May 9, 2002

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janet L. Westbrook

Date of Filing: January 17, 2002

Case Number: VBA-0059

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on December 21, 2001, involving a Complaint filed by Janet L. Westbrook (Westbrook or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Westbrook claims that her former employer, UT-Battelle, LLC (Battelle or the Company), the DOE contractor that manages the Oak Ridge National Laboratory (the Laboratory), terminated her as part of a reduction in force (RIF) as a retaliation for making disclosures that are protected under Part 708. In the IAD, however, the Hearing Officer determined that Battelle had shown that it would have terminated the Complainant, even in the absence of the protected disclosures. As set forth in this decision, I have decided that this determination is clearly erroneous and that Westbrook should be granted relief.

# 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 retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Westbrook in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

## B. History of the Complaint Proceeding

The events leading to the filing of Westbrook's Complaint are fully set forth in the IAD. *Janet L. Westbrook*, 28 DOE ¶ 87,018 (2001)(*Westbrook*). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Westbrook was employed as a radiation safety engineer at the laboratory from 1989 to December 1, 2000. One of her responsibilities was to perform radiation safety reviews under a principle known as ALARA,

meaning “as low as reasonably achievable,” economic and social factors being taken into account. The ALARA engineers group was composed of four persons: one supervisor and three staff engineers, one of whom was Westbrook. During the relevant period the chain of command at the laboratory was as follows: Westbrook’s supervisor was Dr. Gloria Mei, the head of the ALARA engineering group. Mei reported to Dr. Ron Mlekodaj, who in turn reported to Dr. Steve Sims, who was the Director of the Battelle Office of Radiation Protection. Sims was in that position until October 2000, when there was a general reorganization within the Environment, Safety, Health and Quality Directorate. After October 2000, Sims became the Deputy Director of the Occupational Safety Services Division of the Directorate. Ms. Carol Scott is the Director of that Division.

On June 8 and 12, 2000, Westbrook met with Scott to discuss concerns that she had about radiation safety at the lab. In August 2000 Scott and Sims decided to reduce the ALARA engineer staff from 3 to 1, as part of a larger lab-wide reduction in force. On December 1, 2000, Westbrook was terminated as part of that RIF.

Westbrook filed a Complaint under Part 708 with the DOE Oak Ridge Operations Office (DOE/OR). After the completion of an investigation, Westbrook requested and received a hearing on this matter before an OHA Hearing Officer. There were 11 witnesses who provided testimony during a hearing that lasted two days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

# C. The Initial Agency Decision

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee’s disclosure. . . .

10 C.F.R. § 708.29.

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee reasonably believes that she is disclosing a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety. . . .(1) In this case, Westbrook claimed that Company management chose her for dismissal during the RIF because of her long series of protected disclosures, especially the disclosures she made during her June 2000 meetings with Scott.

As the IAD pointed out, there was no dispute that Westbrook disclosed to her employer what she believed to be violations of Laboratory rules governing procedures to be followed when the potential exists for radiation exposure. The Company’s position was that no reasonable person, especially a radiation engineer like Westbrook, could have reasonably believed that the problems that she noted revealed a *substantial* violation of law, rule or regulation or a *substantial* and specific danger to employees or the public health and safety. *Westbrook*, 28 DOE at 89,114-115.

The IAD noted that a DOE Investigator found that Westbrook articulated at least six concerns during her June 2000 meetings with Scott. However, as the IAD stated, Westbrook needed to show only that she made one protected disclosure. After reviewing the record and the hearing testimony, the IAD found that Westbrook made a protected disclosure involving the Laboratory’s decision to raise the dosage level to 5 rem per hour before an ALARA review was required to be performed, a level that Westbrook noted is significantly higher that the one rem per hour used at other DOE facilities.(2) The IAD concluded that where a radiation safety engineer complains about matters that could lead to higher radiation exposures for

workers at the Laboratory and fellow engineers share her belief, substantial issues are raised that fall within the purview of the Contractor Employee Protection Program.

Westbrook also disclosed to Scott concerns regarding Sims' approval of a waiver of Laboratory rules to implement the change from using engineers to using technicians, to perform certain radiation safety reviews. The IAD found that since the switch could significantly affect employee health and safety, these disclosures raised substantial concerns that were protected under Part 708.

The IAD stated that Scott made her decision as to whom to eliminate in the RIF in August 2000, two months after her June meeting with Westbrook. The IAD determined that the two-month period clearly established a temporal proximity between the disclosure and the retaliation sufficient to meet the regulatory requirement that the employee establish that the protected disclosure was a contributing factor to the retaliation.

The IAD next considered whether the Company had clearly and convincingly demonstrated that it would have terminated Westbrook in the absence of the protected disclosures. 10 C.F.R. § 708.9(d). The IAD noted management's determination to move the ALARA engineering group from an overhead function to a "charge-out" function. This decision was made before Westbrook made her protected disclosures in the June 2000 meetings with Scott. *Westbrook*, 28 DOE at 89,118. The IAD also considered the testimony of Sims and Scott that, based on their knowledge of the engineers' work, they would be able to charge to other programs the work of only two ALARA engineers: the engineer who had supervisory experience (Mei) and one of the three others. The IAD found that in deciding which of the three other ALARA engineers to retain, Scott and Simms had only one consideration in mind: which engineer would be able to charge out his cost. They selected the engineer who had charged out one-third of his time that year and for whom an office using his services had already indicated that it would pay for one-half of his time in the coming year. The IAD pointed out Sims' testimony that no office had expressed a willingness to pay for Westbrook's time and in fact, according to Sims, officials had made negative comments about Westbrook. In summary, the IAD found that Westbrook's discharge occurred because "(i) senior management required the cost associated with positions in her group to be charged to parts of the Laboratory that utilized their services, (ii) management believed that it might be able to charge out time associated with two ALARA engineer positions, and (iii) frictions between potential customers and Westbrook meant her time was the least likely to be able to be charged out to customers." *Id.* at 89,119. Based on these considerations, the IAD concluded that the Company had shown by clear and convincing evidence that it would have terminated Westbrook even if she had not made the protected disclosures.

# II. The Westbrook Statement of Issues and the Company's Response

## A. Statement of Issues

Westbrook filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). 10 C.F.R. § 708.33. The Statement raises the arguments set forth below to support Westbrook's contention that the Company did not show by clear and convincing evidence that it would have terminated her in the absence of the protected disclosures.

### 1. RIF Review Sheets

The Statement notes that Company procedures for selecting employees to be terminated in a RIF require that qualifications of targeted employees be compared through the use of a RIF Review sheet. The RIF Review sheets in this case were compiled by Sims and submitted to Scott on August 23, 2000.

Administrative Record at 224, 226. The Statement contends that according to testimony of Sims, Scott made the decision to terminate Westbrook in a July 21, 2001 meeting, which took place more than one month before Scott compared the qualifications on the RIF Review Sheets. Transcript of Hearing (Tr.) at 391-92.

The Statement also points to testimony of Mei, Westbrook's direct supervisor, who gave Westbrook a score of "6" out of a possible "7" as a performance rating. This rating was given on approximately June 30, and was approved by Mlekodaj, Mei's supervisor. Tr. at 416; 427-28. However, Mei was instructed to change the rating from "6" to "3". Later a compromise rating of "4" was agreed upon. This rating was the one that appeared on the RIF sheets. Tr. at 319, 419, 429-30.

The Statement points out that the RIF review sheets compared the qualifications of the three employees and maintains that under the objectively measurable criteria set out on the RIF sheets, Westbrook should have been the employee who was retained. In this regard, the Statement notes that Westbrook has been with the Lab longer than the retained employee; is over 40 years of age and therefore entitled to extra consideration; and has considerably more overall experience than the retained employee.

### 2. Charge-Out Justification

The Statement notes that a key reason given for reducing the ALARA staff by two employees and for terminating Westbrook was that all work needed to be charged out in the future and Westbrook performed the lowest level of charge-out work of the three candidates. However, the Statement contends that Scott did not consider that there was considerable other work performed by Westbrook that was not charge-out type work, had been funded by overhead in the past, and would need to be funded by overhead in the future.

The Statement contends that the finding of the IAD that Westbrook was difficult to work with is unsubstantiated by any witnesses and is only provided through hearsay evidence of Scott and Sims.

## B. The Company's Response

In its response to the Westbrook Statement of Issues, the Company raises the following contentions. First, the Company sets out what it believes to be the appropriate standard for review in this case. The Company argues that unless the findings of fact are clearly erroneous or without substantial basis, they may not be disturbed on appeal. The Company then responds seriatim to a number of points raised by Westbrook's Statement of issues. I will not detail each response here. However, I will note key Company objections in areas that will be addressed more fully below.

In response to the claim in the Statement of Issues that Westbrook's performance evaluation was unfairly lowered by Scott, the Company contends that Mei did not have unilateral authority to assign a performance rating to Westbrook. The Company also states that the Statement of Issues erroneously claims that Scott did not follow the RIF review process. In this regard, the Company argues that the testimony of all witnesses supports the position that standard RIF procedures were followed. The Company also reiterates its position that Westbrook's low charge-out rate indicates that it would not be able to fully charge her time under the new system. The Company repeats that because Westbrook was difficult to get along with, she was unable to cultivate customers to whom she could charge out her services.

# III. Analysis

As I indicated above, the IAD noted that the Complainant was terminated as part of an overall reduction in force (RIF), in which two engineer positions were selected for elimination. Thus, the two key actions to be examined in this case are the decision to eliminate two positions, and the selection of Westbrook's

position as one of the two eliminated. In this regard, the IAD found that management's decision to eliminate two positions was based on its determination that all ALARA work would be charged out in the future. It also found that the Company's decision in selecting which of the three ALARA staff engineers would be "riffed" was based on "who among the three would be able to charge out his cost." *Westbrook*, 28 DOE at 89,118.

After reviewing the entire record in this case I have several concerns about the overall approach of the IAD. I recognize that the IAD found the testimony of Scott and Sims to be candid. I am not reevaluating that determination. However, I believe that the IAD failed to consider some important evidence in the record that refutes the Company's position that it would have terminated Westbrook absent the protected disclosures. Further, the IAD accepted the assertions of Battelle's witnesses that Westbrook would not be able to charge out her work, even though there was weak, if any, corroboration for this point. In my view, the IAD did not adequately evaluate whether the totality of the Company's evidence was sufficient to meet Battelle's burden of proof in this case. As discussed below, after considering these factors and giving them appropriate weight, I find that Battelle has not met its burden to show by clear and convincing evidence that it would have terminated Westbrook in the absence of the protected disclosures. In this regard, I do not attach particular significance to the fact that the decision to charge out ALARA work was made before Westbrook made the protected disclosures. I accept the overall determination that some ALARA functions would need to be charged out was made impartially and without regard to Westbrook. Ultimately, as discussed below, I find Battelle has not supported its position that (i) it would have to discharge two ALARA engineers in order to satisfy the charge-out mandate, and (ii) the selection of Westbrook as one of the discharged engineers was made without consideration of her protected disclosures.

# A. Evidence Regarding the Decision to Eliminate Two Positions

I found little support in the record for the Company's stated position that if it adopted a charge-out system, it would be necessary to eliminate two staff engineer positions. According to the evidence, significant non charge-out work was being performed by the staff engineers. In this regard, Mei, Westbrook's direct supervisor, testified that Westbrook had been assigned to projects that were not associated with charge-out functions. Tr. at 422-24. Scott's testimony supported this conclusion. She testified that most of the ALARA work was overhead work, i.e. work that would remain even if some other types of work were to be charged out. However, when asked how this other work would be paid for, she stated that Sims would have to answer this question. Tr. at 354- 55. Sims agreed that even though Westbrook was only using 11 percent of her time towards charge-out functions, she was not working only 11 percent of a full time schedule. There was significant overhead work that she was performing. Tr. at 384. Sims was asked who would perform this other work if two ALARA engineers were terminated. He testified that he was not familiar with that work, and did not know if Westbrook was terminated who would perform it. Tr. at 384, 385, 386. (3)

Thus, according to the testimony, there was a considerable amount of overhead work for the ALARA team at the lab. Yet, Scott and Sims, who made the ALARA RIF determination, were unclear about the basics of the overhead work. They seemed to be unaware of the scope of the overhead work, did not know who performed it or give serious thought as to how this overhead work would be performed after the RIF. Their failure to focus on the overhead work leads me to question the thoroughness of the deliberations leading to the decision to RIF two ALARA engineers. To help meet its burden of proof in this regard, the Company could have explained, through its witnesses, how those overhead functions have been performed since the RIF. The weakness of the Scott and Sims testimony on this point detracts from the Company's position that the RIF of two ALARA engineers was necessary. Without more clarity on the overhead work issue, I am not persuaded that the Company made a rational and informed decision to terminate two ALARA engineers. In light of the fact that there was still essential non charge-out work to be performed, the assertion that two ALARA engineer positions should or could be eliminated seems pretextual.

# B. Evidence Regarding the Company's RIF Sheets

There is evidence in the record that suggests that the RIF sheets, which contained the objective information on which the termination selections were to be made, were not given serious attention, and were drawn up to favor a preselected individual. I have reviewed the criteria set out on the RIF sheets and find troubling inaccuracies and manipulation. They lead me to doubt the Company's position that the process by which Westbrook was not selected as the retained employee was unrelated to the protected disclosures.

For example, a key criterion in the RIF selection process appears to have been manipulated by the Company and misapplied to the Complainant. Entitled "transferability of skills," this criterion was one of six set out on the RIF comparison worksheets. The definition of this criterion as set out on the RIF sheet is as follows: "Ability to directly transfer skills or acquire new skills necessary to maintain core competencies, demonstrates flexibility and adaptability to changing needs of business. Has multiple skills to work a variety of functions, seeks opportunities to learn new skills and improve on known skills." "Flexibility" in this context has to do with transferability of substantive skills in order to adapt to changing needs of business. This transferability of skills criterion is not an uncommon RIF criterion. The definition quoted above, and provided for this criterion--ability to transfer skills and acquire new skills necessary to maintaining core competencies--indicates to me that this criterion was given its familiar definition. I assume that this criterion and its definition here were used throughout the Company-wide RIF, and I see nothing unusual in either the criterion or its definition. Both are easy to understand. *See* Tr. at 75-76.

However, I was surprised to see the way this criterion was applied in this case. Specifically, the retained employee's rating has an unusual notation: "His flexibility has led to his *being in demand by customers*." (Emphasis added.) This makes little sense. The stated definition of flexibility relates to acquiring substantive skills to adapt to changing business needs. In actuality, the retained employee had no newly-acquired substantive skill that the complainant lacked. Something else in my view accounts for the more favorable rating on this criterion. I believe it is the Company's other purported concern that Westbrook could not get along with customers and would not be able to charge out work. That concern is unrelated to this criterion. The ability to "get along with customers" does not appear to me to be the type of "skill transference" or "acquisition of new skills" envisioned in this criterion, when properly applied. In fact, one witness at the hearing, a human resources generalist, confirmed that "flexibility" referred to possession of skills that can be used in future assignments and "the ability to transition to different work." Tr. at 76. These "skills" are part of one's substantive competence, not personal style.

In my view, the Company's use of this criterion to assess whether an employee is flexible enough to "satisfy" or "get along with" customers is so strained that it suggests a manipulation of the system to reach a predetermined result. Had this criterion been fairly applied, i.e. squarely judging whether an affected employee showed the ability to improve substantive skills, Westbrook's rating may well have exceeded that of the retained employee. The Company could certainly have incorporated as a discrete criterion an employee's ability to attract non-overhead work through the use of interpersonal skills. However, this was not one of the criteria. Instead, Battelle used the criterion "transferability of skills" in a distorted manner. That leads me to believe its use was an afterthought, one designed to downgrade Westbrook and target her for termination. As such, it detracts from Battelle's position that the RIF was performed impartially with respect to Westbrook.

Further, the RIF sheets set out incorrect information concerning Westbrook's length of Company-credited service and time performing current work. The RIF sheet indicated 10 years for Westbrook, whereas she had actually been employed at the Lab as an ALARA engineer for nearly 12 years. Tr. at 26. *Westbrook*, 28 DOE at 89,113. The retained individual had been in service for only 8 years. Moreover, the RIF sheet states that managers are encouraged to give positive consideration to retention of long service employees who are 40 years of age or older. Westbrook was 50 years old at the time of the RIF, while the retained employee was 35. Thus, in these criteria, Westbrook was superior to the retained employee. The Company has not stated how this information was factored into the overall retention rating, or what weight was given to this factor. *Id.* at 89,118.

Not all information in the RIF record favored Westbrook. The retained employee did have superior performance reviews for 1999 and 1998. He was reviewed as "consistently exceeding expectations" for those years, while Westbrook received a "consistently meets expectations." For the year 2000, Westbrook received a "4" (out of "7" rating), whereas the retained employee received a "5" rating. Thus, in this criterion, the retained employee does at first glance appear to be superior to Westbrook.

However, under scrutiny, Westbrook's low performance rating for the year 2000 is flawed. As noted above, Mei believed that Westbrook should receive a "6" rating for that year. Although Mlekodaj had originally agreed with the "6" rating, Mei was told by Mlekodaj to reduce the rating to a "3." A compromise rating of "4" was eventually assigned to Westbrook. Tr. at 417, 429. Mei's ratings for the other two ALARA engineers were sustained; only her rating for Westbrook was overruled. Mei implied that the overrule came from management at a level above Mlekodaj, which would have been Scott and Sims. Tr. at 416-19. These two latter witnesses did not testify about how this lowered rating came about. Thus, as the record stands, Westbrook's low performance rating for the year 2000 appears to have been dictated by high-level Company management. The unexplained lowered rating detracts from Battelle's position that the RIF was not used to terminate Westbrook improperly.

The RIF sheet also states that Westbrook's unique skills, running "elaborate computer codes," are not a necessary core competency, while the retained employee provides needed support for Oak Ridge divisions. There is little evidence to support this rating for Westbrook. It was not a significant part of the hearing testimony. This aspect of Westbrook's work was not raised as a key reason to terminate her.

There is other evidence that the RIF sheets were more of a pro forma exercise than a real attempt to rate the employees. Sims testified that his notes indicated that Scott proposed Westbrook for termination on July 21, 2000. Tr. at 392. *See also* Notes of Steve Sims, submission of March 15, 2001. However, the RIF documents were not generated until August 2000. Thus, Scott had apparently selected Westbrook before there was an opportunity to compare qualifications on the RIF sheets. Yet, Scott, who at that time had only been on the job for several months, testified that she did not have any special knowledge of the 200 employees in her organization. She stated that she therefore relied on Sims to provide her with information about the employees. Tr. at 317, 319. However, there was some key information that Scott did have about Westbrook. The information was that Westbrook had made protected disclosures to her in June 2000.

In sum, I find that the RIF sheets provide weak if any support for the Company's position that Westbrook's termination came about through legitimate reasons and with appropriate deference to the established RIF procedures. I am left with the distinct impression that the stated criteria were manipulated and not given due consideration in the retention process.(4)

## C. Westbrook's Ability to Charge Out and Evidence That Westbrook Was Difficult to Work With

As indicated above, it has been the Company's position that Westbrook was riffed because she was difficult to work with and thus she could not attract customers to whom her work could be charged out. It was the testimony of Sims that only 11 percent of Westbrook's work was the type of work that could be charged out, whereas the scientist who was retained was able to charge out "about one third" of his work. Tr. at 377. (5) Both Sims and Scott testified that the basis for selecting Westbrook was that because she was difficult to work with, she would be less successful in charge-out functions. Tr. at 323-325, 351, 378, 381- 82. However, Sims and Scott did not work directly with Westbrook and provided hearsay evidence that Westbrook was difficult to work with. *E.g.*, Tr. at 325, 349, 358, 361-64, 365-66. (6)

Mei also testified about what she heard. She said she had had complaints about Westbrook, that she had heard that Westbrook was difficult to work with and had requests that she be removed from a job. Tr. at 408, 415. There is also second and third hand evidence from four other witnesses about Westbrook's difficulties in her working relationships. *E.g.*, Tr. at 192, 200, 205, 209, 280, 307, 311, 407, 415. Further,

the record includes copies of a number of E-mails and several memoranda describing the difficulties that some lab employees encountered while working with Westbrook.

There is limited direct testimony about Westbrook's behavior on the job. One safety engineer testified that "Janet has a different style. She's more direct. She tends to be more in their face." Tr. at 239. This witness indicated that the relationship between Westbrook and some team managers was "ineffective." Tr. at 240. She believed Westbrook to "come across very aggressively" and found her approach to be "confrontational." Tr. at 241. On the other hand, another witness testified that he admired Westbrook's attention to detail in the review she performed on his work. He stated that in meetings he attended with her, he never observed her do anything "inappropriate" or "out of the norm." Tr. at 440, 441.

Mei testified that even though some customers did not like Westbrook, others did like her. Tr. at 414, 424. In fact, there were a number of memos in the record that are complementary to Westbrook. Tr. at 424. Thus, there is certainly evidence on both sides of the issue of Westbrook's professional, interpersonal style, and whether she was easy or difficult to work with. I believe that some employees may well have been uncomfortable with her style.

Nevertheless, evidence that some employees may have had objections to Westbrook's working style is not sufficient to establish that a significant number of potential customers would object to using her services, especially if she were the only ALARA engineer available for safety review. (7) Sims identified 11 employees who objected to working with Westbrook and pointed out two projects on which she had difficulties. Tr. at 361-66. She was removed from the projects at the request of those customers. Several other employees who had problems with Westbrook are identified in the copies of E-mail messages included in the record. (8)

However, Sims recognized that Westbrook had professional involvement with "dozens" of laboratory employees. Tr. at 381. Thus, the fact that through hearsay evidence and E-mails, about a dozen employees were identified as having objections to working with Westbrook does not persuade me that the larger group of employees that she had contact with objected to working with her. I am also not convinced that the much greater group of potential customers lab-wide would object to working with Westbrook in the future. In this regard, Scott testified that 500 to 600 people had the potential to use the services of the ALARA engineering group. Tr. at 321. In this light, the dozen or so purportedly dissatisfied customers seems negligible, especially given the evidence in the record that some lab employees respected Westbrook and appreciated working with her.

The testimony of Scott and Sims to the effect that, because of her personality, Westbrook was less likely to be able to attract charge-out customers was unsubstantiated, and in my opinion, without anything more, the type of speculative problem often used to justify dismissal of a whistleblower. Ultimately, there is no significant direct evidence from potential customers on this issue, and it was this type of evidence that, at a minimum, was called for here. The hearsay testimony does not sufficiently support the Company's position. I also consider the documentary material supporting that testimony to be relatively weak. I therefore cannot find the evidence regarding Westbrook's purported inability to attract charge-out customers meets the rigorous standard of proof required in this case.

In sum, it was Battelle's burden to provide clear and convincing evidence to support its position that it would have terminated Westbrook absent the protected disclosures. It attempted to show, through the testimony of Scott and Sims, that Westbrook would not have been able to attract charge-out customers. It should have supported that key point with direct evidence. The Company was certainly in a position to call potential customers as witnesses to explain why they would prefer not to work with Westbrook. The Company also could have presented former Westbrook customers to testify that they found Westbrook difficult to work with and that they would have significant reservations about having her perform future ALARA reviews. (9) These witnesses could also then have clarified the difficulties they perceived working with Westbrook, and how they would accomplish their safety inspection work if Westbrook were the only engineer offered to them. They could also have provided information about how the safety

reviews actually were carried out after the RIF. Such testimonial evidence, had it supported Battelle's position, would certainly have made the Company's position more convincing. The mere say-so of management officials on these key points does not satisfy the burden of proof in this case. The copies of E-mail messages and other memoranda in the record indicating that some employees did not find Westbrook easy to work with also do not measure up to the standard of proof required here. The Company has simply not provided clear and convincing evidence for its position.

# IV. CONCLUSION

As indicated by the above discussion, the IAD found that Westbrook made protected health and safety-related disclosures. The IAD also determined that Battelle made the decision to terminate her only two months later, and that this temporal proximity was sufficient to establish that the disclosures were a contributing factor to the termination decision. These facts are no longer disputed, and I believe are well-established by the record. It was therefore the Company's burden to show by clear and convincing evidence that it would have terminated Westbrook absent the protected disclosures. Battelle offered a plausible explanation for the termination, i.e., that under the charge-out system, only two ALARA engineers could be retained and since Westbrook would have difficulty in attracting customers in the new charge-out system, she should be one of the two discharged. However, the Company failed to bring forth adequate substantiation to support this justification. Mere plausibility and reasonability are simply inadequate to meet the rigorous "clear and convincing evidence" standard applicable here.

In fact, there was significant evidence in the record that does not support the Company's position that it would have eliminated two positions and terminated Westbrook even in the absence of the protected disclosures. For example, the record indicates that the decision of the Company to eliminate two positions was made without thorough consideration of the overhead work being performed by the ALARA group. Further, the reduction in Westbrook's performance evaluation, under the noted circumstances, detracts from the Company's assertions that the RIF was objectively performed with respect to the ALARA group. The IAD did not consider that information. Moreover, as noted above, Battelle failed to provide persuasive direct testimony to support its contention that lab personnel would object to paying for Westbrook's services. After weighing and balancing the evidence, I find that the Company has not made a clear and convincing showing that it would have terminated Westbrook in the absence of the protected disclosures. I therefore find that Westbrook is entitled to relief in this case.

Accordingly, Westbrook should submit a statement of the specific relief that she seeks along with appropriate calculations of that relief. This relief may include such items as reinstatement, back pay, costs and attorney's fees. The information should be submitted within 30 days of the date that she receives notice of this determination. The Company will have an opportunity to respond to that statement. I will then issue an order setting forth relief for Westbrook.

It Is Therefore Ordered That:

(1) The Appeal filed by Janet Westbrook on January 17, 2002 (Case No. VBA-0059), of the Initial Agency Decision issued on December 21, 2001, is hereby granted.

(2) Within 30 days of the date that she receives notice of this determination, Westbrook shall submit a detailed statement showing the relief she is claiming in this case, and a justification of her expenses. This relief may include such items as reinstatement, back pay, costs and attorney's fees. The statement shall be served on the attorney for Battelle.

(3) Battelle shall be permitted to submit comments on the statement of relief. The comments shall be due 10 days after receipt of the statement.

(4) 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 9, 2002

(1) The regulation provides: "If you are an employee of a contractor, you may file a complaint against your employer alleging that you have ben subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, or any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--(1) A substantial violation of a law, rule , or regulation; (2) A substantial and specific danger to employees or to public health or safety; . . ." 10 C.F.R. § 708.5(a)(1) and (2).

(2) A rem is "the dosage of an ionizing radiation that will cause the same biological effect as one roentgen of X-ray or gamma- ray exposure." *Westbrook*, 28 DOE at 89,115.

(3) He had no specifics, but said that lab personnel were being "squeezed," and "it was going to be tough." Tr. at 386.

(4) The IAD took the position that whether Westbrook's dismissal complied with rules governing RIFS was not an issue here because this is not an appeal of a dismissal action. Westbrook, 28 DOE at 89,119, Note 5. I disagree. As a rule, if RIF criteria are improperly or unfairly applied, resulting in the termination of a whistleblower, it belies the employer's position that the RIF, as it was applied to the complainant, was legitimate. This, in turn, undermines the company's position that it would have terminated the employee in the absence of the protected disclosure.

(5) The charge-out percentages for the three ALARA engineers were developed at Sims' request by a Battelle finance officer. The time frame Sims requested for the charge-out comparison was from the beginning of the fiscal year through June 2000. Tr. at 384. During the testimony of the finance officer, the Hearing Officer indicated that it was his own understanding that the retained employee "was working on a temporary project for a particular organization at the lab." He further stated: "that would explain, at least, why his charge-out rate was 38 percent and the other two were at 10, 11, 12 percent." He added: "I did not see any footnote. . . to explain that this was an anomaly, and that you cannot compare the 37 (sic) percent rate to the 10 or 12 percent rate. . . ." Tr. at 301- 02. This suggests that Battelle's comparison of charge-out percentage rates may be inapt.

(6) Sims testified that he had agreed to requests to remove Westbrook from a project. He stated he had heard about such a request on another project. Tr. at 366, 383. Copies of several E-mails in the record confirm that such requests were made.

(7) Sims testified that he could not "force people to buy the services of an individual. . . . " Tr. at 376. *See also* Tr. at 390. There is no evidence regarding what would happen if Westbrook were the only ALARA engineer available for safety review.

(8) These other employees seem to be associated with the same two projects that Sims identified as posing difficulties for Westbrook.

(9) As stated above, Sims identified by name several Battelle employees who he stated had experienced difficulties and frictions with Westbrook. Tr. at 361-66.