August 5, 2002
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Robert Burd

Date of Filing: November 16, 2001

Case Number: VBA-0060

On November 16, 2001, BWXT Pantex, as successor to Mason & Hanger Corporation (M&H) (collectively referred to as "the contractor"), filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Robert Burd*, 28 DOE ¶ 87,017 (2001). The IAD found that the contractor terminated Robert Burd (the complainant), a former employee at the DOE's Pantex nuclear weapons plant, in retaliation for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. It further directed the complainant to file a report providing a calculation for back pay, and if there is no immediate reinstatement offer, to update that back pay report every 90 days. *Id*.

As set forth below, I have determined that the contractor has failed to show the IAD was erroneous in finding for the complainant on the issue of retaliation, and that relief should be granted to Burd in the form of costs, expenses, attorney fees, back pay, and other reasonably foreseeable monetary damages incurred as a result of the retaliatory termination, including moving and travel expenses. However, after weighing and balancing the equities in this matter, as required by the applicable DOE case law, I will not order the contractor to reinstate Burd.

## I. Background

### A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned 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 CFR § 708.2 (definition of retaliation). Under the DOE regulations, review of an IAD is performed by the OHA Director. 10 CFR § 708.32.

**B. History of the Complaint Proceeding**

The events leading to the filing of Burd's Complaint are fully set forth in the IAD, *supra*. I will not reiterate all of the details here. For purposes of the instant appeal, the relevant facts are as follows.

From January 1998 until his termination in September 2000, Burd worked for the contractor as a radiation safety technician (rad tech) in the Non-MAA Section of the Radiation Safety Division at Pantex. Burd's Operations Manager and immediate supervisor was Henry Ornelas. This case centers around an altercation between Burd and Ornelas which led to the termination of both employees.

The incident occurred on September 8, 2000. Burd and two other rad techs, Kendra Bridges and Phil Franks, were waiting for a meeting in their area. Bridges revealed that at that time, Burd's partner, Russell West, was working an overtime shift and had been working for approximately 24 consecutive hours, save for a pre-dawn, two-hour break. Burd strongly objected to West's being permitted to work excess overtime, since the Pantex standard limited an employee to no more than 16 hours. While the three rad techs were discussing the overtime issue, Ornelas arrived, interjected himself into their conversation, and made a statement to the effect that overtime issues were "none of their business." Burd responded that it was unsafe to work for such a long period of time and that the handling of overtime in West's situation was "stupid." Ornelas replied, "Are you calling me stupid?" From there, the conversation quickly became heated, and their voices grew louder and louder until Burd finally told Ornelas to "shut up." Ornelas then ordered Burd to accompany him to the office of their Department Manager, Wayburn Scott Wilson. After Ornelas twice reiterated the order, Burd agreed, and they proceeded toward Wilson's office, with Ornelas following closely on Burd's heels.

Wilson was not there, so Ornelas grabbed Burd's arm to lead him to the office of their Operations Coordinator, Richard Jones. As the employees approached and entered Jones' office, they were both yelling. The cramped space in Jones' small office forced Complainant and Ornelas to stand close to each other, virtually face to face. They remained standing and continued to yell, despite Jones' request that they settle down and explain the situation. According to the IAD, Burd stepped toward Ornelas, this action prompted Ornelas to use his chest to bump Burd away, and in response, Burd yelled "Don't bump me, Hank." Jones then inserted himself between the employees and again admonished them to calm down. Ornelas finally stepped aside, Jones ordered Burd to return to the rad techs' area, and the altercation ended.

Jones reported the altercation to Wilson. On September 11, 2000, Wilson and Michael Knight, Manager of the Radiation Safety Department, reported the altercation to Peter Selde, the Division Manager. With Selde's approval, Knight and Chris Passmore, another member of radiation management, launched an investigation into the altercation, as well as the overtime issue.

On September 18, 2000, Knight and Passmore presented an investigation memo to Selde (the September 18 memo). Attached to the September 18 memo were written statements from Burd, Ornelas and Jones, summaries of oral interviews with them, and summaries of oral interviews with other rad techs who witnessed the portion of the argument that occurred in their meeting area. Contractor's Hearing Exhibit F.

As set forth in the September 18 memo, Knight and Passmore found that (1) Burd told Ornelas to "shut up"; (2) Burd "approached Ornelas and got 'face to face' with him"; and (3) "Ornelas pushed Complainant off of him." *Id*. They further concluded that Burd's and Ornelas' conduct on September 8, 2000 constituted "clear violations" of the Pantex Employee Manual ("the Manual") and Pantex Bulletin 869 (Bulletin 869). *Id*. The Manual prohibits "general," "safety," and "security" misconduct and lists examples of each. Bulletin 869 sets forth a "zero tolerance policy" regarding physical and non-physical confrontations. The first section of Bulletin 869 provides for automatic discharge of employees who engage in physical confrontations. The second section provides for discipline up to and including discharge of employees who engage in non-physical confrontations.

In the following days, Selde consulted several people regarding the appropriate course of action. First, on September 22, 2000, Selde, Knight and Passmore met with Michael Soper, a Labor Relations representative. Pantex procedures require that managers consult Labor Relations when contemplating formal discipline for an employee. During that meeting, Selde requested that Knight further investigate the duration and circumstances leading to the escalation of the confrontation between Burd and Ornelas.

On September 25, 2000, Knight presented Selde with a second investigation memo (the September 25 memo). In the September 25 memo, which is based upon a follow-up interview with Jones, Knight concluded that (1) the confrontation in Jones' office lasted 6-8 minutes, with Burd and Ornelas "face to face" for about 1-2 minutes; and (2) Burd "advanced on Ornelas and got in his face," before Ornelas bumped him away. Contractor's Hearing Exhibit G.

Later on September 25, 2000, Selde, Jones, Wilson, Knight, and Soper met with Robert Rowe, the Human Resources Director. During that meeting, Knight, Wilson, and Jones advised Selde that Bulletin 869 did not require termination for either employee; Soper and Rowe advised that Bulletin 869 required termination for both.

Selde next consulted the general manager of Pantex at the time, Dr. Benjamin Pellegrini. Selde sought Pellegrini's position regarding Bulletin 869, since it had been issued and signed by

Pellegrini's predecessor. Pellegrini advised Selde that he supported strict enforcement of the policy.

Finally, on September 27, 2000, Selde met with the Personnel Evaluation Board (PEB). Pantex procedures require the PEB to review termination decisions. The PEB consisted of 10 members, including Soper, Rowe, and representatives from the employer's Employees Concerns Office and legal department. Also present as witnesses were members of radiation management, including Jones, Wilson, Knight and Chris Cantwell. Neither Burd nor Ornelas attended the meeting, and besides Jones, no other witness to the altercation attended. PEB members had been given copies of the September 18 and 25 memos and all attachments.

The PEB first discussed Ornelas. After short deliberation, Selde recommended that Ornelas be terminated, and the PEB unanimously concurred. Finding that Ornelas engaged in a physical confrontation, by chest-bumping Burd, and insubordination, by disregarding Jones' order to settle down, the PEB agreed that Bulletin 869 called for Ornelas' termination. Ornelas' personnel file contained evidence of two prior disciplinary actions, including a verbal counseling and a documented warning.

The PEB next discussed Burd. After extended deliberation, Selde recommended that Burd be terminated, and again, the PEB unanimously concurred. Finding that Burd engaged in a non-physical confrontation with Ornelas and two acts of insubordination, once by telling Ornelas to shut up, and again by ignoring Jones' initial order to settle down, the PEB agreed with Selde that Burd's conduct fell within the purview of Bulletin 869. Although Bulletin 869 provides for, but does not mandate, termination, the PEB and Selde agreed that Burd's discharge was warranted, because he was the initial aggressor in the altercation with Ornelas and repeatedly insubordinate. Burd had no prior disciplinary actions in his personnel file. Except Selde, every radiation safety manager present at the meeting had recommended a lesser form of discipline for both employees.

The following day, September 28, 2000, Selde presented Burd and Ornelas with draft termination statements, which restated the contractor's investigatory findings regarding the September 8 incident. Given the choice between accepting the termination statements or resigning, both employees resigned.

On October 13, 2000, Burd filed a Part 708 complaint, alleging that the contractor effectively terminated him for raising safety concerns regarding overtime practices. The contractor does not dispute that it forced Burd to resign, but maintains that it would have terminated Burd for violating Bulletin 869, regardless of whether he made a protected disclosure. The complaint was referred to OHA for an investigation. After completion of the investigation, Burd requested a hearing before an OHA Hearing Officer. There were eight witnesses who testified at the day-long hearing held in this matter (including one who testified by videotape), each party submitted several written exhibits, and the Hearing Officer considered the deposition testimony of Selde and Ornelas. After considering the evidence in the record, the Hearing Officer issued the IAD that is the subject of this appeal.

**C. The Initial Agency Decision**

The IAD cited the respective burdens of proof for the employee and the contractor under Part 708:

> 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 CFR § 708.29. The IAD further noted that under Section 708.5(a), a disclosure is protected if an employee reasonably believes that he is disclosing "a substantial and specific danger to employees or to public health or safety."

In applying these standards to the instant case, the IAD considered the factual record and concluded that Burd had made a protected disclosure when he raised a valid safety concern about rad techs working excessive overtime in a nuclear weapons facility. 28 DOE at 89,107. The IAD further determined that Burd made a prima facie showing that his protected disclosure was a contributing factor to a retaliation, since his termination occurred within a brief period of time, 20 days after the protected disclosure, and all the persons involved in the decision to terminate Burd knew or had constructive knowledge of the fact that he had raised a valid safety concern. *See IAD* at 89,108 and cases cited therein.

Under Section 708.29, the complainant having made a prima facie case of retaliation, the burden shifted to the contractor to prove by clear and convincing evidence that it would have terminated Burd in the absence of the protected disclosure. The IAD considered the contractor's contentions that (1) strict enforcement of Bulletin 869's zero tolerance policy is necessary to ensure the security of Pantex; (2) Burd had fair notice of the policies set forth in Bulletin 869; (3) the employer conducted a fair investigation into the events of September 8, 2000; (4) the investigation revealed that Burd engaged in two acts of insubordination and a non-physical confrontation, as prohibited under Bulletin 869; (5) given the severity of Burd's conduct, Bulletin 869 required his termination; and (6) the employer applied Bulletin 869 fairly and without improper motives to Burd. In response, Burd (1) challenged the integrity of the internal investigation; and (2) maintained that his termination was a form of discipline substantially disproportionate to the discipline imposed on other employees for similar conduct.

The IAD determined that the contractor conducted a thorough investigation and fairly characterized Complainant's behavior, "although non-physical, as confrontational and insubordinate," *Id*. at 89,109. Nevertheless, after examining how over time the contractor had disciplined employees for engaging in confrontations and insubordination, the IAD concluded that even accepting the contractor's description of complainant's behavior, "the employer failed

to show with clear and convincing evidence that it consistently discharged employees for similar misconduct." *Id*.

According to the IAD, a "disciplinary list" provided by the contractor showed that between the August 23, 1999 effective date of Bulletin 869 and Burd's termination on September 28, 2000, the contractor disciplined employees for hostile, disruptive behavior approximately 18 times. All but three of those employees received a lesser form of discipline than termination. The three who were terminated were Ornelas, Burd, and a third employee found to have engaged in a non-physical confrontation. The contractor maintained that when employees have engaged in insubordinate and confrontational conduct rising to the level of Burd's behavior, they have been terminated. The contractor argued that Burd's behavior distinguished his case from the disciplined employees who were not terminated, because his non-physical conduct was particularly egregious, and that he had been the aggressor in the case by advancing on Ornelas and had failed to comply with Jones's order to stop the argument. *IAD* at 89,110.

Burd contended that his behavior was not unusual for the "generally truculent Pantex environment," that he was the victim of aggression by Ornelas, and should not have been terminated. He argued that to the extent his behavior was confrontational and insubordinate, the disciplinary list shows that similarly situated employees have escaped termination. Burd distinguished himself from Ornelas and the third employee terminated under Bulletin 869, both of whom had been disciplined for prior misconduct before termination, because Burd had never received a formal discipline of any kind. *IAD* at 89,111. In addition, Burd claimed that the disciplinary list was not exhaustive, and that numerous confrontations and acts of insubordination were handled "in-house," outside of the formal disciplinary process. Several other witnesses corroborated Burd's assertions that many confrontations were handled on an informal basis. *Id*.

After considering the evidence on the way the contractor disciplined its employees who had engaged in non-physical confrontations and insubordination, the IAD concluded that the contractor had failed to show that it consistently invoked Bulletin 869. The IAD noted that Selde and Soper testified that they first invoked the zero tolerance policy against Burd and Ornelas, and that several other incidents had escaped formal review. In addition, the IAD found that the contractor failed to show that it applied Bulletin 869 in a consistent manner, since it had only terminated Burd and one other person out of the many employees who had engaged in similar non-physical confrontational and insubordinate behavior. The IAD found "nothing particularly egregious in [Burd's] conduct that would warrant singling him out from the other employees who disobeyed, repeatedly cursed and yelled at, and threatened violence toward their supervisors or coworkers, but received lesser penalties." *Id*. Finally, the IAD rejected the contractor's argument that Burd should be treated the same as Ornelas, noting that not only had the latter engaged in a physical confrontation, making him automatically subject to termination under Bulletin 869, but Ornelas had a record tainted by two prior disciplinary actions taken against him at Pantex.

Based on the finding summarized below, the IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. This appeal followed.

## II. The Contractor's Contentions on Appeal and the Complainant's Response

### A. The Contractor's Statement of Issues and Appeal Brief

*1. Legal Arguments*

In its Statement of Issues filed on December 3, 2001, the contractor argued that the IAD was erroneous and should be reversed. However, the contractor complained about the short time allowed by the IAD for submission of the Statement of Issues, and requested permission to file an appeal brief. I granted that request. The contractor's "Original Brief on Appeal,"which superseded the Statement of Issues, was filed on February 22, 2002. In its brief, the contractor makes the following arguments: (1) Section 708.4(b) bars a complaint that involves misconduct the employee "deliberately caused," or in which he "knowingly participated;" (2) the IAD applied the wrong standard for misconduct when it relied on the case of *Dreis & Krump Manufacturing Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976), when it should have applied the four-point test used in *Atlantic Steel Co.*, 245 NLRB 814 (1979) to determine the complainant's misconduct was so opprobrious as to lose the protection of Part 708; (3) the complainant is only eligible for back pay from the date of discharge until he began subsequent employment, September 29 through October 20, 2000; (4) complainant's subsequent earnings offset the contractor's back pay liability; (5) reinstatement is not an appropriate remedy in this case.

*2. Newly Discovered Evidence Relevant to Reinstatement*

In addition to the legal arguments summarized above, the contractor's brief raises a new factual issue that was not considered in the IAD, namely, the complainant's failure to list, on the Pantex job application he filed with M&H, a prior job with Nordic Trak, a manufacturer of fitness and exercise equipment. The contractor alleges that Burd was fired from his job at Nordic Trak after he engaged in a physical confrontation with his supervisor. According to the contractor, Burd's failure to disclose this fact is relevant to the reinstatement remedy requested in the present case. Based on its allegations that Burd misrepresented his employment history to hide evidence of a prior physical confrontation that led to his discharge from a prior job several years before the September 2000 incident in this case, the contractor asked to conduct additional discovery, including taking an additional deposition of the complainant.

Using the procedure outlined in Section 708.33(b), I directed the parties to provide additional information regarding Burd's employment with Nordic Trak, and his application for employment

at Pantex that he submitted to M&H. 1/ On April 19, 2002, the contractor submitted a copy of Burd's employment application to M&H, which did not mention the Nordic Trak job. *See* April 19, 2002 letter from Richard Thamer, Attorney for BWXT Pantex. Nor did Burd list the Nordic Trak job on any other pre-employment documents he submitted to M&H. However, as discussed below, Burd did list the Nordic Trak job on the security clearance background questionnaire he submitted to the local DOE security office.

On May 31, 2002, the contractor filed its final submission on the reinstatement issue, including an Affidavit of Kelley D. Young, which states that Young worked as sales manager of Nordic Trak in Amarillo "several years ago," and during that time, he hired Burd to work for him in a full-time position. While at work, Young and Burd "did have a physical confrontation." Young "terminated Burd immediately for the confrontation." Although the complainant gave written authorization for Nordic Trak to release his employment records to the contractor's attorney, the effort to obtain those records failed. *See* May 31, 2002 letter from Richard Thamer, Attorney for BWXT Pantex. The contractor maintains that the DOE security office does not share background information submitted on security questionnaires, so it never learned about Burd's Nordic Trak job until Young came forward in 2002, during the pendency of the present appeal. The contractor also cites Burd's characterization, on his Pantex employment application, of a part-time coaching job he had at a local junior high school as "a position that started out bad that only continued to get worse," when he was fired for improperly disciplining a student, as further evidence that the complainant has "a pattern of workplace confrontation and deception." *Id*. at 2-3.

**B. The Complainant's Response**

*1. Legal Arguments*

The complainant filed separate responses to the Statement of Issues and the Original Brief on Appeal. Since the contractor's brief superseded its Statement of Issues, this decision will focus on the complainant's response to the contractor's brief. In his response, the complainant contends that: (1) under OHA case law, the factual findings in the IAD should be sustained since

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1/ Section 708.33(b) provides that:

> (b) In considering the appeal, the OHA Director:
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> (1) May initiate an investigation of any statement contained in the request for review and utilize any relevant facts obtained by such investigation in conducting the review of the initial agency decision;
> (2) May solicit and accept submissions from any party that are relevant to the review. The OHA Director may establish appropriate times to allow for such submissions;
> (3) May consider any other source of information that will advance the evaluation, provided that all parties are given an opportunity to respond to all third person submissions; and
> (4) Will close the record on appeal after receiving the last submission permitted under this section.

there has been no showing that they are clearly erroneous; (2) based on the IAD's finding that the complainant made a protected disclosure that was a contributing factor to an act of retaliation by the contractor, and upon consideration of the equities in this case, reinstatement is the proper remedy; (3) the complainant should also receive back pay, the calculation of which should include the average amount of overtime earned by rad techs at Pantex, compensation for the economic loss he experienced when he was forced to maintain two different households as a result of his termination, interest on the amounts awarded for back pay and incidental damages, attorneys fees, and the expenses of pursuing his complaint under Part 708.

*2. Newly Discovered Evidence*

Initially, the complainant opposed the request for further discovery, arguing that the allegations about Burd's termination from his job at Nordic Trak for a physical altercation were unsupported by any affidavits or competent evidence. In addition, he argued that the contractor had ample opportunity to discover this information when it took Burd's deposition on June 15, 2001, over a month before the hearing, and later at the hearing. The complainant also submitted a copy of "an employment document Burd filed with DOE" that lists Nordic Trak as a former employer. That document is a personnel security questionnaire for the background investigation necessary to determine Burd's eligibility for the access authorization (security clearance) required to work at Pantex, attached as Exhibit A to Complainant's Response to [Contractor's] Original Brief, March 8, 2002.

On April 29, 2002, the complainant filed a response to the contractor's April 19, 2002 submission, in which he admitted working at Nordic Trak, but denied that he engaged his supervisor, Kelley Young, in a physical confrontation. Burd emphasized that he reported the Nordic Trak job on his security questionnaire, and stipulated to the Pantex employment application submitted earlier by the contractor. Burd's April 29 response questioned Young's credibility, implying that Young, who now works for BWXT Pantex, is attempting to curry favor with his employer by coming forward with negative information about Burd. Burd also questioned Young's failure to document his alleged confrontation with Burd in Nordic Trak's employment records. Finally, the April 29 submission argues that the contractor has failed to show that any inequities would result if it were required to reinstate Burd.

On May 31, 2002, the complainant filed his final submission, in which he objected to the Young Affidavit, and asked that it be stricken from the record. He argued that "this Affidavit is self serving and comes from a current BWXT employee who is in a position to brown nose and receive favorable employee benefits," and asserts that there is no other evidence of any improper behavior on Burd's part. This submission also challenged Young's memory because he could not recall the year or any other details about the time when he and Burd worked at Nordic Trak. Finally, the complainant notes that the contractor could have found some other evidence to corroborate Young's claims, and could have asked Burd about "any of these naked allegations," during his pre-hearing deposition. Upon receipt of this submission, I closed the record.

## III. Analysis

In considering the arguments raised in this appeal, we will begin with the issue of whether the contractor met its burden under Part 708, and then address remedy issues. The contractor has refined its position from the Statement of Issues to the Original Brief, but on a fundamental level its primary argument remains the same: it maintains that it was justified in terminating Burd, and that the IAD erred in concluding that it failed to show by clear and convincing evidence that it would have fired him in the absence of his protected disclosure.

### *A. The Contractor's Liability*

In its brief, the contractor makes two principal arguments on liability. First, the contractor claims that Section 708.4(b) bars a complaint that involves misconduct the employee "deliberately caused," or in which he "knowingly participated." According to the contractor, Burd's complaint involved misconduct because he was involved in an altercation during which he called Ornelas "stupid," told him to "shut up," and had to be physically separated from Ornelas by Jones. This argument misinterprets Section 708.4(b) and misapplies the rule to the present case. That rule means that an employee whose actions created or contributed to a situation described in Section 708.5, such as "a substantial violation of a law, rule, or regulation, a substantial and specific danger to employees or to public health or safety, or fraud, gross mismanagement, gross waste of funds, or abuse of authority," could not bring a complaint based on a protected disclosure about such situation under Part 708. Burd complained about a safety issue–allowing a colleague to work excess overtime in the inherently dangerous environment of a nuclear weapons plant–he did not create or contribute to a safety problem by his own actions. 2/ After Ornelas heard Burd's complaint, an altercation between the two men ensued. Burd's misconduct was in the altercation, not the complaint, and it was the complaint that the IAD found, and I agree, contributed to Burd's termination. I therefore reject the argument that Burd's complaint is not actionable under section 708.4(b) because it involved misconduct.

Second, the contractor argues that instead of applying section 708.4(b), the IAD erred in applying the standard from *Dreis & Krump Mfg. Co., Inc. v. NLRB (Dreis)*, *supra*, in determining whether Burd's conduct warranted termination. While I have already rejected the contractor's argument that Burd's complaint should be barred under section 708.4(b), I will nevertheless consider its second argument. For the reasons explained below, I find that the labor law cases cited by the contractor as authority for overturning the IAD are inapposite to the present appeal, which is governed instead by the DOE Contractor Employee Protection Program in 10 CFR Part 708, and the case law developed under Part 708.

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2/ The contractor's claim in the Statement of Issues that the IAD erred by ignoring the testimony of Brenda Finley, DOE's Employee Concerns Program manager, illustrates the apparent failure at Pantex to recognize the importance of Burd's safety complaint. Finley's hearing testimony shows that she focused on Burd's fear that he might be fired for insubordination, and ignored the underlying safety issue.

*Dreis* involved an employee who had engaged in protected conduct–filing a grievance under a collective bargaining agreement–who was fired for publicly using mildly disparaging language to describe his supervisor. An arbitrator upheld the firing, the NLRB reversed the arbitrator, and the employer appealed to the United States Court of Appeals for the Seventh Circuit. The Court affirmed the NLRB, and ruled for the employee, holding that "communications occurring during protected conduct remain protected unless . . . so violent or of such serious character as to render the employee unfit for further service." *Dreis, supra, at* 544 F.2d 329. The IAD quoted the forgoing language to support its conclusion that the record did not show anything about Burd's conduct that would distinguish him from other employees who were insubordinate but received lesser penalties.

According to the contractor, the IAD should have applied the four-point test articulated by the NLRB in *Atlantic Steel Co.*, 254 NLRB 814 (1979) to determine whether Burd's conduct was so "opprobrious" as to lose the protection of Part 708. This argument is without merit. Although labor law cases may be instructive on how other adjudicative forums have resolved issues similar to those that arise under Part 708, they are not controlling because Part 708 is designed to effectuate different policy objectives and apply different legal standards that are specifically tailored for the DOE complex. As explained in the preamble to Part 708, the rule is intended to foster the free flow of information about safety at nuclear weapons facilities through the contractor chain of command to DOE and the Congress. *See* 63 Fed. Reg. 373 (Jan. 5, 1998). The governing legal standard is in section 708.29: once the employee makes a prima facie case of retaliation, the burden shifts to the contractor to show by clear and convincing evidence that it would have taken the same action absent the protected conduct. The IAD considered the evidence in the record about the manner in which the contractor had applied its disciplinary policy to similarly situated employees who had engaged in non-physical confrontations and insubordination, and determined that the contractor failed to make that showing. Similarly, a previous OHA decision ruled against a contractor who failed to show by clear and convincing evidence that it consistently applied the same level of discipline to other employees who were similarly situated to the complainant who engaged in protected conduct. *See Morris J. Osborne*, 27 DOE ¶ 87,542 (1999) (*Osborne*). Thus, I find that if the IAD erred in its reliance on *Dreis*, it was harmless error, as the ultimate ruling against the contractor under Part 708 would have remained the same in its absence. Based on my conclusion that the contractor failed to justify Burd's termination under the clear and convincing evidence test, I next consider remedy issues.

*B. Remedy Issues*

The contractor maintains that (1) the complainant is only eligible for back pay from the date of discharge until he began subsequent employment, September 29 through October 20, 2000; (2) complainant's subsequent earnings offset the contractor's back pay liability; and (3) reinstatement is not an appropriate remedy in this case. The contractor does not contest the IAD's ruling that it pay interest on any amount awarded to the complainant.

In addition to reinstatement, back pay, costs and attorneys fees, the complainant seeks reimbursement of health insurance costs for himself and his family, and "incidental damages" to reimburse him for expenses he incurred as a result of having to move to Los Alamos, New Mexico, where he got a comparable new job as a radiation control technician for a contractor at another DOE nuclear weapons facility. These expenses include temporary lodging in hotels, rent and deposit for an apartment in Los Alamos, and travel between Los Alamos and Amarillo, where the complainant's wife and child lived in the family home. I will address each of the money issues in turn, and then consider whether reinstatement is warranted, in view of the newly discovered evidence.

With respect to the first issue which concerns the period of eligibility for back pay, I agree with the contractor that the complainant is eligible for back pay without any offsets from the date of discharge, September 29 through October 20, 2000, which corresponds to the period during which he was out of work after being terminated by the contractor. 3/ *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993). Accordingly, I will order the contractor to pay Burd $2,318.08 in back pay for this period, and $3,477.12 for lost holiday pay, a related category of monetary damages that can be figured without any offsets. 4/ Since Burd would not have incurred these expenses absent his wrongful termination, I will also direct the contractor to reimburse Burd for $1,883.44 in time off he took for travel to attend the birth of his child in Amarillo, and matters relating to this case including depositions in Albuquerque, and meetings with his attorney and the hearing in Amarillo. *See n. 4, supra*.

Concerning the second issue, I agree that the complainant's subsequent earnings should generally offset the contractor's back pay liability for the period after Burd began his new job. However, prior OHA decisions have recognized that an employee who is the victim of retaliation for conduct protected under Part 708 can lose more than just his base salary as a result of the contractor's action. *See, e.g., Sorri* (lost salary enhancements, lost 401(k) contributions); *Osborne* (lost overtime, lost health insurance benefits). In this case, Burd's new job with Duratek, Inc. pays a higher base hourly rate than Burd's old job at Pantex. In the absence of other factors, that would mean Burd should not receive any back pay after October 20, 2000. But Burd argues that he lost the opportunity to work overtime at Pantex, and that the post-October 20, 2000 back pay calculation must account for the average amount of overtime worked by rad techs at Pantex, and give Burd credit for the overtime earning opportunity he lost when he was terminated. I am persuaded that an adjustment for lost overtime is necessary to restore Burd to the position he would have occupied but for the retaliatory termination. *See Osborne, supra*; 10 CFR § 708.36(a)(5). Accordingly, I will direct the parties to confer with each other and agree

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3/ I agree with the contractor that there is no "collateral source" issue in this case, as the complainant received no money for a collateral source such as unemployment compensation during the period when he was unemployed after his termination.

4/ See calculations in Complainant's Damages Brief at 2; Complainant's Response to Contractor's Original Brief on Appeal at 7.

upon a proper calculation of back pay for the period after October 20, 2000 that takes account of lost overtime.

In addition to reinstatement (discussed separately below), back pay, costs and attorneys fees, section 708.36(a)(5) authorizes the DOE to order "such other remedies as are deemed necessary to abate the violation and provide a successful complainant with relief." The next issue is whether Burd's claim for reimbursement of medical insurance costs for himself and his family to replace the insurance coverage he lost when terminated, and "incidental damages" to reimburse him for expenses he incurred as a result of having to move to Los Alamos, falls within the purview of this rule. I find that reimbursement for these claims is the type of restitutionary remedy envisioned by the plain language of section 708.36(a)(5), and it should be granted.

A direct OHA precedent exists for restitution of lost medical insurance benefits in *Osborne*, *supra*. I will order the contractor to pay Burd $3,449.08 to compensate him for health insurance he was forced to purchase after his termination. 5/

With respect to the items related to moving for which Burd seeks restitution, I find that it is reasonably foreseeable that in order to mitigate his damages from the contractor's retaliation, Burd would seek employment as a radiation control technician at the closest DOE nuclear weapons facility, Los Alamos. During the pendency of this Part 708 case, it was also reasonable for Burd to maintain his residence in Amarillo, since he had an expectation of returning to work at Pantex, especially after OHA issued the IAD ordering reinstatement in November 2001. Thus, Burd should be reimbursed for the expenses related to maintaining a second residence in Los Alamos, and travel between the two cities. According to the complainant's two damage submissions cited in *n. 4*, *supra*, these expenses totaled $11,784.93 through July 27, 2001.

I will order the contractor to reimburse Burd for attorneys fees and expenses, which totaled $11,020.21 as of July 27, 2001, but which have increased since then. I will direct Burd's attorney to submit an updated, itemized bill, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses.

Finally, I will order the contractor to pay interest at the rate specified in the IAD, one-half percent per month, on all monies paid to the complainant under this Decision. Neither party challenged this interest rate during the course of the appeal.

I turn now to the final issue in this appeal, whether the contractor should be ordered to reinstate Burd by offering to rehire him for a rad tech job at Pantex. At the outset, I reject the contractor's argument that DOE cannot direct BWXT Pantex to hire Burd, since he worked for M&H at the time of his termination, and never worked for BWXT. The Deputy Secretary of Energy has recognized that reinstatement by a successor contractor may be ordered to remedy a violation of

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5/ Complainant's Damages Brief at 2; Complainant's Response to Contractor's Original Brief on Appeal at 7.

Part 708, depending on a consideration of the equities in a given case. *See Osborne, supra*; *Daniel Holsinger v. K-Ray Security, Inc.* (Decision of the Deputy Secretary), http://www.oha.doe.gov/cases/whistle/dsholsinger.htm.

Before the newly discovered evidence about Burd's job at Nordic Trak, the equities appeared to favor ordering reinstatement, since there was no showing of hardship by the contractor, such as showing that BWXT Pantex, as the M&O contractor at a large DOE facility, would have to displace an innocent employee in order to offer employment to Burd, which was the critical factor considered in the *Holsinger* case. Taken as a whole, however, the newly discovered evidence tips the balance of equities against ordering reinstatement. There are several factors involved. First, there is the allegation in the Kelley Young affidavit that Burd was fired from his job at Nordic Trak after engaging in a physical confrontation with Young, who was then his supervisor. Burd denies this happened, challenges Young's inability to remember other details such as the date, and maintains that Young has a motive for coming forward with evidence against him to "brown nose" his supervisors at BWXT Pantex, where Young now works. Although we have no direct means of resolving the conflict between these two accounts on the basis of the current record, the circumstantial evidence tends to undermine Burd's credibility on this issue. For example, he makes much of the fact that he disclosed the Nordic Trak job to DOE on his personnel security background information questionnaire. However, information reported to the government on personnel security forms is covered by the Privacy Act, and agencies do not share this information with contractors. Burd does not deny that he omitted any mention of the Nordic Trak job on the pre-employment papers he submitted to M&H, nor does he explain why he failed to mention it, except to claim it was a part time, secondary job. In particular, Burd's complaint that the contractor could have discovered this information earlier through due diligence rings hollow. During Burd's pre-hearing deposition on June 15, 2001, the contractor's attorney was questioning Burd about his past employment history, and he asked Burd directly "did you ever get fired from any of these jobs?" June 15, 2001 Deposition at 7. Burd never mentioned the Nordic Trak job that he had omitted from his Pantex application form and from his personal resume. Despite his protestations to the contrary, Burd's repeated efforts to conceal the Nordic Trak matter from the contractor lead me to believe that he thought he had something to hide. This is the most negative aspect of the newly discovered evidence.

Reinstatement is an equitable remedy, and with any equitable remedy, however, an adjudicator "must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Teamsters v. United States, 431 U.S. 324,375 (1977) [quoting Hecht Co. v. Bowles, 321 U.S. 321,329-330(1944)]. The ancient maxim of equity states that one who seeks equity must come into a court of equity with clean hands. With respect to the remedy of reinstatement, the complainant in this case does not have clean hands because he failed to disclose is full job history and he has not dispelled the doubt created by his reluctance to reveal it.

**IV. Conclusion**

As indicated above, I affirm the IAD, except the portions of the IAD that (1) deny restitution for travel and relocation expenses related to the complainant's having to move to a new town to get comparable employment and thus mitigate his damages from the wrongful termination during the pendency of this action, and (2) order the contractor to reinstate the complainant, which I reverse. I find that the complainant proved by a preponderance of the evidence that he made a protected disclosure when he complained about a radiation control technician being permitted to work excess overtime, and that this was a contributing factor to the contractor's decision to terminate the complaint, which was an act of retaliation. I further find that the complainant's prima facie case of retaliation shifted the burden of showing by clear and convincing evidence that it would have terminated the complainant in the absence of his protected disclosure, and that the contractor failed to meet that burden.

After considering the complainant's damage submissions, and the contractor's arguments on damages, I will direct the contractor to pay the complainant the sum of $33,932.86, representing back pay, restitution for other monetary damages incurred by the complainant as result of his termination, attorneys fees and costs, through July 27, 2001, and interest on that amount calculated at the rate of one-half percent per month. I will also direct the complainant's attorney to submit an updated, itemized bill, and to confer with the complainant and agree on the proper amount of attorneys fees and costs. Finally, this is an interlocutory order that is not appealable until issuance of a Supplemental Order specifying the remedy in full, in the event the parties are unable to reach a settlement.

**It Is Therefore Ordered That:**

(1) The appeal filed by BWXT Pantex on November 16, 2001 is hereby granted in part and denied in part, as set forth in Paragraphs (2) through (6) below.

(2) The Initial Agency Decision issued on November 1, 2001 is affirmed, except as follows:

> (a) the contractor shall pay restitution to the complainant for all travel, lodging, and relocation expenses incurred as a result of the complainant's having to move to Los Alamos, New Mexico to find comparable employment after being wrongfully terminated in September 2000;
>
> (b) the contractor shall not be required to offer employment to the complainant at the Pantex Plant.

(3) The parties shall confer with each other and agree upon a proper calculation of back pay for the period from October 20, 2000 through the date of this Decision, taking into account the average number of overtime hours worked by radiation control technicians at the Pantex Plant during that period.

(4) The complainant's attorney, Michael A. Warner, shall submit an updated, itemized statement, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses.

(5) This is an interlocutory order that is not appealable until issuance of a Supplemental Order specifying the remedy in full.

(6) This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 5, 2002