# Case No. VBA-0032

November 26, 1999

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Roger H. Hardwick

Date of Filing: July 26, 1999

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This Decision considers an Appeal of an Initial Agency Decision issued on July 6, 1999, on a complaint filed by Roger H. Hardwick (Hardwick or the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Hardwick seeks compensation for alleged retaliatory actions taken against him by Science Applications International Corporation (SAIC), a DOE contractor, and by KenRob and Associates, Inc. (KenRob), his former employer under a subcontract with SAIC, as a result of making an alleged protected disclosure to DOE. In the Initial Agency Decision, however, the Hearing Officer determined that the complainant had failed to show that the matters he relayed to DOE constituted a protected disclosure under Part 708. As set forth in this decision, I have determined that Hardwick's Appeal 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 related proceeding, will be directed by the DOE to provide relief to the complainant.

The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2,

1992, establish administrative procedures for the processing of complaints. As initially formulated, these procedures typically included independent fact-finding by the DOE Office of Inspector General (IG), 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 may request a hearing before a Hearing Officer assigned by the DOE Office of Hearings and Appeals (OHA), pursuant to which the Hearing Officer renders an Initial Agency Decision.

On March 15, 1999, DOE issued an amended Part 708, effective April 14, 1999, setting forth procedural

revisions and substantive clarifications 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). Certain of these amendments have bearing upon the present proceeding. Under the revised regulations, review of an Initial Agency Decision, as requested by Hardwick in the present Appeal, is performed by the OHA Director. 10 C.F.R. § 708.32.

## B. Complaint Proceeding

The present case was initiated by the filing of a complaint by Hardwick on December 23, 1994. The factual allegations set forth in Hardwick's complaint, described below, are essentially uncontroverted.

In January 1992, the complainant was employed by KenRob as Telecommunications Manager at the firm's office in Las Vegas, Nevada. In this capacity, Hardwick's mission was to develop a base for new business in the western United States, with a primary emphasis on telecommunications and computer technical support services.

During 1993, SAIC was the prime contractor with the DOE for a Technical and Management Support Services Contract for the Yucca Mountain Site Characterization Project (YMP). Under this contract SAIC was required to perform a wide range of scientific, technical management and administrative support services, including provision of computer support services to both DOE's Las Vegas Office, and DOE's Yucca Mountain Site office, located about 100 miles from the Las Vegas office. On December 6, 1993, SAIC awarded a contract to KenRob, which was staffed solely by Hardwick. Hardwick was named as telecommunications specialist, and his role was to provide computer support services (also referred to as information technology or IT) at the Yucca Mountain Site Office (YMSO). The performance period for this contract was from December 6, 1993, through March 31, 1994.

In January 1994, Hardwick met with John Gandi, DOE Team Leader for Information Resources Management at the Yucca Mountain office and offered his view that improvements in IT support at the YMSO were necessary. Hardwick prepared a draft letter outlining his concerns, and presented the draft to Winfred Wilson, then DOE site manager of the YMSO.

Mr. Wilson adopted Hardwick's draft virtually without change, structured it as a memo from himself to Mr. Gandi, and sent it to Mr. Gandi. The memorandum as drafted seemed to indicate that Mr. Gandi should consider improvements in providing IT support to the YMSO. Copies of the memorandum, which was dated January 18, 1994, were sent to five SAIC employees and three DOE employees, who were located at the Yucca Mountain Site. Approximately two weeks later, Harold Brocklesby, a SAIC manager who received a copy of the memo, told Hardwick that his duties under the SAIC subcontract were over. On May 23, 1994, KenRob was awarded a contract by the DOE's Office of Civilian Radioactive Waste Management (OCRWM) to provide communications network and computer facilities support at Las Vegas, Nevada and Washington, D.C. locations. Hardwick was not offered any position under that contract. On July 13, 1994, KenRob issued a letter to Hardwick advising him that his employment would be terminated in 30 days. His employment was terminated on August 12, 1994.

Following its investigation of the matters described in the complaint, the IG issued a Report of Inquiry and Recommendations on February 19, 1999 (IG Report). The IG Report found that Hardwick made a protected disclosure under 10 C.F.R. Part 708, and that the disclosure was a contributing factor to his removal from the SAIC contract and not being appointed to any position under the OCRWM contract. The IG Report further found that SAIC and KenRob failed to provide clear and convincing evidence that these personnel actions would have been taken in the absence of the protected disclosure.

On March 3, 1999, KenRob submitted a request for a hearing under 10 C.F.R. § 708.9, that was transmitted to OHA on March 8, 1999, at which time a Hearing Officer was appointed by the OHA Director. Following the resolution of various procedural motions, the Hearing Officer convened a hearing in the case on June 8, 1999. However, the Hearing Officer terminated the hearing after all evidence

concerning the nature of Hardwick's disclosure had been received.(1) As subsequently explained in the Initial Agency Decision issued on July 6, 1999, the Hearing Officer determined at an early stage of the hearing that Hardwick had failed to show by a preponderance of the evidence that the disclosure he made during a January 1994 meeting with Mr. Gandi, and later described in the January 18, 1994 memorandum, was protected under 10 C.F.R. Part 708.

The Initial Agency Decision points out that the Contractor Employee Protection Program of Part 708 does not provide protection to employees for every disclosure, but enumerates the specific types of disclosures for which employment retaliation is prohibited. Generally, protected disclosures are those which reveal information concerning gross waste, fraud, abuse, gross mismanagement, substantial violations of law and substantial dangers to employees or to public health and safety. 10 C.F.R. § 708.5. Given the facts of the present case, the Hearing Officer concluded that the matters disclosed by Hardwick in the January 18, 1994 memorandum did not fall within the scope of these types of protected disclosures. Hardwick claimed that his memorandum sets forth protected disclosures relating to gross waste, fraud, abuse and mismanagement on the part of SAIC. The Hearing Officer found, however, that despite these general claims, Hardwick had failed to state with specificity or adequately explain how SAIC's failure to provide what he believed to be the correct level of technical support at YMSO constituted gross waste, fraud, abuse or mismanagement.

Particularly with regard to his purported disclosure of mismanagement,(2) Hardwick argued that he needs only to show that there was "mismanagement," and not "gross mismanagement," as stated in the revised Part 708 regulations effective April 14, 1999. 10 C.F.R. § 708.5(a)(3). The Hearing Officer rejected this contention, however, observing that the insertion of the word "gross" in the regulation was merely a clarification and by doing so, the agency was not adopting a more stringent standard of "mismanagement" to invoke regulatory protection. As pointed out by the agency in the Notice of Proposed Rulemaking, "the criterion of ?gross' mismanagement is consistent with the provisions of the Whistleblower Protection Act of 1989 (5 U.S.C. 2302(b)(8))." 63 Fed. Reg. 733, 734 (January 5, 1998). Furthermore, under established case law preexisting the revision, a disclosure of mismanagement has been required to involve serious matters to receive protection under Part 708, and not just disagreements between managers and employees. *Holsinger v. K-Ray, Inc.*, 26 DOE ¶ 87,506 (1996); *Mehta v. Universities Research Assoc.*, 24 DOE ¶ 87,514 (1995) (*Mehta*). Thus, the Hearing Officer ultimately determined in the Initial Agency Decision that the matters raised by Hardwick in the January 18, 1994 memorandum did not rise to a disclosure of mismanagement within the purview of Part 708. The Initial Agency Decision explains:

Mismanagement does not include a difference of opinion on decisions that are debatable. The mismanagement that is covered by Part 708 involves action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *See Carolyn v. Dep't of the Interior*, 63 M.S.P.B. 684 (1994). The Complainant here cannot, through broad, speculative and unsupported assertions about possible ill-effects of limited IT services, bootstrap his discussion regarding IT improvements into a protected disclosure of serious mismanagement.

Initial Agency Decision at 19-20.

In accordance with section 708.32(a), Hardwick filed a Notice of Appeal of the Initial Agency Decision on July 26, 1999, followed by a Statement of Appeal (Hardwick Appeal) on September 8, 1999. On October 12, 1999, KenRob and SAIC filed their respective Responses to the Hardwick Appeal. 10 C.F.R. § 708.33(a).

# II. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the OHA Director. *See David Ramirez*, 23 DOE ¶ 87,505 (1994). The regulations provide, in pertinent part, that a DOE contractor

may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee for "[d]isclosing to a DOE official . . . information that [the employee] reasonably and in good faith believe[s] reveals -- (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority." 10 C.F.R. § 708.5(a)(3). However, the regulations clearly place the initial burden upon the complainant: "The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure . . . ." 10 C.F.R. § 708.29; *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993). "Preponderance of the evidence" is 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 Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (*Hopkins*); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). As a result, the complainant has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he made a disclosure protected under Part 708. If the complainant does not meet this threshold burden, he has failed to make a *prima facie* case and his claim must therefore be denied.

## A. Hardwick Appeal

In his appeal, Hardwick raises a number of contentions in support of his position that the determination reached in the Initial Agency Decision is incorrect as a matter of fact and law. Hardwick argues: (1) the Hearing Officer's conclusion that Hardwick did not reasonably believe that he was making a protected disclosure is contrary to the IG Report; (2) the Hearing Officer failed to understand the true nature of Hardwick's disclosure; (3) the seriousness of Hardwick's disclosures is verified by Mr. Gandi's response to the January 18, 1994 memorandum; (4) Mr. Gandi's plan to have Hardwick write a letter for Mr. Wilson's signature demonstrates that Hardwick's disclosures identified serious mismanagement; (5) Mr. Gandi's response to Hardwick's disclosures was muted due to personal relationships existing between senior DOE officials and SAIC management. These contentions are addressed successively below.

In support of his Appeal, Hardwick initially points to the IG's finding in its report of investigation that Hardwick "disclosed to a DOE official issues regarding the coordination and communication of SAIC Information Services staff located in Las Vegas and [IT] support staff at the Yucca Mountain Site Office." IG Report at 7. I note, however, that although the IG Report found that Hardwick made a protected disclosure, it does not specifically state or even examine specifically what type of protected disclosure Hardwick is deemed to have made. In any event, the Part 708 regulations provides that in making findings in support of Initial Agency Decision, "the Hearing Officer may rely upon, but is not bound by, the report of investigation." 10 C.F.R. § 708.30(c). Thus, the fact that after a more detailed examination of the issues, the Hearing Officer ultimately reached a different determination than the IG Report does not mean that the Initial Agency Decision is defective.

Turning to the alleged protected disclosure of gross mismanagement, Hardwick argues that "[c]ontrary to the Hearing Officer's decision, [the January 18, 1994 memorandum] clearly identified serious mismanagement in the operation of SAIC's contract to provide [IT] services at the Yucca Mountain Site Office field operations." Hardwick Appeal at 2-3. Borrowing phrases used in the memorandum, Hardwick asserts that "coordination and communication," "significant degradation of service," and "lack of documentation and policies and procedures" are not *de minimis* disclosures. Hardwick further argues that these disclosures must be considered significant and serious in view of the critical importance of the Yucca Mountain project, undertaken as a future depository for high-level nuclear waste, and "having a viable, functional and competent computer network at the project site . . . was essential to the operation." Hardwick Appeal at 3. Nonetheless, having examined the January 18, 1994 memorandum and related record, I must uphold the determination reached in the Initial Agency Decision.

As stated by the DOE Deputy Secretary in considering an analogous complaint, "[e]quating a particular type of disagreement to ?mismanagement' as contemplated by the ?whistleblower' regulation demands a careful balancing lest the term encompass all disagreements between contractor and its employees." *Mehta v. Universities Research Association*, 24 DOE ¶ 87,514 at 89,065 (1995) (complaint dismissed on jurisdictional grounds). In the present case, I believe that when balanced in context, the matters relayed by Hardwick did not constitute a disclosure of mismanagement contemplated for protection under Part 708.

For instance, in *Smith v. Dep't of Army*, Dkt. PH-1221-97-0447-W-1 (November 24, 1998) (*Smith*), the Merit Systems Protection Board (MSPB), considered a whistleblower claim based upon a purported disclosure of mismanagement and reaffirmed the legal principles relied upon by the Hearing Officer in the Initial Agency Decision. In rejecting the whistleblower claim in *Smith*, the MSPB stated:

"Gross mismanagement" is more than de minimis wrongdoing or negligence. *Embree v. Department of Treasury*, 70 M.S.P.R. 79, 85 (1996). It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. *Id.* There must be an element of blatancy. Therefore gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission. *Id.*

Slip op. at 2; *see also Carolyn v. Dep't of the Interior*, 63 M.S.P.B. 684 (1994). Having reviewed the January 18, 1994 memorandum in detail, I find no direct or indirect charge of mismanagement with regard to SAIC's provision of IT support, but only an itemization of concerns concluding that "if we deal with these issues now it will make growth easier." Hardwick Appeal, Exhibit 4 at 2. Assuming there were adequate funds available to address the problems, it might be argued on the basis of the memorandum that SAIC management had been somewhat negligent with regard to IT support at the YMP. However, as clarified by *Smith*, simple negligence does not amount to mismanagement or nearly begin to approach the threshold "element of blatancy" inherent in a disclosure of gross mismanagement, protected under Part 708. Hardwick maintains that the matters discussed in the memorandum, *e.g.* "coordination and communication," are serious and not *de minimis*. Hardwick has missed the point. That the memorandum discusses serious matters does not mean that the memorandum revealed serious mismanagement with regard to those matters.

We find equally unavailing Hardwick's next contention that the seriousness of his disclosures is demonstrated by Mr. Gandi's May 17, 1994 memorandum to Mr. Wilson (Hardwick Appeal, Exh. 5), which Hardwick claims was in response to the January 18, 1994 memorandum. The May 17, 1994 memorandum details a number of completed and proposed improvements in IT support for the YMSO. According to Hardwick, the "seriousness" of the January 18, 1994 memorandum is "verified" since "these changes and improvements would not have been accomplished but for Hardwick's disclosures." Hardwick Appeal at 4. I note that the record does not fully support Hardwick's claim that the IT support initiatives outlined in the May 17, 1994 memorandum were taken directly in response to the January 18, 1994 memorandum.(3) In any event, the fact that DOE recognized the importance of IT support and took action to make improvements in the area as funds became available does not necessarily mean that Hardwick's prior stated concerns amounted to a disclosure of gross mismanagement. To the contrary, other parties to the discussions leading to the January 18, 1994 memorandum testified that they considered Hardwick's concerns to be positive recommendations for improvement rather than intimating an allegation of mismanagement.(4)

Next, Hardwick argues that his disclosures must have involved a protected disclosure of gross mismanagement because Mr. Gandi "did not discount the validity or importance of his disclosure." Hardwick Appeal at 5. In this regard, Hardwick maintains that "[i]f [his] disclosures weren't significant, Gandi wouldn't have concocted the plan to have Hardwick write a letter for Wilson's signature." Hardwick Appeal at 6.(5) Again, however, I cannot make the logical leap that Hardwick urges. While Hardwick's concerns were ostensibly deemed significant to the degree that they were recommended for documentation in a memorandum, this does not lead us to the conclusion that Mr. Gandi perceived Hardwick's concerns as charges of gross mismanagement. Instead, as recounted by the Hearing Officer, Mr. Gandi testified at the hearing that "he did not see the January 18 memo as ?negative' [but] as pointing out areas which could use some improvement." Initial Agency Decision at 14.

Finally, Hardwick asserts that according to a 1996 report of the General Accounting Office (GAO), two senior DOE officials at the YMP had personal relationships with SAIC employees. Hardwick maintains that "[t]hose relationships would certainly explain the bizarre way that Gandi decided to act upon

Hardwick's disclosures." Hardwick Appeal at 6-7. However, in the absence of any viable evidence that an actual disclosure of gross mismanagement was made, I consider Hardwick's final contention highly speculative, immaterial, and beyond the scope of the Initial Agency Decision. Indeed, as pointed out in KenRob's Response, the Hearing Officer determined early on in the proceeding in an interlocutory letter determination that this apparent charge of an ethical violation raised by Hardwick was "irrelevant to the proceeding." Letter of May 28, 1999, from Virginia A. Lipton, Hearing Officer. I concur with this determination.

## B. Conclusion

On the basis of the foregoing, I conclude that Hardwick has failed to show in his Appeal that the determination reached in the Initial Agency Decision is erroneous as a matter of fact or law. I concur with the determination that pertinent matters discussed by Hardwick in January 1994, as later set forth in a memorandum of January 18, 1994, did not constitute a disclosure protected under the provisions of the Contractor Employee Protection Program, 10 C.F.R. Part 708. Accordingly, Hardwick's Appeal must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Roger W. Hardwick on July 26, 1999, of the Initial Agency Decision issued on July 6, 1999 (Case No. VWA-0032), is hereby denied. Accordingly, as determined in the Initial Agency Decision, the complaint filed by Roger W. Hardwick on December 23, 1994, under the Contractor Employee Protection Program, 10 C.F.R. Part 708, is denied.

(2) 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 30 days after receiving this decision. 10 C.F.R. § 708.35.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 26, 1999

(1)Subsequent to the hearing, the Hearing Officer learned that the court reporter's car had been burglarized, and all the tapes made of the hearing were stolen. Consequently, no transcript of the hearing exists, and the discussion of the hearing in the Initial Agency Decision is based on the Hearing Officer's recollection of the testimony and notes made during the hearing.

(2)The Initial Agency Decision states that during the hearing and in a pre-hearing deposition, Hardwick "virtually admitted" that he had no support whatsoever for his claims of gross waste, and fraud, and thus the Hearing Officer properly determined that the only claim that might have some validity is that of mismanagement. Initial Agency Decision at 19, note 11.

(3)While there is some overlap, the May 17, 1994 memorandum clearly goes beyond the scope of the January 18 memorandum. As further pointed out by the Hearing Officer, Mr. Wilson himself did not perceive the May 17, 1994 memorandum as being in reply to the January 18 memorandum. Initial Agency Decision, at 15 n. 7.

(4)The Hearing Officer recounts that at the hearing, Mr. Gandi, Mr. Wilson and Ms. Mary Ann Jones (Mr. Gandi's Deputy), uniformly testified that at no time during their January 1994 discussions did Hardwick express a concern rising to alleged mismanagement. The Hearing Officer further recounts that Hardwick did not attempt to rebut this testimony when provided an opportunity. Initial Agency Decision, at 19 n. 10.

(5)Hardwick's supposition that Mr. Gandi "concocted a plan" in this regard runs contrary to the testimony presented at the hearing. According to Mr. Wilson, it was his recommendation that Hardwick draft a memorandum reflecting his concerns about IT services. *See* Initial Agency Decision at 15.