Case No. VBA-0010

March 9, 2001

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jagdish C. Laul

Date of Filing: September 12, 2000

Case Number: VBA-0010

This Decision considers an Appeal filed by Excalibur Associates, Inc. (Excalibur) of an Initial Agency Decision issued on September 1, 2000, on a complaint filed by Jagdish C. Laul (Laul or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Laul seeks compensation for his dismissal by his former employer, Excalibur, allegedly in retaliation for his participation in an activity protected under Part 708. In the Initial Agency Decision, the Hearing Officer determined that the complainant had carried his burden to show that he had engaged in a protected activity and that it was a contributing factor in Excalibur's action in dismissing him. The Hearing Officer further determined that Excalibur had failed to carry its burden to show that it would have taken the same action in the absence of Laul's protected activity. Accordingly, the Hearing Officer directed remedial action from Excalibur in compensation for Laul's claim. As set forth in this Decision, I have determined that Excalibur's Appeal of the Initial Agency Decision must be denied.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or -leased 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. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

As initially formulated, the program regulations, codified at 10 C.F.R. Part 708, generally prescribed independent fact-finding by the DOE Office of Inspector General, followed by the issuance of a Report of Inquiry setting forth the IG's findings and recommendations on the merits of the complaint. Thereafter, the complainant could request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer rendered an Initial Agency Decision. However, on March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural revisions that "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. § 708.8; *see* 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised regulations, OHA conducts the investigation of the complaint, if one is requested by the complainant. 10 C.F.R. § 708.22.

Similar to the prior regulations, the Director of OHA then appoints a Hearing Officer who conducts a hearing on the record and issues an Initial Agency Decision. 10 C.F.R. §§ 708.28, 708.30. Parties may seek review of an Initial Agency Decision by the filing of an appeal with the Director of OHA, in accordance with section 708.32.

B. Factual Background

The complainant's former employer, Excalibur, is a subcontractor of Kaiser Hill Company (Kaiser) which is the managing and operating contractor of DOE's Rocky Flats Field Office (Rocky Flats). Laul was hired by Excalibur in November 1997. Laul is an environmental engineer who holds a doctorate in nuclear chemistry, and was given a position as a "Principal Scientist." During the relevant time period, Excalibur's senior management was comprised of Charlie Burns, Chief Executive Officer (CEO), and Wayne Spiegel, Chief Operating Officer (COO). The third member of Excalibur's management team was David Richards, who was employed by Excalibur between October 1997 and May 1999.

Excalibur's primary contract with Kaiser required that Excalibur prepare "Emergency Preparedness Hazards Assessments" (EPHA) and "Emergency Assessment Resource Manuals" (EARM) for most of the sites at the Rocky Flats facility. A building or a work area is considered a site. The EPHA described in detail the risks associated with the release of each hazardous material located within a site. After the EPHA for a given site was prepared by Excalibur and approved by Kaiser, Excalibur prepared the EARM for that site. The EARM provided operational guidance on the appropriate actions to take in the event of the release of each hazardous material located within a site. Mark Spears, Manager of the Hazardous Assessment Committee (HAC), and Wilbert Zurliene, alternate HAC Manager, were the two Kaiser employees with primary responsible for substantively reviewing the EPHAs and EARMs written by the Excalibur employees.

Upon assuming the Principal Scientist position with Excalibur, the complainant was assigned to work primarily on drafting and revising EARMs. Laul initially acted as team leader and reported directly to the Kaiser HAC Managers, Spears and Zurliene. However, this working arrangement changed following a meeting in January 1998, when Laul presented Spears and Zurliene with an initial set of draft EARMs. Spears and Zurliene reported to Excalibur's senior management (Spears, COO) that they were dissatisfied with the quality of work presented by the complainant. Upon receiving this negative feedback, Burns (Excalibur CEO) directed Richards to take the lead in dealing with Kaiser in place of Laul. Thus, in February 1998, Richards became Laul's direct supervisor. The complainant was no longer permitted to sign the documents he prepared, and his interactions with the HAC Managers were substantially limited.

In June 1998, Excalibur entered into a subcontract with Global Business Associates (GBA), and thereby acquired one GBA employee, Ron Beaulieu. Under this contract, GBA was given the responsibility for preparing and maintaining certain EPHAs and EARMs. This contract and the extension of the contract into fiscal 1999 had the effect of reducing the work on EARMs available for employees of Excalibur. Also in June 1998, Excalibur's senior management's performed a rating of each of its twelve analytical employees. In these written evaluations, the complainant was rated the lowest of the twelve Excalibur employees.

The complainant was discharged by Excalibur on October 21, 1998. The October 21, 1998, out processing form provided to the complainant indicates he was discharged because there was "insufficient scope of work" to justify retaining his services.

II. Complaint Proceeding

On December 18, 1998, the complainant filed this complaint with the DOE Office of Inspections of the Office of the Inspector General (IG), claiming that his October 21, 1998 dismissal was a retaliatory act for his participation in a prior Part 708 proceeding. Laul asserts in his complaint that in June 1996, he filed a

whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The complainant's believes that Excalibur's decision to terminate him was influenced by Kaiser management officials having knowledge of his prior Part 708 proceeding.

On April 16, 1999, the IG transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine and focus the issues raised in the complaint. 10 C.F.R. § 708.22. The investigator conducted an investigation, and issued a Report of Investigation on December 3, 1999. 10 C.F.R. § 708.23. On that same day, the OHA Director appointed a Hearing Officer. On May 10 and May 11, 2000, the Hearing Officer convened a hearing on the Laul complaint in Rocky Flats. 10 C.F.R. §§ 708.25, 708.28.

A. Legal Standards Governing This Case

(1) The Complainant's Burden

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. The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). *See also Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*).

(2) The Contractor's Burden

If the complainant meets his burden, the regulations require Excalibur to prove by "clear and convincing" evidence that it would have terminated the complainant if he had not engaged in protected conduct. 10 C.F.R. § 708.29. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." *See Hopkins*, 737 F. Supp. at 1204 n.3. In evaluating whether a contractor has met its burden, the Hearing Officer considers the strength of the contractor's evidence in support of its action and any evidence that the contractor takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

B. The Initial Agency Decision

On September 1, 2000, the Hearing Officer issued an Initial Agency Decision finding in favor of the complainant. *Jagdish C. Laul*, 28 DOE ¶ 87,006 (2000) (*IAD*). There is no dispute that prior to the complainant's dismissal he participated in "an administrative proceeding conducted under part 708." 10 C.F.R. § 708.29(b). That administrative proceeding was initiated in June of 1996 when the complainant filed a whistleblower complaint against Kaiser and his direct employer Tenera, a subcontractor of Kaiser. The final agency decision on that complaint was issued on August 19, 1998. The Hearing Officer therefore turned to the issue of whether Laul's protected activity was a contributing factor to his October 21, 1998 dismissal. For the reasons summarized below, the Hearing Officer concluded that Laul had carried his burden in this regard.

The Hearing Officer initially found that three adverse personnel actions preceded the complainant's dismissal and contributed to the Excalibur's decision to dismiss him. *IAD*, 28 DOE at 89,049. The first personnel action occurred in February 1998 when Burns reduced Laul's authority and directed Richards to take the lead in dealing with the HAC Managers. The second personnel action was Excalibur's decision to enter into a subcontract with GBA in June 1998 that had the effect of reducing the work on EARMs available for Excalibur employees. The third personnel action was Excalibur's senior management's

written rating of the complainant in June 1998, under which the complainant was rated the lowest of the twelve Excalibur employees. Of these three actions, the Hearing Officer found that the written rating was the most important factor in Excalibur's selection of Laul for dismissal. *Id*.

The Hearing Officer ruled as a legal matter that "a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had 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." *IAD* at 89,050, *citing* *Barbara Nabb*, 27 DOE ¶ 87,519 (1999). The Hearing Officer determined that there was the requisite temporal nexus since each of the three Excalibur personnel decisions leading to Laul's dismissal occurred during the pendency of his protected participation in the Part 708 proceeding. In addition, the Hearing Officer found that there was a close time nexus between the protected conduct, which concluded in August 1998, and his October 21, 1998 dismissal. *IAD* at 89,050.

The Hearing Officer's finding of constructive knowledge, however, requires greater analysis. In this regard, the Hearing Officer found that although Excalibur had no direct knowledge of the protected conduct, constructive knowledge was properly imputed to Excalibur's management under the circumstances of this case. In reaching this conclusion, the Hearing Officer held that "[u]nder Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct." *IAD* at 89,050, *citing* *Am-Pro Protective Services, Inc.*, 26 DOE ¶ 87,511 (1996) *(Am-Pro*); *Morris J. Osborne*, 27 DOE ¶ 87,542 (1999); *Jimmie L. Russell*, 28 DOE ¶ 87,002 (2000). As described below, the Hearing Officer found in this case that there are two communication linkages which demonstrate that negative information was passed from those with knowledge of the protected disclosure to Excalibur's management.

The Hearing Officer found that the first such communication linkage occurred between Kaiser employees involved in that protected proceeding and the Kaiser HAC managers. The basis for finding a passage of negative information is as follows:

> In this case at least three Kaiser officials were directly aware of the complainant's participation in the protected proceeding. They are R. E. Kell, the deputy manager of the Kaiser Safety Engineering and Technical Service Office (SETS office), Robert Allen, Manager, Kaiser Human Resources, and Dana Dorr, Kaiser Work Force Restructuring Manager (hereinafter referred to collectively as the "directly involved Kaiser employees"). Mr. Kell signed the April 1996 memorandum that directed Tenera, the complainant's employer, to dismiss the complainant. Excalibur Exhibit #17. That dismissal was the adverse personnel action that led to the prior whistleblower proceeding. Mr. Allen and Mr. Dorr worked for Kaiser on investigating and evaluating the prior whistleblower complainant.
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> The evidence is clear that other Kaiser employees knew of the protected conduct and made negative comments about the complainant. The record indicates that two senior Kaiser/Tenera employees, Mr. Maini, a Tenera employee who headed the Kaiser SETS Office, and Ms. Bateman, made comments that the complainant was a whistleblower and should not be rehired during 1996. In addition the record indicates that Mr. Tony Buhl, Vice President Environment Safety and Health and Assurance, made comments that he would not hire the complainant during 1998.
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> It is clear that HAC manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. On the organization chart for the SETS Office dated March 1, 1996, Mr. Spears reported directly to Mr. Maini and his deputy Mr. Kell. As mentioned above, Mr. Kell was directly involved in the prior proceeding and Mr. Maini, his supervisor, was found by the Deputy Inspector General to have made negative comments about hiring the complainant. Ms. Bateman is also listed on that

> organization chart. As also mentioned above, she was also found by the Deputy Inspector General to have made comments aimed at assuring the complainant was not hired. Including Mr. Spears, there are six people named on the March 1996 organization chart of the SETS Office. Three of the other five people on the chart were directly involved in the prior protected proceeding. In such an office set up I believe that while Mr. Spears may not have been aware that the complainant was a whistleblower, Mr. Spears would have been aware of the problems being caused by the complainant and the negative feeling of his peers and supervisors toward the complainant.

IAD at 89,051-52 (footnotes omitted). The Hearing Officer further found the Kaiser HAC Managers' "alacrity" in negatively evaluating the complainant to Excalibur management in January 1998, to be additional evidence that they had a preconceived negative bias toward the complainant. The Hearing Officer determined that the HAC Managers did not have a reasonable basis for concluding that Laul's work was not technically competent, and that their testimony concerning this matter was "weak and evasive." *Id.* at 89,052. On the basis of this evidence, the Hearing Officer concluded that "it is more likely than not that the complainant's participation in a prior Part 708 proceeding led various Kaiser employees to make negative comments about the complainant that predisposed the HAC managers to negatively evaluate the complainant to Excalibur." *Id.* at 89,051.

The second communication linkage noted by the Hearing Officer is between the Kaiser HAC managers and Excalibur's management. The record shows that beginning in January 1998, the Kaiser HAC Managers provided negative evaluations of the documents prepared by Laul and that shortly thereafter, Excalibur's management functionally replaced him with Richards. The Hearing Officer concluded:

> Therefore, even though I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding, I find that Excalibur's senior manager received and considered the negative opinions of the HAC managers. These findings lead to the conclusion that Excalibur had constructive knowledge of the complainant's participation in the protected proceeding when it made various personnel decisions regarding the individual. Once there is a reasonable inference that the complainant's participation in the protected proceeding had an effect on the individuals making personnel decisions at Excalibur the complainant has met his burden of showing that his participation in the protected proceeding was a contributing factor to the adverse personnel decisions.

IAD at 89,053-54. The burden therefore shifted to Excalibur to show by clear and convincing evidence that the complainant would have been dismissed absent his participation in the prior Part 708 proceeding. More specifically, the Hearing Officer stated that Excalibur must demonstrate by clear and convincing evidence that it would have taken the personnel actions even if it had not received the HAC Managers' negative evaluation of the complainant's work. *IAD* at 89,054. The Hearing Officer then concluded that Excalibur failed to carry this burden.

The Hearing Officer initially noted that Excalibur had presented no documentation or analysis in the record to show that the complainant's work was not technically competent. While Excalibur attempted to show that there were reasonable business decisions for the personnel actions leading to Laul's dismissal, the Hearing Officer found that Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC Managers, and he cited examples to this effect. *See IAD* at 89,053. The Hearing Officer concluded: "Therefore, in order to prevail Excalibur is required to demonstrate that, in the absence of knowledge of the HAC managers' opinions, it would have reached the decision to hire a subcontractor, rate the complainant poorly and then dismiss him. I do not believe the testimony provided by Excalibur comes close to making these showings under the clear and convincing standard." *Id.*

Accordingly, the Hearing Officer concluded that the complainant had participated in an administrative proceeding conducted under Part 708, that Excalibur's dismissal of the complainant was an adverse

personnel action that constituted a retaliatory act under Part 708, and that the complainant is therefore entitled to remedial action from Excalibur. In accordance with the complainant's request for relief, the Hearing Officer awarded him back pay and litigation expenses. The *IAD* specifies that back pay be calculated from October 21, 1998 until the day the complainant accepted a position at Los Alamos National Laboratory, October 12, 1999, at the hourly rate the complainant was paid as a consultant, $39.60. *IAD* at 89,055.

C. Excalibur's Appeal

In its Appeal(1), Excalibur raises a number of arguments in support of its claim that the *IAD* is incorrect as a matter of fact and law. Excalibur's initial challenges are procedural in nature, relating to evidentiary determinations made by the Hearing Officer in the context of the hearing. In this regard, Excalibur claims that the Hearing Officer committed reversible error by: (1) failing to exclude evidence that was irrelevant, Appeal at 3-5; (2) admitting hearsay testimony, Appeal at 5-7; (3) permitting testimony from witnesses that lacked proper foundation, Appeal at 7; and (4) permitting the improper use of deposition testimonial evidence, Appeal at 8. Excalibur argues that "[e]ach of the erroneous rulings regarding the evidence that was admitted at the hearing substantially influenced the decision that was made and must cause the decision to be in grave doubt." Appeal at 10.

Next, Excalibur argues that critical factual findings made by the Hearing Officer are clearly erroneous and mandate reversal of the *IAD*. More specifically, Excalibur challenges the Hearing Officer's findings that: (1) there is a temporal nexus between Laul's protected activity and any adverse personnel action taken against him by Excalibur, Appeal at 11; (2) the HAC Managers, Spears and Zurliene, had constructive knowledge of the complainant's protected activity and the existence of a general animus against the complainant, Appeal at 12-15; (3) Excalibur's management had constructive knowledge of the complainant's protected activity, Appeal at 16; and (4) Excalibur's decision to lay off the complainant was unduly influenced by the negative feedback received from the HAC Managers, Appeal at 16-19. According to Excalibur, "[t]he Complainant failed to prove by a preponderance of the evidence that his protected activity was a contributing factor to the adverse decision [and Excalibur] met its burden by proving by clear and convincing evidence that its decision would stand regardless of Complainant's protected activity." Appeal at 19.

Finally, Excalibur asserts that legal conclusions set forth in the *IAD* are inconsistent with the law and must be reversed. In this regard, Excalibur argues that: (1) the complainant's dismissal is the only retaliation alleged in his complaint, and the Hearing Officer's consideration of other adverse personnel actions (*e.g.*, the low performance ranking) is beyond the scope of his authority, Appeal at 19-20; (2) the Hearing Officer misapplied applicable case law in ruling that constructive knowledge may be demonstrated where the individuals making the personnel decision were influenced by the opinions of those persons with knowledge of the protected conduct, Appeal at 20-21; and (3) the complainant failed to carry his "contributing factor" burden as a matter of law since he did not show that Excalibur had actual or constructive knowledge of his protected activity, Appeal at 21-23.

On December 1, 2000, Laul filed a Response to Excalibur's Appeal (Response) asserting that the *IAD* is legally and factually correct, and that Excalibur's Appeal fails to present any valid reason for setting aside the decision reached in the *IAD*. Excalibur then filed a Reply to Laul's Response on January 9, 2001. The record of this proceeding was closed on January 11, 2001. Excalibur's Appeal is considered below.

III. Analysis

It is well settled that the factual findings of the Hearing Officer are subject to being overturned only if they can be deemed to be clearly erroneous, giving due regard to the trier of fact to judge the credibility of witnesses. *Eugene J. Dreger*, 27 DOE ¶ 87,564 at 89,351-52 (2000), *citing Oglesbee v. Westinghouse Hanford Co.*, 25 DOE ¶ 87,501, 89,001 (1995); *O'Laughlin v. Boeing Petroleum Services, Inc.*, 24 DOE ¶

87,513, 89,064 (1995). *Compare Pullman Standard v. Swint*, 456 U.S. 273 (1982), with *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Federal Rule of Civil Procedure 52(a)). On the other hand, conclusions of law set forth in the *IAD* are subject to *de novo* review. *Kaiser-Hill Company, L.L.C.*, 27 DOE ¶ 87,555 at 89,299 (2000), *citing Salvatore Gian friddo*, 27 DOE ¶ 87,544 at 89,221 (1991); *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ?abuse of discretion')."). After considering the issues raised by Excalibur, I have concluded that the determination reached in the *IAD* is correct and must be sustained, and that the complainant is therefore entitled to relief under Part 708.

Excalibur initially raises a number of procedural issues in its Appeal, claiming that substantial evidence was erroneously placed into the record and resulted in undue bias on the part of the Hearing Officer. Below, however, I will first consider the substantive objections raised by Excalibur. For the stated reasons, I conclude that Excalibur has failed to show that the determination reached in the *IAD* is legally or factually incorrect. I will then turn to Excalibur's procedural claims of bias, which will then have been placed in their proper context.

A. Adverse Personnel Actions

Excalibur argues that the Hearing Officer acted beyond the scope of his legal authority in considering adverse personnel actions affecting the complainant, other than his dismissal in October 1998. As explained above, the Hearing Officer found that three adverse actions contributed to the Excalibur's decision to dismiss Laul: (1) the reduction of Laul's authority in February 1998, (2) the decision to enter into a subcontract with GBA in June 1998, and (3) the June 1998 rating of the complainant as the lowest of the twelve Excalibur employees. *IAD*, 28 DOE at 89,049. Excalibur asserts that section 708.14(a) requires that complaint be filed "by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation," and section 708.12(a) requires that the employee specifically identify the alleged retaliation. 10 C.F.R. §§ 708.12(a), 708.14(a). Excalibur argues that since Laul identified only his dismissal as a retaliation in his complaint, the Hearing Officer was legally barred from considering the three adverse personnel actions leading to the complainant's dismissal. I disagree.

Sections 708.12 and 708.14 prescribe the information that must be contained in a valid Part 708 complaint and the time limitation for filing such complaint. These provisions having been satisfied, however,(2) they do not then limit the authority of the Hearing Officer to examine relevant actions taken by contractor leading to an ultimate act of alleged retaliation against the complainant. Such connected personnel actions may serve to establish a pattern of discriminatory acts or a logic to the contractor's actions not evident from examination of each individual act itself, thus adding evidentiary support to the complainant's claim. *See Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993); *Barbara McNabb*, 27 DOE ¶ 87,519 at 89,119-21 (1999). Of course, those related actions could also tend to contradict the complainant's arguments, or support claims of the contractor. It would be unwise to prohibit the Hearing Officer from considering this type of evidence as long as it is potentially relevant. My review of the *IAD* establishes that the Hearing Officer appropriately considered the related personnel actions taken by Excalibur and found them to be material factors leading to the complainant's dismissal. Indeed, it is obvious to me that the Hearing Officer's deliberation of this case would have been incomplete absent a full examination of the circumstances leading to Laul's dismissal.

B. Contributing Factor

(1) Legal Contentions

Excalibur argues that the Hearing Officer misapplied pertinent case law in finding that the complainant carried his burden to show that his protected activity was a "contributing factor" to Excalibur's decision to

dismiss him. In the *IAD*, the Hearing Officer held that "a complainant can show that protected conduct was a contributing factor by showing that the official taking the action had 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." *IAD* at 89,050, *citing Barbara Nabb*, 27 DOE ¶ 87,519 (1999). The Hearing Officer further held that "[u]nder Part 708 case law, a complainant can establish constructive knowledge by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct." *IAD* at 89,050, *citing Am-Pro Protective Services, Inc.*, 26 DOE ¶ 87,511 (1996) *(Am-Pro*); *Morris J. Osborne*, 27 DOE ¶ 87,542 (1999); *Jimmie L. Russell*, 28 DOE ¶ 87,002 (2000).

Excalibur maintains that the Hearing Officer misapplied this legal standard in finding that constructive knowledge of Laul's protected activity can be attached to Excalibur based upon a showing of constructive knowledge on the part of the HAC Managers. Relying on the law of agency, Excalibur asserts that "an agent of [Excalibur] must have actual knowledge of the protected disclosures for the knowledge to be imputed on one of the officials who took the action against Complainant." Appeal at 21, *citing Torres v. Pisano*, 116 F.2d 625 (2d Cir. 1997); RESTATEMENT (SECOND) OF AGENCY §§ 272, 275. Excalibur claims that "[c]onstructive knowledge cannot be imputed to management by non-employees," Appeal at 21, and that the cases relied upon by the Hearing Officer do not support the legal conclusion reached in the *IAD*. Excalibur therefore argues that since the complainant has failed to show that Excalibur had actual or constructive knowledge as a matter of law, he has failed to establish that his protected activity was a "contributing factor" to his dismissal. Appeal at 22-23. I conclude, however, that the Hearing Officer's holding is amply supported by legal precedent.(3)

Initially, it is well settled that a whistleblower complainant need not prove direct or actual knowledge of a protected activity by the final decision-maker in order to prevail on a claim of prohibited retaliation, where the decision-maker was under the control or influence of persons having such knowledge. *See Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982). This principle has been affirmed in whistleblower decisions of the U.S. Department of Labor. *See, e.g., Dean v. Houston Lighting & Power Co.*, 93-ERA-7 (ALJ Apr. 6, 1995)*; Frady v. Tennessee Valley Authority*, 92-ERA-19 (Sec'y Oct. 23, 1995); *Pillow v. Bechtel Construction*, 87-ERA-35 (Sec'y July 19, 1993). Excalibur does not disagree with this principle in general, but argues as a matter of law that constructive knowledge cannot be imputed to Excalibur management under the circumstances of this case since the HAC Managers were neither agents nor employees of Excalibur. I am not at all persuaded by this legal contention.

I find the determination to impute knowledge to Excalibur under the circumstances of this case was an informed and reasonable one which takes account of the way contractors and subcontractors typically interact at DOE facilities. I also find that it is wholly consistent with our ruling in *Jimmie L. Russell*, *supra*, one of several cases cited by the Hearing Officer in the *IAD*. The complainant in that case, a DOE subcontractor employee, made protected disclosures to the prime contractor and to DOE. The contractor (UC) terminated the complainant's work assignment in retaliation for the protected disclosures, and the complainant was then dismissed by his subcontractor employer as a consequence of the contractor's action. The subcontractor (Comforce) argued that it bore no responsibility for the complainant's dismissal since it had no knowledge of the complainant's protected disclosures. In rejecting this claim, the Hearing Officer stated:

> Although I find that Comforce had no role in the UC's decision to terminate Mr. Russell's work assignment at LANL, Comforce admits that it terminated its employment contract with Mr. Russell because the UC ended his work assignment with LANL. As discussed above, the UC's decision to end his work assignment constituted a retaliation against Mr. Russell for activity that is protected under Part 708. Comforce therefore terminated Mr. Russell's employment as a result of Mr. Russell's protected activity, and is jointly and severally liable with the UC for the damages arising from this termination.
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> As noted above, Part 708 applies to employees of DOE contractors and the term "contractor"

> is specifically defined to include "a subcontract under a contract . . . with respect to work related to activities at DOE-owned or -leased facilities." 10 C.F.R. §§708.1- 2. Mr. Russell was employed by a UC subcontractor, Comforce, to perform a work assignment at LANL. Both the UC and Comforce took actions which directly and negatively impacted the "terms", "conditions" and "privileges" of Mr. Russell's employment at LANL. Accordingly, both the UC and Comforce bear liability to remedy these "retaliations" under 10 C.F.R. §708.2. Although Comforce has shown that it acted against Mr. Russell solely as a result of actions taken by the UC, that showing does not relieve Comforce from liability in this matter. Part 708 contains no provision exempting a subcontractor from liability under such circumstances. To create such an exemption would vitiate the protections for whistleblowers that Part 708 was intended to provide. Accordingly, I find that Comforce is jointly and severally liable, along with the UC, for the damages arising from Comforce's termination of Mr. Russell's employment on March 5, 1999.

28 DOE at 89,026. The Hearing Officer's determination takes account of the special nature of contractor and subcontractor relationships at DOE facilities. Since the overriding objective of the subcontractor is to satisfy the contractor, which has employed the subcontractor and to which the subcontractor is often legally obligated, the contractor is in a position to exert substantial influence in many respects including by affecting the subcontractor's personnel decisions. Thus, the policy objectives underlying Part 708 mandate that the important legal distinctions between DOE contractor and subcontractor not be viewed as a bar to liability where the subcontractor, acting under the influence of the contractor, carries out a retaliation against a whistleblower complainant. Under these circumstances, the contractor's knowledge of a protected activity may be legally imputed to the subcontractor and constitute constructive knowledge(4) of the protected activity.

(2) Factual Contentions

Excalibur also contests the Hearing Officer's factual findings that there was a temporal nexus between Laul's protected activity and his dismissal, and that the HAC Managers had constructive knowledge of Laul's protected activity.(5) According to Excalibur, these findings are "clearly erroneous" and cannot support the complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his dismissal. Appeal at 11-15. Again, I must disagree.

Excalibur claims that there is no temporal nexus in this case because Laul filed his first Part 708 complaint against his former employer (Tenera) based upon alleged protected disclosures made in 1995, three years before his dismissal by Excalibur, and there is no continuity of ownership between Tenera and Excalibur. I find Excalibur's temporal analysis untenable. While Laul filed his first Part 708 complaint in June 1996, no final agency decision was issued until August 1998. It was on this basis that the Hearing Officer found a temporal nexus in this case, finding that the three personnel decisions that led to Laul's dismissal occurred during the pendency of the Tenera case and "[t]here is also a close time nexus between the protected conduct, which concluded during August 1998, and his October 21, 1998 dismissal." *IAD* at 89,050. I therefore do not agree that the finding of a temporal nexus is clearly erroneous.

I also reject as equally unfounded Excalibur's charge that the Hearing Officer clearly erred in finding that the HAC Managers had knowledge of the complainant's protected activity. Although the HAC Managers denied such knowledge, this is by no means conclusive evidence on this point. In *Dean v. Houston Lighting & Power Co.*, 93-ERA-7 (ALJ Apr. 6, 1995), the DOL considered a similar issue in a case where the contractor (HL&P) denied knowledge of the complainants' (Dean and Lamb) protected disclosures to the Nuclear Regulatory Commission (NRC). The Administrative Law Judge stated, in pertinent part:

> HL&P has categorically denied knowledge of Dean and Lamb's protected activities by Balcom or anyone else responsible for Dean's and Lamb's terminations. **In such circumstances, proof of such knowledge is necessarily established by circumstantial evidence**. . . . I find that Complainants have proved that HL&P had sufficient knowledge of their protected activities to

> act upon that knowledge, and did so, adversely to Complainants. In the absence of proof of direct knowledge obtained through statements or admissions by the Complainants, HL&P managers and decision makers, or other persons with personal knowledge, knowledge imputable to HL&P may be established by proof that its responsible managers heard rumors, which generated suspicions, or made or acted on assumptions that Complainants had spoken to the NRC about their safety concerns. Proof is sufficient if Respondent's managers either were aware, or strongly suspected, that Complainant had complained to the NRC. . . . In this case the HL&P witnesses denied knowledge of Lamb's and Dean's protected activities, at least to the extent that they involved contacts with the NRC. But it is evident that by "knowledge" they meant virtually absolute certainty, that is the level of certainty that would be established by actual observation, documentary confirmation, or direct disclosure by a reliable person. While none of them may have had that degree of certainty, and so could categorically deny such knowledge, the record establishes that they were amply aware of circumstances, through investigations, discussions, and other interactions, as well as close familiarity with personalities in a small universe, which would have supported strong and reasonable suspicions, or assumptions, which could have affected, and, I find, did affect their conduct, which I find was also tempered by the caution that attends the involvement of legal counsel.

Slip op. at 55-56 (emphasis supplied). In the *IAD*, the Hearing Officer performed exactly this kind of analysis of circumstantial evidence in finding knowledge on the part of the HAC Managers. As examined above, the Hearing Officer found on the basis of testimony and supporting evidence that: (1) at least three Kaiser officials were directly aware of the complainant's participation in the protected activity, (2) other Kaiser employees knew of the protected conduct and made negative comments about the complainant, and (3) it is clear that HAC Manager Spears worked with various Kaiser employees who had knowledge of the complainant's participation in the protected proceeding. *IAD* at 89,051-52. In the latter regard, the Hearing Officer found significant that a March 1996 organization chart showed that Spears worked in Kaiser's Safety Engineering and Technical Service Office (SETS Office) and reported directly to one of the Kaiser officials (Kell) who were directly aware of the complainant's participation in the protected proceeding. Indeed, the Hearing Officer found that of the five Kaiser employees working in the SETS Office, besides Spears, three were directly involved in Laul's protected proceeding. The Hearing Officer further found that the HAC Managers' alacrity in negatively evaluating the complainant in January 1998 under the foregoing circumstance was evidence of preconceived negative bias, and found the testimony of the HAC Managers on this point to be "weak and evasive.(6) On the basis of this substantial evidence, albeit circumstantial, I reject the claim that the Hearing Officer was clearly erroneous in concluding that the HAC Managers had knowledge(7) of Laul's protected activity.

I therefore conclude that Excalibur has failed to show in its Appeal that the *IAD* was either legally or factually incorrect in finding that the complainant carried his burden to show that his protected activity was a contributing factor to his dismissal by Excalibur in October 1998.

C. Contractor's Burden

Excalibur's remaining substantive contention is that the Hearing Officer committed clear error in finding that the firm failed to show by clear and convincing evidence that it would have taken the same personnel action regarding Laul in the absence of his protected activity. Excalibur argues that it presented "un-contradicted evidence" regarding its reasons to lay off the complainant. Appeal at 16. According to Excalibur, its decision to place Richards over the complainant was not an adverse action against Laul but was merely intended to relieve Burns of his duties in overseeing the day-to-day operations of the firm. *Id.* Excalibur further maintains that it fully explained its decision to outsource work to a subcontractor (GBA). *Id.* at 17-18. Excalibur concedes that the HAC Managers provided negative feedback regarding work products received in January 1998, but asserts that it was not specific to the complainant. Excalibur maintains that there is "nothing in the record" to support the finding by the Hearing Officer that Excalibur would have rated the complainant differently but for the input of the HAC Managers. *Id.* at 17. Excalibur similarly argues that the finding that it would have considered other options beside dismissing the

complainant absent such input "is unsupported by any evidence in the record." *Id.* at 18.

However, Excalibur has again missed the point. Once it has been ruled that the complainant successfully carried his burden, it is not then the burden of the complainant or the Hearing Officer to adduce evidence establishing the degree to which Excalibur management was negatively influenced by the HAC Managers(8); rather, it is Excalibur's burden to prove by clear and convincing evidence that it would have taken the same actions in the absence of such negative influence. In finding that Excalibur had failed to meet the clear and convincing standard, the Hearing Officer observed initially that Excalibur had not submitted any documents prepared by the complainant or "provide[d] any analysis to support the position that the complainant's work was not technically satisfactory." *IAD* at 89,054. Then, in considering the explanations for Excalibur's determination to retain GBA, the Hearing Officer found the testimony of Burns "illogical" and "unconvincing." *Id.* at 89,053-54. Finally, the Hearing Officer found that Excalibur had provided no plausible explanation for its determination to consider only Excalibur employees, and not subcontractors, when a work force reduction became necessary. *Id.* at 89,055. Based upon my review of this matter, I find that Excalibur has not shown even by a preponderance of the evidence in its present Appeal that the *IAD* is incorrect in finding that the mitigating explanations proffered by Excalibur failed to rise to the clear and convincing standard of proof.

D. Procedural Objections

I will now turn to the numerous procedural challenges raised by Excalibur that primarily relate to evidentiary determinations made by the Hearing Officer in the context of the hearing. Excalibur claims that the Hearing Officer committed reversible error by: (1) failing to exclude evidence that was irrelevant, Appeal at 3-5; (2) admitting hearsay testimony, Appeal at 5-7; (3) permitting testimony from witnesses that lacked proper foundation, Appeal at 7; and (4) permitting the improper use of deposition testimonial evidence, Appeal at 8. Excalibur acknowledges that in hearings conducted under Part 708, "[f]ormal rules of evidence do not apply, but OHA may use the Federal Rules of evidence as a guide," and broad discretion is conferred upon the Hearing Officer in the conduct of the hearing: "The Hearing Officer may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; . . . determine the format of the hearing; . . . ask questions of witnesses; . . . and otherwise regulate the conduct of the hearing." 10 C.F.R. §§ 708.28(a)(4), 708.28(b)(4).

Notwithstanding, Excalibur argues that the cumulative erroneous rulings regarding the evidence admitted at the hearing "caused unfair prejudice against [Excalibur] by confusing the issues" and "substantially influenced the decision that was made and must cause the decision to be in grave doubt." Appeal at 3, 10. In its Reply, Excalibur makes a more serious charge that these rulings "prove that the Hearing Officer had a preconceived negative bias against Excalibur and manufactured a way to find in favor of Laul and against Excalibur." Reply at 2-3. I find these assertions without merit and unsupported by any fair review of the record of this case.

With the luxury of hindsight, it is apparent to me that the Hearing Officer admitted some testimony and evidence which ultimately proved to be irrelevant. However, I perceive no prejudice to Excalibur since such evidence was not relied upon and did not affect the determinations reached in the *IAD*. Nor do I perceive the "confusing of issues" reported by Excalibur. Instead, as discussed above in considering Excalibur's substantive objections, I find that the *IAD* is soundly based on applicable legal precedent, and the factual determinations reached by Hearing Officer were not clearly erroneous as claimed by Excalibur.

Next, Excalibur's claim of "negative bias" on the part of the Hearing Officer is a serious charge and I considered it carefully. Such charges are not sustainable on the basis of mere speculation but must be supported by clear evidence sufficient to overcome the presumption of regularity attached to administrative proceedings. I find no such clear evidence in this case. Rather, it appears that Excalibur's charges of bias simply reflect its displeasure that the Hearing Officer did not reach the determination that the firm seeks. Therefore, no further consideration of this charge is warranted.

IV. Conclusion

On the basis of the foregoing, I conclude that Excalibur has failed to show in its Appeal that the determination reached in the *IAD* is erroneous as a matter of fact or law. Accordingly, Excalibur's Appeal must be denied. The parties shall proceed with the remedial action specified in the *IAD*.

It Is Therefore Ordered That:

(1) The Appeal filed by Excalibur Associates, Inc., on September 12, 2000, of the Initial Agency Decision issued on September 1, 2000 (Case No. VBH-0010), is hereby denied.

(2) Within thirty (30) days of the date of this order, the complainant shall provide Excalibur with the information specified in Paragraphs (2) and (3) of the Initial Agency Decision. Excalibur shall then perform the remedial action specified in Paragraph (4) of the Initial Agency Decision.

(3) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals, within thirty (30) days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 9, 2001

(1)Excalibur initially filed a document entitled "Issues for Appeal" on September 27, 2000, in which the firm itemized 38 objections to determinations made by the Hearing Officer during the complaint proceeding. However, in each instance, Excalibur failed to provide any argument in support of its position. Accordingly, on October 12, 2000, Excalibur was directed to file an Amended Statement of Issues. Letter of October 12, 2000, from Fred L. Brown, Deputy Assistant Director, OHA, to David Zwisler, Esq., Counsel for Excalibur. The Amended Statement of Issues filed by Excalibur on November 2, 2000, shall be referred to as "the Appeal."

(2)Excalibur does not argue that the Laul complaint does not satisfy these procedural requirements. As noted in the background section, Laul filed the present complaint on December 18, 1998, within 90 days of his dismissal on October 21, 1998. The complaint clearly alleges that the dismissal was in retaliation for his participation in a prior proceeding under Part 708.

(3)In reaching this conclusion, I do not necessarily agree with the Hearing Officer's approach in applying the legal standard set forth in *Barbara Nabb, supra*. He held that a "contributing factor" could be established by showing 1) constructive knowledge by Excalibur and 2) temporal nexus. Standing alone, this formulation is unassailable. However, it could be misread if it is viewed as the ONLY way in which a complainant can establish that the protected "act" was a "contributing factor" to a retaliation. A Hearing Officer in Part 708 proceedings can find that the "contributing factor" test has been satisified on the basis that the evidence shows there is a "causal relationship" between the protected act or disclosure and the alleged act of retaliation. In this proceeding, the Hearing Officer found that in dismissing Laul, Excalibur management was negatively influenced by the HAC Managers who had knowledge of Laul's protected activity. The Hearing Officer might therefore have found on this basis alone that there was "sufficient evidence to permit a reasonable person to infer that the protected [activity] was a contributing factor to the determination." *Am-Pro Protective Services, Inc.*, 26 DOE at 89,065, *citing Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see Frazier v. Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982). Notwithstanding, I find no reason to conclude that the Hearing Officer's analysis was incorrect as a matter

of law.

(4)I do not disagree with Excalibur's contention that the Hearing Officer's use of the term "constructive knowledge" with respect to Excalibur does not comport with the general usage of that term, involving instances where appropriate persons "knew or should have known" or "would have known by exercise of reasonable care." Appeal at 20, *citing* Black's Law Dictionary (6th Ed.). However, the term nevertheless seems apt. In the *IAD*, the Hearing Officer extended the term "constructive knowledge" in Part 708 proceedings to instances where, as here, Excalibur was negatively influenced by those having knowledge of protected conduct and thus was vicariously motivated by such knowledge in taking an adverse personnel action against the complainant, although actual knowledge of the particular conduct was not passed on. *Cf. Frazier v. Merit Systems Protection Board, supra.*

(5)Excalibur also argues that the Hearing Officer's "factual finding" of constructive knowledge by Excalibur is clearly erroneous since "there is no evidence of the transfer of the knowledge of the protected activity" from the HAC Managers to Excalibur. Appeal at 16. Here, Excalibur simply misses the point. The Hearing Officer's finding of constructive knowledge by Excalibur was not based upon the transfer of knowledge of the protected activity from the HAC Managers but on the finding that the Kaiser HAC Managers directly influenced the adverse personnel actions taken by Excalibur against Laul. Indeed, the Hearing Officer acknowledged in the *IAD* that "I believe that Excalibur employees were not aware of the complainant's participation in the prior protection proceeding." *IAD* at 89,053.

(6)"Excalibur challenges the Hearing Officer's assessment that the HAC Managers were not candid in their testimony. Appeal at 15, n. 4. However, the Hearing Officer is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony, *Altemose Construction Company v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975), and I give substantial weight to credibility findings that "rest explicitly on an evaluation of the demeanor of the witnesses," *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

(7)I do find, however, that the Hearing Officer's characterization of the HAC Managers' knowledge as "constructive" to be inapt. While it is an inconsequential semantic distinction in this case, the Hearing Officer should have determined on the basis of the record in this case that there was sufficient circumstantial evidence of "actual" knowledge, based upon a finding that it is more likely than not that the HAC Managers knew of Laul's protected conduct. *See Dean v. Houston Lighting & Power Co., supra.*

(8)It is true that the Hearing Officer found that "[i]n this case, Excalibur's senior management's opinions of the complainant were clearly affected in a number of ways by the evaluation of the HAC Managers." *IAD* at 89,054. However, this finding was simply an outgrowth of his preceding determination that Laul had carried his burden to show that his participation in the protected activity was a contributing factor to the adverse personnel decisions. *IAD* at 89,053-54.