stage of the project, "it was intended that pipe supports would be done in conjunction with pipe stress," as shown in the flowchart, but by 2008 this was not the case. *Id.* at 231-32. Finally, Mr. Das was not part of the management team, nor was he involved in long-range planning of the SWPF project. *Id.* at 480. Consequently, he had no knowledge of the future stages of the project beyond what his managers imparted to him. Given his understanding that his group's calculations would have to be revisited at a later stage of the project and that coordination with pipe support engineers and completion of stress calculations was not only his experience but the intended work flow presented in the Parsons's desktop instruction, coupled with his belief that the construction stage was imminent and his assertion that the concerns he raised at the weekly meetings were treated dismissively, I find that Mr. Das reasonably believed that the procedure Parsons was following was wasting money.

Having determined that Mr. Das reasonably believed he had revealed in his disclosure a waste of funds, the remaining question is whether he believed the waste of funds was "gross," as set forth in Part 708. Adopting language from cases argued under the Whistleblower Protection Act, which also provides protection for disclosures of "gross waste of funds," OHA has defined that term as "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonable expected to accrue to the government." *See Thomas L. Townsend,* Case No. TBU-0082 (2008); *Fred Hua,* Case No. TBU-0078 (2008) (*citing Jensen v. Dep't of Agriculture,* 104 M.S.P.R. 379 (2007)). In describing the costs associated with Parsons's failure to complete the pipe stress calculations, integrating pipe support review, before declaring them suitable to be entered into the DCS, Mr. Das testified that when the pipe support analysts eventually reviewed a given pipe stress calculation, they might well determine that the locations of the supports assumed by the pipe stress analysts were inappropriate to the loads generated, and require that the supports be relocated; this would require in turn new pipe stress calculations for the same length of pipe. Tr. at 106-07. Such recalculations could be required of hundreds of calculations

involving thousands of supports, each support location potentially needing revision. *Id.* at 108-09. Mr. Das never mentioned a specific amount that he believed Parsons was wasting by not coordinating pipe stress and pipe support analysis as he had seen done in his experience. Nevetheless, I will assume that he was aware of the substantial professional hourly rate he was being paid, and that it was reasonable for him to surmise that the other pipe stress and pipe support analysts were being paid comparable rates. As I found above, Mr. Das reasonably believed that Parsons's procedure was wasting funds. I now find as well that he reasonably believed that correcting the calculations at a later stage of the project would require extensive labor, billed at substantial rates. I conclude that he reasonably believed that the costs associated with the additional labor of revisiting hundreds of calculations would constitute "a more-than-debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government," or a gross waste of funds.

2. The November 24, 2010, E-Mail to Mr. Hughes and Mr. Somma

It is undisputed that Mr. Das made a second disclosure to Mr. Hughes and Mr. Somma in an e-mail dated November 24, 2008. In the e-mail, Mr. Das disclosed what he termed "a serious quality and safety problem" with DMJM's Calculation J-00473 and expressed his concern that work performed by DMJM "may create safety concerns in [the] future." *Id.* In his complaint, he stated that the incomplete and inaccurate stress calculations did not comply with Parsons's project procedures and that the poor quality of DMJM calculations demonstrated an "inappropriate use of funds."

Once again, I must decide whether Mr. Das reasonably believed that the disclosures he made, this time in his November 24, 2008, e-mail, constituted (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. Because I conclude that a reasonable person in Mr. Das's position, with his level of experience, could have believed that the quality of DMJM's calculations demonstrated a gross waste of funds, I need not decide whether Parsons's action posed a substantial and specific danger to employees or to public health and safety or constituted a substantial violation of a law, rule, or regulation. I note, however, that in the e-mail, Mr. Das alleged safety concerns. He conceded at that time, and during the hearing as well, that any danger arising from the allegedly poor quality of DMJM's calculations was speculative; it would not manifest itself until later, and only if the calculations were not corrected: if the design was faulty, the construction would be faulty, and "we do not know the future consequence" of faulty construction. *Id.* at 316. The disclosure of danger only potentially rising in the future is not a protected disclosure. *Chambers v. Department of Interior,* 515 F.3d 1362, 1369 (Fed. Cir. 2008) (Whistleblower Protection Act case). Considering the low likelihood of harm resulting from the cited danger, in light of the testimony that he was aware the pipe stress calculations would be revisited during the construction stage of the project, I would find that Mr. Das did not meet his burden of establishing by the preponderance of the evidence that he reasonably believed that his disclosure revealed a "substantial and specific danger to employees or public safety." 10 C.F.R. §§ 708.5, .29.

Parsons argues that the DMJM pipe stress calculations were acceptable. Alan Helton, the Pipe Stress Group member who served as the liaison with DMJM, testified about the subject of Mr.

Das's November 24, 2008, e-mail, Calculation J-00473. He stated that DMJM had found that the proposed piping met the requirements of the governing code. Tr. at 183. While he recognized that some of the loads DMJM had calculated were "very high," the resulting stresses were nevertheless within acceptable limits, and he recommended to Mr. Hughes that the calculation be approved, on the condition that certain steps be taken at a later stage of the project. *Id.* at 184, 186.

Mr. Das in fact agreed that the calculated stresses met the applicable code. *Id.* at 303. Nevertheless, Mr. Helton was aware, and advised Mr. Hughes and Mr. Niedbalski, that several of DMJM's calculations, involving different segments of the piping design, revealed high loads that would need to be addressed before the piping plan was finalized. Parsons Ex. 37 (e-mail from Mr. Hughes in response to Mr. Das's November 24, 2008, e-mail.) Furthermore, Mr. Das testified that Calculation J-00473 did not record, as is industry practice, where the DMJM analysts had made assumptions in their analysis. *Id.* at 121-22. He argued to Mr. Niedbalski that the calculation needed to be corrected; Mr. Niedbalski replied that those problems could be addressed later in the process. *Id.* at 123-24. Once a calculation was entered into the DCS, however, its results could be relied upon in other pipe stress calculations, particularly regarding segments of adjoining piping, and the analysts relying on it would not be aware of its weaknesses. *Id.* at 120.

Mr. Das knew that DMJM was being paid by Parsons to perform some 60 pipe stress calculations and felt that they should perform them properly. Tr. at 119, 168. Despite the fact that Mr. Niedbalski and Mr. Hughes told him that any weaknesses in DMJM's calculations would be addressed later, he was concerned that those weaknesses could lead to errors on any future calculations that referred back to those DMJM calculations, which would in turn require revisiting not just the DMJM calculations but potentially a great number of Pipe Stress Group calculations. I therefore find that Mr. Das reasonably believed the quality of the DMJM's calculations, from his perspective, constituted a waste of funds. For the reasons set forth in the above section, I find that Mr. Das reasonably believed that the extent of the labor costs entailed in reanalyzing the DMJM calculations and any Pipe Stress Group calculations that relied on them was significantly out of proportion to the government's benefit from those expenditures, and thus that he reasonably believed he had revealed a gross waste of funds.

B. The Alleged Retaliations

In order to prevail, Mr. Das must next demonstrate, by a preponderance of the evidence, that his protected disclosures were a contributing factor to one or more alleged acts of retaliation taken against him by Parsons. Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5. Mr. Das alleges that Parsons retaliated against him by laying him off and thus causing RCS to terminate his employment.

In determining whether protected disclosures were a contributing factor to allegedly retaliatory acts, OHA Hearing Officers have noted that there is rarely a "smoking gun" that establishes such

a nexus. *See, e.g., Ronald Sorri*, Case No. LWA-0001 (1993). Consequently, we have consistently held that retaliatory intent can be established through circumstantial evidence. Specifically, a complainant can demonstrate that a protected disclosure was a contributing factor to an alleged retaliatory act if he can show that the acting official had actual or constructive knowledge of the protected 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. *Id.* Since there is no direct evidence of retaliation in the record, Mr. Das must demonstrate that the Parsons and RCS employees responsible for the alleged retaliatory act had actual or constructive knowledge of his protected disclosures, and must also show temporal proximity between the disclosures and the retaliation.

As previously explained, if Mr. Das can demonstrate that either of his disclosures was a contributing factor to his termination, Parsons and RCS must then demonstrate, by clear and convincing evidence, that they would have laid off and terminated Mr. Das even in the absence of any protected disclosures. For the reasons set forth below, I find that the Complainant's second disclosure was a contributing factor to Parson's decision to terminate his employment. I therefore need not consider whether the Complainant's first disclosures, which occurred between five and eight months prior to the termination, were a contributing factor.

Mr. Somma made the decision to lay off Mr. Das, with input from Mr. Hughes and Mr. Niedbalski. Tr. at 552, 694, 703. It is evident that Mr. Somma had actual knowledge of Mr. Das's second disclosure. He was a recipient of the November 24, 2008, e-mail in which Mr. Das expressed his concerns regarding the DMJM calculations. Parsons Ex. 36. He was also copied on Mr. Hughes's response to Mr. Das minutes later. Parsons Ex. 37. According to his testimony, Mr. Somma began discussing anticipated layoffs in the summer or early fall of 2008. Tr. at 693. The layoffs were to take place when Parsons certified to the DOE that its planning for the SWPF was 90% complete. *Id.* at 692. That milestone was achieved on December 12, 2008. *Id.* As set forth above, Mr. Hughes advised Mr. Das on December 16 that his last day would be December 18. Mr. Das's November 24, 2008, disclosure was sufficiently close in time to Mr. Hughes's layoff decisions such that a reasonable person could conclude that the disclosure was a contributing factor to Parsons's decision to lay off Mr. Das.

Although I have found that Mr. Das's November 2008 disclosure was a contributing factor in Parsons's decision to lay him off, I must also consider whether his disclosure was a contributing factor to the decision to terminate his employment. This case presents somewhat unusual facts, in that Mr. Das made his disclosures only to Parsons, but it was RCS, his employer, that terminated his employment. In its post-hearing brief, RCS contends that Mr. Das's disclosure cannot be a contributing factor to RCS's termination of Mr. Das's employment, because RCS never had any knowledge of his complaint. RCS Post-Hearing Brief at 4. At the hearing, RCS's human relations manager testified that Parsons sent an e-mail to RCS notifying it that three of its employees, including Mr. Das, were going to be laid off on December 18, 2008. Tr. at 390-91; *see* RCS Ex. C. She further testified that Mr. Das's employment ended solely because Parsons had laid him off. Tr. at 393. Although I find that RCS had no role in Parsons's decision to terminate Mr. Das's employment at Parsons, RCS admits that it terminated its employment contract with Mr. Das because Parsons ended his work assignment through a layoff. Had Parsons been Mr. Das's employer, I would proceed to analyze whether the Parsons employee

who was responsible for the termination had actual or constructive knowledge of the protected disclosures. Here, two entities divide the roles of, on one hand, the employer and, on the other, the entity responsible for determining whether an employee is laid off. To permit this role division to excuse an employer from responsibility under Part 708, where the employer's action is dictated by the entity controlling workplace retention "would vitiate the protections for whistleblowers that Part 708 was intended to provide." *Jimmie L. Russell* (holding similarly situated entities jointly and severally liable for retaliatory acts). Consequently, although the evidence is clear that RCS had no actual knowledge of Mr. Das's protected disclosure, I will attribute constructive knowledge of Mr. Das's protected disclosures to RCS. Because RCS terminated Mr. Das's employment on December 18, 2008, within four weeks of his second protected disclosure, a reasonable person could conclude that the disclosure was a contributing factor to RCS's decision to terminate Mr. Das's employment.

C. Whether Parsons and RCS Would Have Terminated Mr. Das's Employment in the Absence of His 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*, Case No. TBH-0034 (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 for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*citing Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)).

1. The Strength of the Stated Reasons For Laying Off Mr. Das and Terminating His Employment

The evidence in this case is strong that this layoff was planned. Mr. Somma testified that as the design phases of the SWPF project were completed, fewer employees would be required for the project. Layoffs were anticipated in virtually every organization of the project team. Tr. at 693. Although no one dictated how many staff he could maintain under him, Mr. Somma was nonetheless provided with a reduced budget within which to pay his team members after the design was deemed 90% complete. *Id.* at 694. The general concept of an impending layoff was

known as early as March 2008, when Mr. Das was hired for the project. Mr. Das testified that RCS had advised him when he was first assigned to Parsons that his work there would last about nine to twelve months. *Id.* at 283. The layoff occurred about nine months after he began his work there. *Id.* During the fall of 2008, Mr. Breor, the project manager, held an all-hands meeting to announce a reduction in work force, because the project was approaching the point at which 90% of the design would be complete. *Id*. at 427-28. On November 12, 2008, Parsons held a job fair to assist SWPF workers in securing employment beyond the SWPF project. *Id*. at 432. As of that date, Parsons had not announced who would be laid off, but all employees were encouraged to attend. *Id.*

The evidence is also strong that Mr. Somma selected the workers he intended to retain into the construction stage for rational, business-related reasons. Mr. Somma ultimately determined that his funding would permit him to retain five pipe analysts, which would necessitate the release of 17 from the staff. *Id.* at 282, 642. Mr. Hughes testified that, although it was Mr. Somma who made the ultimate decision as to who was to be retained and who laid off, he recommended to Mr. Somma individuals to be retained, on the basis of their performance in the areas in which he anticipated a future need for services. *Id*. at 643-44. *See* Parsons Ex. 33. By October 13, Mr. Somma had worked with his supervisors to "identify personnel and the knowledge skills and abilities of the personnel to carry them into the next phase of the project." *Id*. at 695. By October 13, 2008, Mr. Somma had produced a preliminary list of workers to be laid off, and Mr. Das was one of those. Parsons Ex. 41. The layoff list was revised a number of times before it reached its final form, but Mr. Das's name remained on each version of the list. Tr. at 725; Parsons Exs. 42, 43.

The record indicates that Parsons had substantial reasons for laying off pipe stress analysts after the SWPF project reached the construction stage. Mr. Hughes had been advised that funding for pipe analysts would be severely curtailed and most of the currently employed analysts would have to be laid off. The layoff was conducted using facially neutral standards. Preliminary lists of those affected by the layoff, created as early as mid-October 2008 contained Mr. Das's name. These factors suggest that Parsons would have laid off Mr. Das in the absence of his protected disclosures. It is equally clear that RCS terminated Mr. Das's employment upon notification that Parsons had no more work for him, and would have done so upon such notification without regard for any justification or lack thereof provided by Parsons.

2. The Strength of Any Motive to Retaliate For the Whistleblowing

I find insufficient evidence of any motive on the part of Parsons or RCS to retaliate against Mr. Das for his whistleblowing. No motive for retaliation was revealed through any document or testimony during this proceeding. In his closing argument, however, Mr. Das's attorney notes Mr. Das made his second disclosure, his November 24, 2008, e-mail, three weeks before Parsons's December 12 target date for completing 90% of the SWPF's design, and so informing the DOE. In effect, he argues that, had the DOE learned of this disclosure and assigned significance to it, it might not have approved Parsons's milestone, which might have affected the DOE's continued funding of the project. I find this argument highly speculative. First of all, Mr. Hughes responded immediately to Mr. Das's disclosure, admitting that he recognized problems with DMJM's calculations and stating that those problems would be resolved at a

future stage. Parsons Ex. 37. More important, the DOE was already aware, and had approved, that pipe stress calculations would continued to be performed in post-90%-complete stages of the project. Tr. at 623. Therefore, even if Mr. Das's disclosure had come to the attention of the DOE funding source, it is unlikely that it would have caused concern. Finally, retaliating against Mr. Das for that disclosure only increased, rather than eliminated, the likelihood that his disclosure would reach the DOE. Given these facts, Parsons's motive to retaliate against Mr. Das is extremely weak, if one exists at all. With respect to RCS, I find absolutely no motive to retaliate against Mr. Das for his disclosure.

3. Treatment of Similarly-Situated Employees

Mr. Das alleges that in the third week of October 2008, Mr. Niedbalski, his team leader, assured him that he would continue to work in the Pipe Stress Group for "as long as the project goes on." *Id.* at 463.[3] Mr. Das has argued that Mr. Niedbalski's statement illustrates that, as of mid-October, he held Mr. Das in high esteem, in contrast to Parsons's decision, two months later, to lay him off. The evidence demonstrates, despite Mr. Das's contention, that Parsons treated him in a similar manner to others in his position.

Mr. Niedbalski testified that Mr. Das, in his opinion, was one of his best performers, and that he had hoped to keep Mr. Das working in the Pipe Stress Group. *Id.* at 553, 577-78. Mr. Niedbalski provided Mr. Hughes, his supervisor, with a list of the pipe stress analysts, placed in three groups, and Mr. Das was among four or five in the top group. *Id.* at 552-53. Nevertheless, several of his best performers were laid off. *Id.* at 554. Those retained were not in Mr. Niedbalski's top-rated group. *Id.* at 579. These facts do not indicate to me that Parsons retaliated against Mr. Das in selecting him to be laid off despite Mr. Niedbalski's opinion of him; instead, it indicates to me that Mr. Somma did not give Mr. Niedbalski's ranking much weight in his decision, assuming he was even aware of its existence. In any event, the fact that other analysts whom Mr. Niedbalski had rated highly were laid off along with Mr. Das demonstrates that Mr. Das was treated similarly to others in this regard.

Other evidence in the record also points out that Mr. Das was treated in a similar fashion to others similarly situated to him. Within the Pipe Stress Group, three analysts, including Mr. Das, had been appointed to be checkers. While it appears that each of them was selected to be a checker because of his capabilities, none of the three were retained beyond December 18, 2008. *Id.* at 644. Moreover, one of those checkers, like Mr. Das, had also been involved in special projects. Nevertheless, he was released on the same day as Mr. Das. *Id.* at 462.

Based on the foregoing, I conclude that Parsons would have laid off Mr. Das even in the absence of his protected disclosures. As discussed above, RCS terminated Mr. Das's employment based solely on Parsons's representation that Mr. Das was to be laid off, and would have done so regardless of Parsons's reason for laying him off. Parsons's and RCS's reasons for their actions are convincing, the motive for retaliation is extremely weak, if present at all, and similarly situated employees were treated in the same manner as Mr. Das.

---

[3] Mr. Niedbalski testified that he did not recall making that promise to Mr. Das and, in his role, lacked the authority to make such a promise to anyone on his team. *Id.* at 551.

III. Conclusion

I conclude that Mr. Das made two protected disclosures, and that the second of those disclosures was a contributing factor to his termination. However, I find that Parsons and RCS have shown, by clear and convincing evidence, that they would have taken the same action even in the absence of the disclosures. Consequently, I conclude that Mr. Das is not entitled to the remedies that he seeks.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Himadri K. Das under 10 C.F.R. Part 708 is hereby denied.

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

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2010