February 14, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Names of Petitioner: Hansford F. Johnson

Dates of Filing: September 17, 2010

Case Number: TBH-0104

This Initial Agency Decision involves a Complaint of Retaliation filed by Hansford F. Johnson against B&W Pantex LLC (B&W) under the DOE's Contractor Employee Protection Program and its governing regulations set forth at 10 C.F.R. Part 708. The complainant was an employee of B&W, the firm employed by DOE to manage and operate the Pantex Plant, where he was employed as a Program Manager, working as the plant energy manager until he retired on March 24, 2010. Mr. Johnson characterizes his retirement as a constructive discharge, alleging that he suffered harassment from his supervisor in the months preceding his retirement, and that this was in retaliation for activity protected under Part 708. For the reasons set forth below, I will deny Mr. Johnson's Complaint.

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; ensur[e] 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 purpose is 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1)-(3). Available relief includes reinstatement, back pay, transfer preference, and such other relief as may be appropriate. *Id.* at § 708.36.

Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower Complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent

fact-finding and a hearing by an OHA Hearing Officer, and an opportunity for review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Procedural History

Mr. Johnson filed a Part 708 Complaint on September 8, 2008, with the Whistleblower Program Manager at the National Nuclear Security Administration's Service Center in Albuquerque, New Mexico. He filed an amendment to his Complaint on November 20, 2008. In his Complaint, Mr. Johnson alleged that he had made protected disclosures and, as a result of his so doing, B&W engaged in a series of retaliatory actions against him, including threatening to fire him and subjecting him to an internal audit. B&W filed its response to the Part 708 Complaint on December 10, 2008, contesting that Mr. Johnson had engaged in any conduct protected under Part 708, and arguing that his Complaint did not identify any acts of retaliation. The Whistleblower Program Manager transmitted the Complaint to OHA for an investigation, to be followed by a hearing, when informal resolution of the Complaint proved unsuccessful. While the case was pending before an OHA Investigator, Mr. Johnson requested that his Complaint be dismissed. On June 4, 2009, the OHA dismissed his Complaint.

On April 14, 2010, after leaving his employment with B&W on March 24, 2010, Mr. Johnson filed a new Part 708 Complaint with the Whistleblower Program Manager. In this Complaint, he referenced his earlier alleged protected disclosures and his previous Part 708 Complaint, and alleged that B&W management had retaliated against him by harassing and constructively discharging him. B&W filed a response to the Complaint on April 23, 2010, requesting that the Complaint be dismissed because Mr. Johnson was improperly attempting to reinstate his prior Complaint, which had been dismissed at his request, and because Mr. Johnson had not alleged an act of retaliation for which relief could be granted under Part 708. The Whistleblower Program Manager subsequently transmitted the Complaint to OHA for an investigation followed by a hearing.

On June 28, 2010, the OHA Director appointed an Investigator (OHA Investigator), who conducted an investigation into the allegations contained in Mr. Johnson's Complaint. The OHA Investigator issued a Report of Investigation (ROI) on September 17, 2010. In the ROI, the OHA Investigator noted that the filing of Mr. Johnson's previous Part 708 Complaint would constitute a protected activity under the regulations, which protect from retaliation conduct including "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). However, the Investigator concluded that it was uncertain whether there was sufficient temporal proximity between the filing of Mr. Johnson's 2008 whistleblower Complaint and the harassment he allegedly experienced beginning in January 2010 to permit an inference that the Complaint was a contributing factor to the alleged retaliation. In addition, the Investigator, though finding that the OHA has held that a constructive discharge can form the basis for relief under Part 708, reached no conclusion as to whether the facts alleged by Mr. Johnson in this case would constitute a constructive discharge.

Immediately after the ROI was issued, the OHA Director appointed me the Hearing Officer in this case. On October 8, 2010, I sent a letter to the parties and asked them to submit briefs discussing the ROI, specifically identifying the parts of the ROI with which each party agreed and disagreed, and identifying facts in the record supporting the party's position. On October 28, 2010, B&W submitted its brief, in which it requested that the Complaint be dismissed. Mr. Johnson tendered his brief and a response to the Motion to Dismiss on November 9, 2010.

On November 24, 2010, I issued a decision granting B&W's Motion to Dismiss to the extent that the Complaint alleged any acts of retaliation other than the harassment and constructive discharge Mr. Johnson alleged occurred in 2010, and denied the Motion in all other respects. *B&W Pantex, LLC*, Case No. TBZ-0104 (2010) (complainant time-barred from alleging any acts of retaliation that he alleged in his first Complaint).

I subsequently convened a hearing in this case, in Amarillo, Texas, on December 1, 2010. Both parties submitted exhibits. B&W presented exhibits into the record which were lettered Exhibit A through Exhibit O, and Mr. Johnson submitted exhibits numbered Exhibit 1 through Exhibit 5. B&W presented as witnesses three B&W management employees, one HR official, and three of Mr. Johnson's co-workers. Mr. Johnson testified on his own behalf, and called his wife, his doctor, three DOE Pantex Site Office employees, and four B&W employees as witnesses.

C. Factual Background

Mr. Johnson alleges that, in 2007 and 2008, he made disclosures protected under Part 708 regarding the implementation of an Energy Savings Performance Contract (ESPC) at Pantex, including by filing a Complaint with the DOE Office of Inspector General (IG). An ESPC is a partnership between a Federal agency and an energy service company (ESC). The ESC conducts a comprehensive energy audit for the Federal facility and identifies improvements to save energy. In consultation with the Federal agency, the ESC designs and constructs a project that meets the agency's needs and arranges the necessary financing. The ESC guarantees that the improvements will generate energy cost savings sufficient to pay for the project over the term of the contract. After the contract ends, all additional cost savings accrue to the agency. Contract terms up to 25 years are allowed. Federal Energy Management Program: Energy Savings Performance Contracts, http://www1.eere.energy.gov/femp/financing/espcs.html.

Mr. Johnson claims he was subject to retaliation for his advocacy of the ESPC by virtue of an audit requested by Pantex Manager Dan Swaim. In March 2008, Mr. Swaim requested an internal audit of the ESPC, to review several issues, including Mr. Johnson's relationship with the owner of NORESCO, LLC, the ESC chosen for the Pantex ESPC. Mr. Johnson further alleges that, in late August 2008, he experienced "emotional distress" from negative interactions with his supervisor, Dale Stout, and that Mr. Stout gave him an increased workload and increasingly shorter deadlines to comply with. Allegedly pursuant to a Complaint by Mr. Stout about Mr. Johnson's performance, Mr. Johnson was subsequently asked by Pantex HR to respond to a Complaint about his work performance.

As noted above, Mr. Johnson filed a Part 708 Complaint in September 2008, but withdrew the Complaint in June 2009, after the Whistleblower Program Manager referred the Complaint to the OHA. Mr. Johnson alleges that he dropped this Complaint because he feared for his job.

In his present Complaint, Mr. Johnson alleges that he began to notice, in approximately January 2010, that Mr. Stout was again retaliating against him by demanding that major documents be finished within one day. Johnson also alleges that Mr. Stout would angrily ask a few hours later what Mr. Johnson was doing or why he was doing a particular function. It seemed to Mr. Johnson that Mr. Stout's conduct was "angrier and louder" every day. These incidents allegedly increased in frequency.

In March 2010, Mr. Johnson went to his physician regarding the stress he was experiencing on the job. His physician prescribed a tranquilizer and recommended that Mr. Johnson stay at home for one week. Mr. Johnson stayed home on sick leave during the week of March 15. Mr. Johnson alleges that, on March 22, 2010, his physician wrote on a Health Event Report Form that Mr. Johnson should not be returned to his previous work environment.

On March 23, 2010, Mr. Johnson met with Jeff Flowers, Mr. Stout's supervisor, and expressed his desire to work in a different location. Mr. Flowers instructed Mr. Johnson to report to him the following day. In his statement to the OHA Investigator, Mr. Johnson described the March 24th meeting as follows:

> I went to Mr. Flower's office at 8 am. He told me to come in and shut the door. He said, "So are you ready to go back to work?" I said, "Yes. Where am I going? He said, "Back to your cubicle." At this point I went into shock. I was dazed, and stayed that way for several weeks. I said, "Back to that same environment? No, I'm not going back there. Haven't you seen the doctor's restrictions? Haven't you seen the 53-B? I am under doctor's orders not to go back to that environment." He said "Reconsider." I said, "No. I can't." He said "Again, reconsider." I said, "No. You surely know I can't go back there." He turned around and grabbed a sheaf of papers. He put them in front of me. Without looking at them, I said "Are you firing me?!" He said, "No. I'm retiring you. Sign at the bottom." I said, "I don't want to retire. I can't afford to retire." He said, "Sign your name at the bottom." I said, "I can't retire. I'll lose my house." He said, "Sign." I signed, in shock. The rest of the day was a blur.

ROI at 9.

II. Analysis

A. Whether the Complainant 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 Section 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *See Joshua Lucero*, 29 DOE ¶ 87,034 at 89,180 (2007) (citing *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990)).

The Part 708 regulations specifically protect employees from retaliation for "[p]articipating in . . . an administrative proceeding conducted under this regulation; . . . ." 10 C.F.R. § 708.5(b). In the ROI, the OHA Investigator found, correctly, that filing a Part 708 Complaint constitutes a protected activity under the regulations. Mr. Johnson's filing of his first Part 708 Complaint in September 2008 began his participation in a Part 708 administrative proceeding, and his participation continued until June 2009, when he withdrew the Complaint. Thus, Mr. Johnson clearly engaged in protected activity, as defined under Section 708.5, from September 2008 to June 2009.

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

As noted above, in order to prevail in a Part 708 action, the complainant must show, by a preponderance of the evidence, that his protected activity was a contributing factor to a retaliatory action taken against him. Section 708.2 of the Contractor Employee Protection regulations defines retaliation as "an 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. Mr. Johnson alleges that B&W constructively discharged him on March 24, 2010.

The OHA has held that a constructive discharge can form the basis for relief under Part 708. *Richard L. Urie*, Case No. TBH-0063 (2008). In *Urie*, the hearing officer used the standard articulated in a Supreme Court case, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), as the standard to establish constructive discharge in the Part 708 context. Under this standard, for a whistleblower to establish that he or she was constructively discharged, the whistleblower must prove by a preponderance of the evidence that his or her working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Urie* at 11. This is an objective "reasonable employee" standard which cannot be triggered by an employee's subjective beliefs. *See Roman v. Porter*, 604 F. 3d 34, 42 (1st Cir. 2010).

1. Working Environment from January to March 2010

In his testimony, Mr. Johnson described being berated by Mr. Stout at work every day from January 2010 until Mr. Johnson's retirement in March 2010. Hearing Transcript (Tr.) at 68-69. He testified that, one to three times a day, Mr. Stout would come by his cubicle and, after joking with Johnson's co-workers, "would do one of those, what the hell are you doing? What -- every time I come by your cubicle, you're either looking at the computer, you're looking at a book, or you're reading the newspaper. And the tone of voice got vicious is what it was." *Id.* at 68. Mr. Johnson testified that, by March, "I was scared to come to work, literally." *Id.* at 69.

One can make a legitimate argument that being unfairly singled out for verbal abuse several times a day could indeed become intolerable. What is glaringly absent in this case, however, is any evidence, aside from Mr. Johnson's assertions, that such were in fact the conditions under which he worked.

Mr. Johnson's supervisor, Mr. Stout, testified that he tried to treat each of his employees the same, and thinks that he did. *Id.* at 235. He described an instance, on March 10, 2010, when he was working on a project with an approaching deadline, relying on input from Mr. Johnson. He stated that he walked by Mr. Johnson's cubicle and saw him reading a newspaper. After going to his office to think about this, he returned to Mr. Johnson's cubicle and said, "Fred, don't you have anything better to do." Tr. at 231. Mr. Stout testified that, after returning to his office, Mr. Johnson came and told him that "you can't come in and talk to me that way; I've been working all day and all that." *Id.*

One of Mr. Johnson's co-workers, David Griffis, who worked in a cubicle near Mr. Johnson, testified that he recalled an instance where Mr. Stout entered Mr. Johnson's cubicle and told him to "put the paper down; I need you to work on some project. You know, not in a conversational tone, but not -- you know, not overly loud. Loud enough for me to hear in the next cubicle, but that was about it." *Id.* at 220.

Mr. Griffis, who was new to Mr. Stout's group, stated that he was assigned a cubicle near Mr. Johnson's for about two and one-half weeks beginning in mid-February 2010. *Id.* at 223. Though this was a period in which Mr. Johnson describes being verbally accosted by Mr. Stout one to three times per day, Mr. Griffis testified that the instance he described was the only time he heard Mr. Stout raise his voice at Mr. Johnson. *Id.* at 224.

Aside from Mr. Johnson and Mr. Griffis, there were two other employees who worked in Mr. Stout's group, both of whom testified at the hearing. One of them, Boyd Deaver, stated that he never saw Mr. Stout single Mr. Johnson out by giving him more work than others, and did not recall Mr. Stout ever treating Mr. Johnson differently than his co-workers. *Id.* at 194. The other employee, David Koontz, agreed. *Id.* at 211. Having worked at Pantex for 37 years, Mr. Koontz described Mr. Stout as being "like any supervisor. You know, once in a while, when you don't do what you're supposed to do, you consider you're probably going to get your butt chewed out. And, you know, that's happened, but it's never been . . . you know, I guess I don't take work personal." *Id.* at 213.

Mr. Johnson did present evidence that he was exhibiting signs of stress during the period in question. A friend of Mr. Johnson's, John O'Brien, who works at the Pantex Site Office, testified that he saw a "decline" in Mr. Johnson, that he was more distracted, agitated, showing signs of "memory issues," and reported lack of sleep and stomach problems. *Id.* at 129. Mr. O'Brien stated that on the weekend prior to his resignation, Mr. Johnson "was very concerned about having to go back into that environment, and I was seriously questioning your ability to function in the environment, as you were perceiving it." *Id* at 130.

A doctor who treated Mr. Johnson during the period in question also testified at the hearing. He explained that Mr. Johnson had presented with symptoms of stress in August 2008, and that Mr. Johnson "reported that his working environment had contributed to most of the symptoms." *Id.* at 145. At that time, Mr. Johnson's doctor prescribed an anti-depressant, Zoloft. *Id.* Though this is an earlier period in which Mr. Johnson alleges that he suffered from emotional distress because of interactions with Mr. Stout, I note here the doctor's testimony as to the 2008 visit only as background, since I have already ruled that Mr. Johnson's previous allegations of retaliation are time-barred from being raised again in the present complaint.

The doctor testified that Mr. Johnson returned to see him on March 15, 2010, "complaining that his depression was worsening. He claimed that his boss at work has been, quote unquote, verbally abusive, making it hard on him to continue working there." *Id.* at 151-52. Because of this, the doctor increased Mr. Johnson's Zoloft dosage from 50 milligrams to 100 milligrams per day, and added a "small dose of Xanax," an anti-anxiety medication. *Id.* at 152. The doctor wrote a note requesting that Mr. Johnson be excused from work during the week of March 15 through 19, 2010. Exhibit 4. When Mr. Johnson returned to work on March 23, 2010, he brought with him a Health Event Report Form (Pantex Form 53-B), indicating that he had visited his doctor again on March 22, 2010. Exhibit 3. The form contained a diagnosis from the doctor of "Depression/Anxiety," and listed under restrictions, "No stressful environment." *Id.*

Mr. Johnson's wife also testified, and her testimony was consistent with the observations of Mr. O'Brien, and Mr. Johnson's doctor. Tr. at 183-84. All of this testimony is evidence that Mr. Johnson was experiencing stress during the period in question. But it is *not* evidence of Mr. Johnson's working conditions, viewed objectively. At best, it is circumstantial evidence of Mr. Johnson's subjective belief regarding those conditions, as it verifies that he contemporaneously complained about his work environment. It may also be circumstantial evidence that his work

environment caused him stress, to the extent one can infer this from the distress observed firsthand by these witnesses. Even then, as Mr. Johnson's doctor testified, a number of external factors can cause stress. "It could be marriage; it can be work; it can be financial problems. It can be anything, yes." *Id.* at 157.

From this evidence, therefore, I might find that Mr. Johnson *subjectively perceived* his working environment to be stressful and unpleasant, perhaps even intolerable for him. But, as noted above, this office, following the Supreme Court, applies an objective "reasonable person" standard to allegations of constructive discharge. That is, Mr. Johnson must prove by a preponderance of the evidence that his working conditions became so intolerable that a reasonable person in his position would have felt compelled to resign. *Urie* at 11. Without any direct evidence of those conditions, other than his own testimony, and with credible testimony in fact contradicting Mr. Johnson's assertions, I cannot find that he has met this burden.

2. Events of March 23 and March 24, 2010

The individual testified that, upon returning to work from leave on March 23, 2010, he reported to the plant medical department, Tr. at 20, which is the standard procedure for employees returning from medical leave. *Id.* at 95. He brought with him the form referenced above, Form 53-B, with the notation from his doctor, "No stressful environment," written as a restriction. *Id.* at 161, 166; Exhibit 3. Mr. Johnson testified that after he turned in this form to the medical department, it was returned to him, but "the restrictions weren't there anymore." Tr. at 173. However, a copy of this form was brought to the hearing by a nurse from the medical department, and it did still contain the restrictions written by Mr. Johnson's doctor. Exhibit 3.

Based on the hearing testimony, I find it more likely that Mr. Johnson confused the Form 53-B that he brought to the plant with a different form, a return to work form that is given to workers to take to their supervisor after they have been processed through the medical department. Tr. at 173-75. This form, which was also produced at the hearing, has a space for restrictions based on the medical department's evaluation of Mr. Johnson, and in this space was printed, "No restrictions at this time." Exhibit 5. There is no need, therefore, to consider what relevance, if any, there might be to the present case had the medical department removed restrictions from Mr. Johnson's Form 53-B.

After leaving the medical department, Mr. Johnson reported to the office of Jeff Flowers, the supervisor of Mr. Stout. Tr. at 27, 58. Mr. Flowers testified that he asked for Mr. Johnson to report to him because of what he had heard that day from a Human Reliability Program (HRP) supervisor at the Pantex Plant. *Id.* at 83-84. The HRP official had told Mr. Flowers that she and a plant psychologist had spoken to Mr. Johnson and that he said he preferred to retire rather than return to work for Mr. Stout. *Id.*

Mr. Flowers testified that, in their meeting of March 23, Mr. Johnson described "his version" of events, and reiterated that he preferred retirement to working for Mr. Stout. *Id.* at 84. Mr. Flowers said that he told Mr. Johnson that he did not want him to make a rash decision, and therefore told him to come back and see him the following morning, "because I wanted to talk to his co-workers alone." *Id.* Mr. Flowers stated that he then called Mr. Johnson's co-workers to his office, and asked another department manager to sit in on the meeting. *Id.* He asked the co-workers if Mr. Johnson's description of his conditions was true, and they said it was not. *Id.*

Mr. Johnson returned to Mr. Flower's office on the morning of March 24. *Id.* at 22, 85. There is a stark discrepancy between the accounts of the two men regarding this meeting. Mr. Johnson's testimony at the hearing was virtually identical to the statement he provided to the OHA Investigator, as set forth in Section I.C of this decision above, in which he stated that Mr. Flowers told him, after Mr. Johnson stated that he could not go back to the same working environment, that he was going to "retire" him. *Id.* at 22-24. He contended that he told Mr. Flowers that he could not afford to retire, but that Mr. Flowers insisted he sign certain documents and took him to an HR official to process the papers, from which point, according to Mr. Johnson's testimony, he "was dazed or shocked or whatever you want to call it." *Id.* at 25.

In contrast, Mr. Flowers testified that, in their March 24 meeting, he asked Mr. Johnson if he was still intent on retiring rather than work for Mr. Stout, and he said that he was. *Id.* at 85. The previous day, Mr. Flowers had asked one of Mr. Johnson's co-workers to put together the papers that would need to be filled out by Mr. Johnson should he choose to retire. *Id.* When Mr. Johnson informed him that he still wished to retire, Mr. Flowers got out the necessary paperwork, which they began to fill out. *Id.* Because Mr. Flowers was not sure whether they were filling out the paperwork correctly, he called an HR official and asked if they could come to his office to go over the retirement paperwork. *Id.*

The HR official, D.J. Shead, testified at the hearing. He was shown a March 24, 2010, memorandum from Mr. Johnson informing the HR department of his retirement, Exhibit I, and Mr. Shead stated that he was present when Mr. Johnson signed the document. Tr. at 244. He testified that he engaged in small talk with Mr. Johnson, asking him about his retirement plans, and that he saw nothing out of the ordinary about Mr. Johnson's demeanor during their meeting. *Id.* at 246.

Finally, on March 24, 2010, Mr. Flowers and Mr. Johnson met with Bill Mairson, the manager of Pantex's Environmental Safety and Health Division, to whom Mr. Flowers reports. Mr. Mairson testified that their meeting began with Mr. Johnson telling him that he could not work for Mr. Stout. *Id.* at 204. Mr. Mairson said that he responded by offering Mr. Johnson "a physical location away from Mr. Stout," though Mr. Johnson would continue to report to Mr. Stout. *Id.* Mr. Mairson also testified that he told Mr. Johnson that he was "free to bid on other positions that were available." *Id.* According to Mr. Mairson, Mr. Johnson found neither option to be an acceptable alternative to resigning. *Id.* In his testimony, Mr. Johnson denied that Mr. Mairson offered him a location away from Mr. Stout, but acknowledged that he had mentioned bidding for other positions. *Id.* at 60.

Considering all of the hearing testimony regarding the events of March 24, 2010, I find more credible the accounts of Mr. Flowers, Mr. Shead, and Mr. Mairson, as opposed to that of Mr. Johnson. If Mr. Johnson could prove that Mr. Flowers in fact coerced him into signing his retirement papers, there would be a basis for finding that he was constructively discharged. *See Heining v. General Serv. Admin.*, 68 M.S.P.R. 513, 519 (1995) ("presumption of voluntariness may be rebutted if the employee can establish that the resignation or retirement was the product of duress or coercion"). My evaluation of the evidence, however, leads me to find that Mr. Johnson has not proven this.

In summary, for the reasons set forth above, I will deny Mr. Johnson's Complaint of Retaliation, as he has not proven by a preponderance of the evidence that he was subject to any action that meets the definition of retaliation set forth in 10 C.F.R. § 708.2, more specifically that his resignation was the product of intolerable working conditions from January 2010 to March 2010, or of any coercion or duress on the day of his retirement, March 24, 2010.

It Is Therefore Ordered That:

(1) The Complaint filed by Hansford F. Johnson under 10 C.F.R. Part 708, OHA Case No. TBH-0104, is hereby denied.

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

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: February 14, 2011