August 21, 2002
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Janet K. Benson

Date of Filing: June 10, 2002

Case Number: VBA-0082

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 22, 2002, involving a Complaint filed by Janet K. Benson (Benson or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Benson claims that her former employer, Livermore National Laboratory (LLNL or the Laboratory), retaliated against her for engaging in activity that is protected by 10 C.F.R. Part 708, the Department of Energy's Contractor Employee Protection Program. 1/ In the IAD the Hearing Officer determined that Benson made disclosures that are protected under Part 708, but that LLNL had shown that it would have taken the same personnel actions in the absence of the protected disclosures. As set forth in this decision, I have decided that this determination, is with one exception, correct.

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.

1/ The Complainant also named the Regents of the University of California (UC) in her complaint. UC managed and operated LLNL for the United States government under a contract between the Regents of UC and the DOE.

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 taken adverse personnel actions 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). 2/

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 Benson 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 Benson's Complaint are fully set forth in the IAD. *Janet K. Benson*, 28 DOE ¶ 87,022 (2002)(*Benson*). For purposes of the instant appeal, the relevant facts are as follows.

This case came before the Office of Hearings and Appeals on June 2, 1999, when Benson requested that OHA convene a hearing to consider issues that she had raised in a Part 708 Complaint. On June 7, 1999, I appointed Linda Lazarus as Hearing Officer. Ms. Lazarus made a number of preliminary determinations in this

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2/ The applicable complaint of reprisal in this case was filed in October 1994, pursuant to regulations effective in April 1992. 57 Fed. Reg. 7533 (March 3, 1992). As the Hearing Officer stated, the DOE amended 10 C.F.R. Part 708 in an Interim Final Rule effective April 14, 1999, 64 Fed. Reg. 12862 (March 15, 1999). The revised regulations provide that the procedures in the new Part 708 apply prospectively in any complaint pending on the effective date of the revisions *i.e.* April 14, 1999. However, the substantive changes reflected in the revised regulations will not be applied in this case because to do so would affect the substantive rights of the parties. Therefore this case is adjudicated in accordance with the substantive standards set forth in the original version of Part 708. *Benson*, 28 DOE at 89,144, n.2.

case, issued several interlocutory orders and conducted the hearing in February 2000 and March 2001. On February 12, 2002, I transferred this case from Ms. Lazarus to Ann Augustyn, and delegated to her the responsibility for issuing the Initial Agency Decision in this case. As stated above, on May 22, 2002, Ms. Augustyn issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

A. Factual Findings of the IAD

The factual background of this case involves a long and complex series of events. In the typical Part 708 appeal-phase determination, even the most involved factual basis can be briefly summarized. However, this case requires reference to nearly all of the factual findings of the IAD. Accordingly, even though the factual background in this case is unusually long, for ease of understanding the issues on appeal here, I have recounted the factual foundation below in virtually the same form as it was set out in the IAD. *See Benson*, 28 DOE at 89,147-52. 3/

In September 1989, the Complainant began to work in LLNL's Education Program Division (Education Program) under the supervision of its Director, Dr. Manuel Perry. At the time, the Education Program was housed in a school building leased from the school district, commonly referred to as "the Almond School." In late 1990 or early 1991, Dr. Perry approved a proposal submitted by the Complainant to seek funding from the National Science Foundation (NSF) for a three-year program, the National Physics Education Program Collaboration (NPEPC), that would provide minority undergraduate students with the opportunity to work with laboratory researchers during the summer. In order to implement the program, LLNL entered into a partnership with California State University, Hayward (CSU-H). Under the terms of the partnership, CSU-H was the recipient of NSF funds, and was responsible for the fiscal and logistical requirements of the program such as management, bookkeeping, student transportation, and dormitory facilities. For its part, LLNL handled all student activities, including the assignment and evaluation of projects and mentors for each student. The

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3/ I have omitted from my summary the IAD's citations to the record.

Complainant and Dr. Charlie Harper, the head of the Physics Department at CSU-H, were designated as the co-project investigators (co-PIs) for NPEPC.

In 1991, NSF approved funding for the first two years of NPEPC. Funding for the third year was conditional upon performance. Midway through the first year of the NPEPC, communication problems arose between the Complainant and Dr. Harper. Sometime in early 1993, Dr. Harper suggested that the third year of NPEPC be modified to include a college course on laboratory research techniques. The Complainant believed at the time that the suggested modification violated LLNL and NSF rules and regulations, and would result in the diversion of funds to CSU-H. The Complainant first memorialized several concerns in this regard in a February 1993 memorandum to Dr. Perry.

As time went on, the problems between the Complainant and Dr. Harper escalated, and Dr. Perry removed the Complainant as co-PI. On July 27, 1993, Perry replaced the Complainant with Eileen Vergino. LLNL had hired Vergino in early July 1993 as the Deputy Manager of LLNL's Education Program. Dr. Perry told her that she was taking over the Complainant's position because of the "animus" between Dr. Harper and the Complainant.

In the fall of 1993, Ms. Vergino took over the Education Program because Dr. Perry retired. In September 1993, the Complainant wrote to Ms. Vergino complaining about her removal as co-PI of NPEPC. During the latter part of 1993, performance issues with the Complainant began to surface. According to Ms. Vergino, the Complainant was not completing her work on time, was only sporadically attending staff meetings, and was frequently not in the office during regular working hours.

In February 1994, Vergino asked the Complainant and another employee to account for time because of complaints that both were not working regular hours. In response, the Complainant could only account for 11 hours in a two month work period covering 160 hours.

In April 1994, Vergino hired Linda Dibble as Senior Administrator to handle all personnel issues in the Education Program. According to Dibble, within two weeks Vergino expressed concern that the Complainant seemed unproductive, appeared to be coming in late and leaving early, and was not participating in staff meetings.

The next month, May 1994, the Complainant filed her first Part 708 complaint. The DOE subsequently dismissed the complaint for lack of jurisdiction, because at the time LLNL had not yet contractually agreed to be bound by Part 708.

From May through September 1994, personnel issues regarding the Complainant continued. First, LLNL asked the Complainant to account for absenteeism not reflected on her time cards. Then, the Complainant's supervisor, Glenn Young, indicated that the Complainant had failed to complete an assignment of finding mentors for students participating in NPEPC. In August 1994, Mr. Young provided a marginal performance appraisal for the Complainant. Mr. Young stated in a memorandum that the Complainant should be placed under a highly structured work environment with detailed tasking, reporting requirements, and frequent meetings.

In the meantime, LLNL learned that the lease on the Almond School, the building that housed the Education Program, would be expiring. Accordingly, LLNL needed to find a new location for the program. Building 415, which required some remodeling and repainting, was selected.

In mid-September 1994, the Complainant was assigned to a new full-time position working for Mr. Young in LLNL's Apprentice Program, a program designed as an affirmative action outreach effort to train underprivileged youth, women, and minorities in the trades. Mr. Young provided a detailed job description to the Complainant. Even though the responsibilities assigned to the Complainant appeared to be complementary to her previous experience in recruiting and placing students, and in affirmative action compliance, the Complainant objected to the assignment on the grounds that she was unfamiliar with these areas.

In late September 1994, the Complainant received her performance appraisal for the period 1993-1994. It was "less than satisfactory." The appraisal cited the Complainant's failure to take initiative and the constant follow-up required by those who gave her assignments.

On October 12, 1994, the Complainant filed her second Part 708 Complaint. In her complaint, she indicated that she had been demoted, reassigned and given unsatisfactory performance appraisals in retaliation for challenging the modification of the grant funding the NPEPC.

By December 1994, plans were underway to move the Education Program to Building 415. Linda Dibble advised the staff in early December that carpet was being installed in the building on December 5, 1994, after which time the staff could visit their new offices. The Complainant indicated that she would wait until after the holidays to see her office so that the fumes from the new carpeting could dissipate. In late January 1995, the Complainant purportedly told Ms. Dibble that she had allergic reactions to "new carpet, paint fumes, windows painted close[d], and . . . asbestos." In early February, the Complainant spoke with Mr. Young about her concern regarding the new carpet smell. Thereafter, Linda Dibble requested that LLNL's Hazards Control Department conduct an industrial hygiene "walk through" of Building 415 for guidance on addressing this issue. The Hazards Control Department instructed Dibble to "bake" the building by (1) closing all the windows and turning up the heat for two days and then (2) opening up all the windows to allow the new carpet smell to dissipate into the air. Dibble followed these instructions. Next, Dibble asked LLNL's Health Services Department (HSD) to evaluate the Complainant for purposes of determining whether she could occupy Building 415.

On February 14, 1995, Dr. Scott from LLNL's HSD evaluated the Complainant and determined that she could not work for the short term in Building 415. Scott instructed the Complainant to consult her allergist, Dr. Kaufman, and bring a note from him stating how long it would be before she could enter Building 415. Also, Dr. Scott requested that Dr. Kaufman provide a list of chemicals to which the Complainant is sensitive so LLNL could test for them. Dr. Scott also asked that the Complainant report to HSD on February 21, 1995, prior to going to work.

On February 21, 1995, the Education Program moved to Building 415. The Complainant was slated to occupy a second floor office in Building 415 with her colleagues from the Education Program. On that same day, the Complainant reported to HSD as previously instructed with a note from Dr. Kaufman stating that the Complainant was suffering from acute respiratory problems aggravated by "formaldehyde out-gassing" from the carpeting in her present area. 4/ Ed Ochi of LLNL's Industrial Hazards

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4/ At the time Dr. Kaufman wrote the note, he was unaware that the Complainant had never entered Building 415 where the new carpeting had been laid, and that no formaldehyde was

(continued...)

Division decided that the Complainant could try to work on the first floor of Building 415 in an area that had not been repainted or carpeted. Dibble set up a temporary office for the Complainant on the first floor of Building 415. Dr. Scott issued a restriction barring the Complainant from working on the second floor only of Building 415 from February 21 to 28, 1995. Dr. Scott noted on the work restriction that he would re-evaluate the Complainant's situation in one week. With the note in hand, she then proceeded to the first floor office in Building 415. After one hour, she felt ill and went home. When the Complainant returned to work on February 24, she was placed in a Trailer 3156 which was located down the street from Building 415.

On February 28, 1995, the Complainant returned to HSD, and Dr. Scott decided that the Complainant should not enter Building 415 for another four weeks.

On March 28, 1995, the Complainant met with Dr. Scott and reported that she was receiving weekly treatment from her allergist, and was experiencing no problems working in Trailer 3156. Dr. Scott extended the Complainant's work restriction in Building 415 for another month, until April 25, 1995.

During this time, the Complainant was working with Glenn Young on the Apprentice Program. On March 31, 1995, Young requested that the Complainant relocate to Building 571 and assume the daily operation of the Apprentice Program. At the Complainant's request, Dr. Scott revised the Work Assignment Restriction to cover both Buildings 415 and 571.

Toward the end of March 1995, Dibble asked LLNL's Hazards Control department to perform an industrial hygiene evaluation of, among other places, Buildings 415 and 571. The evaluation concluded that any airborne contaminants present in the two buildings were at levels acceptable to the published workplace guidelines and standards.

On April 25, 1995, the Complainant visited HSD and expressed concern that if she were to enter Buildings 415 or 571, she would have problems. Dr. Scott agreed to extend her restrictions

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4/ (...continued)
used in the manufacture of the carpet installed in the offices in Building 415.

for another month until May 25, 1995, based only on the Complainant's articulated fears.

In the meantime, the Complainant's performance issues remained a concern for her supervisors. In April 1995, Mr. Young expressed dismay that the Complainant was having trouble completing her assignments without a step-by-step description of every task. In May 1995, Young told Barry Goldman, the Team Leader of Student Programs in the Education Program, that the working relationship between the Complainant and him was not going well. Young told Goldman that part of the difficulty working with the Complainant was that she worked in an isolated location and he could not determine what she was doing. Because of performance issues, the Complainant was removed from Young's supervision and the Apprentice Program. Goldman decided to assume direct supervision over the Complainant in May 1995.

On May 25, 1995, the Complainant returned to HSD and told Dr. Scott that she was still reluctant to work in Buildings 415 and 571. This time, however, Dr. Scott decided that the Complainant could work in these two buildings "as tolerated" from May 25 to June 23, 1995. Scott stated that he had been in both buildings recently and knew from personal experience that the new carpet odor was gradually disappearing. He agreed to evaluate the Complainant again in one month.

The Complainant's work restrictions expired on June 23, 1995. At this point, Goldman determined that because of programmatic needs, he could no longer accommodate the Complainant's desire to remain in the trailer. Goldman informed the Complainant that she must report to her office in Building 415 on June 26, 1995, unless she provided medical documentation outlining the restrictions LLNL needed to accommodate. On June 26, 1995, the Complainant submitted a hand-written note from her allergist stating that the Complainant tests intolerant to petroleum products, paints, lacquers, varnishes, formaldehyde products, organic dusts, glue products, and fibers of many kinds, especially organic in origin.

At this point, Goldman decided he could no longer use the services of an employee who could not enter the building where all the program work was done. Goldman consulted with Vergino and a decision was made to send the Complainant home. The Complainant was subsequently placed on paid administrative leave pending a review of her medical status and disability eligibility.

On August 3, 1995, the Complainant's allergist sent a medical note to LLNL stating that the Complainant "could function in an ordinary environment, [but] needed to avoid a chamber heavily laden with vapors of formaldehyde coming from large yardage of new and never before aerated carpet." The note further stated that all that the Complainant required was "clear, ambient room air."

The Complainant returned to LLNL on August 9, 1995 after a six week hiatus. She and Dr. Scott went to Building 415, but the Complainant fell ill and went home. As a consequence, Dr. Scott issued another work restriction prohibiting the Complainant from working in Building 415 until September 17, 1995.

Following this incident, Gloria Kwei, the Manager of LLNL's Human Resources Department, wrote the Complainant a letter informing her that she would be on unpaid leave until September 17. In the letter, Kwei stated that the program no longer had assignments that could be performed outside Building 415. Kwei further stated that if the Complainant's work restrictions became permanent, a job search of other parts of LLNL would be performed and if no alternative assignment was found, the Complainant would be separated from her employment.

On September 10, 1995, the Complainant wrote to the Secretary of Energy complaining that on July 22, 1993 she was improperly removed from her position as the Project Director for an education project funded by NSF. The Complainant further stated that LLNL had required that she work in a building containing toxins to which she is allergic.

On September 17, 1995 the Complainant's work restriction expired again and she again entered Building 415 with Dr. Scott. The Complainant complained of not feeling well and she went home. Dr. Scott issued another work restriction for Building 415 until November 6, 1995.

On November 20, 1995, LLNL decided to obtain an outside medical evaluation as to the Complainant's ability to work in Building 415. The Complainant was subsequently evaluated by Dr. Abba Terr, an allergy and immunology specialist. Dr. Terr issued a report on December 27, 1995. Dr. Terr did not find any objective evidence of a medical condition, but concluded that based on the Complainant's subjective beliefs, there was no reason to believe she could enter Building 415 without becoming "subjectively ill."

Sometime in January 1996, Dr. Richard Watts, Dr. Scott's successor, met with the Complainant to discuss her return to work. During this meeting the Complainant agreed that she should be permanently restricted from working in Building 415. Accordingly, Dr. Watts issued a permanent restriction prohibiting the Complainant from working in Building 415 and 571. At this point, LLNL determined that in view of the Complainant's inability to perform the essential assigned functions of her position, she should be separated.

Before separating the Complainant, Gene Dent, LLNL's Rehabilitation Representative, tried to contact the Complainant via certified mail and telephone in order to discuss vocational rehabilitation. Records show that the Complainant received the certified mail letter. However, the Complainant never responded to the letter. At the hearing, the Complainant explained that she never contacted Mr. Dent because she "didn't feel [she] needed to be rehabilitated."

On February 22, 1996, Robert Perko of LLNL's Staff Relations sent the Complainant a notice of separation. In his letter to the Complainant, Perko stated that the Complainant had five calendar days to respond either orally or in writing to LLNL if she believed the action was improper. The Complainant did not respond.

On March 22, 1996, LLNL sent a second certified letter to the Complainant advising her that she was being terminated effective March 22, 1996. The letter informed the Complainant that her separation was due to her inability to perform the essential functions of her job. The letter also advised that she could appeal the separation if she believed LLNL's policies or procedures had been improperly applied. The Complainant did not appeal.

B. IAD's Conclusions of Law

After making the above findings of fact, the IAD proceeded to analyze them and reach conclusions of law. The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. As the IAD noted:

> It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding or refused to participate in an activity as described in

> § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29

Benson, 28 DOE at 89,146.

Once the employee has met this burden, the burden shifts 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. *Benson, 28 DOE at 89,147.*

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee in good faith believes that she is disclosing a violation of any law, rule, or regulation; a substantial and specific danger to employees or to public health or safety, or fraud, mismanagement, gross waste of funds or abuse of authority. 10 C.F.R. § 708.5(a). *Benson*, 28 DOE at 89,152.

The IAD found that Benson's oral statements to Dr. Perry between January 1993 and July 1993 regarding NPEPC fraud, waste and abuse by LLNL, and the written statements contained in her February 1993 memorandum to Dr. Perry were protected disclosures under Part 708.

The IAD next considered whether the protected disclosures were a contributing factor to the following four alleged retaliations: (i) Benson's reassignment on September 23, 1994 to LLNL's Apprentice Program; (ii) her "less than satisfactory" performance appraisal on September 27, 1994; (iii) the decision to assign her to work in Building 415; and (iv) LLNL's determination to separate her in March 1996.

The IAD found that Vergino made the decision to assign Benson to the Apprentice Program and was the supervisor who gave Benson the "less than satisfactory" performance appraisal. The IAD also found that Vergino knew that animus existed between Harper and Benson, but had no knowledge that the complainant had filed a Part 708 complaint until July 1995, and had no knowledge about the allegations of fraud made by Benson. Based on these findings, the IAD determined that Vergino had neither constructive nor actual knowledge of the nature of the protected disclosures regarding NPEPC. The IAD concluded that Benson had not shown that the reassignment and the performance appraisal were retaliations for the protected disclosures. The IAD went on to determine that, in any event, the Laboratory had clearly and

convincingly shown that it would have taken these two actions absent Benson's protected disclosures.

The IAD then considered whether the reassignment of Benson to Building 415 or LLNL's termination of Benson was a retaliation for the protected disclosures or for Benson's filing a Part 708 complaint in October 1994 or for her September 1995 letter to the Secretary of Energy. 5/ The IAD found that the LLNL official involved in asking Benson to enter Building 415 in May 1995 was Barry Goldman. He also requested her to move to the building in June 1995. The IAD determined, however, that Goldman did not know that Benson had filed Part 708 Complaint until July 1995. Accordingly, the IAD found that Benson had not established that the protected disclosures were a contributing factor to the purported retaliation of expecting her to work in Building 415. The IAD went on to conclude that in any event, LLNL had clearly and convincingly shown that the move of the entire education program to that building had nothing to do with Benson, and was simply due to the fact that the lease on the Almond School had expired.

With respect to the termination of the complainant in March 1996, the IAD found that Goldman, with the concurrence of Dibble, Vergino and Kwai, made the decision that Benson could no longer perform work outside Building 415. The IAD determined that Dibble, Goldman and Vergino did know of Benson's Part 708 filing. Nevertheless, the IAD determined that there is "no credible evidence of any nexus between the complainant's protected disclosures and her termination." However, the IAD went on to find that there was in any event clear and convincing evidence that LLNL separated Benson because her inability to work in Building 415 prevented her from performing the essential function of her job.

The IAD next considered whether Benson had engaged in a protected activity under Section 708.5(a)(3) by refusing to work in Building 415, and whether LLNL retaliated against her for engaging in this activity. That provision generally protects a contractor employee from retaliation by a contractor employer for

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5/ In that letter Benson alleged that LLNL demanded that she work in "environments containing chemicals and toxins to which she is allergic." She contended that the separation was a ruse for terminating her for making the protected disclosures and for the 1995 letter to the Secretary.

refusing to participate in an activity which causes the employee to have a reasonable apprehension of serious injury to himself, other employees or the public. The IAD found that Section 708.5(a)(3) was not designed to protect employees with pre-existing disabilities or medical conditions who refuse to perform the job for which they were hired when their disability or medical condition becomes incompatible with a work environment that is considered safe and healthy under workplace guidelines. The IAD noted that intensive testing demonstrated that there was nothing inherently dangerous in Building 415 from an environmental standpoint. Accordingly, the IAD rejected the claim of retaliation for participating in a protected activity.

The IAD next considered whether Benson made disclosures that were protected under Section 708.5(a)(1), when she stated that she had a dangerous and life threatening reaction to working in Building 415. The IAD found statements to this effect were made directly to Dibble in January 1995, and also included in her September 1995 Letter to the Secretary of Energy. The IAD found these statements to be protected. The IAD recognized that the managers who made the decision to terminate Benson had actual knowledge that she had written to the Secretary of Energy at the time they terminated her, but concluded there was no temporal proximity between the letter and the termination. The IAD also found that even if the termination was the culmination of an ongoing series of reprisals, it would be unreasonable to infer a nexus between any of the protected disclosures and any claimed act of reprisal. The IAD therefore concluded that Benson's disclosures in January and September 1995 regarding Building 415 were not a contributing factor in LLNL's decision to terminate her from employment in March 1996. The IAD also found that in any event LLNL had shown by clear and convincing evidence that it would have terminated her absent the protected disclosures.

In sum, the IAD concluded that Benson was not entitled to relief.

III. The Benson Statement of Issues and the LLNL Response

A. Statement of Issues

Benson 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 first maintains that under 5 U.S.C. § 554(d) (of the Administrative Procedure Act or APA), the agency official who

presides over a hearing must make the recommended decision, unless he or she is no longer with the agency. The Statement argues that where evidence of credibility or demeanor is significant to a decision, the examiner presiding at the hearing must issue a decision.

The Statement then raises the claim that this case turns upon the credibility of witnesses. The Statement contends that Benson has been prejudiced because Hearing Officer Augustyn reviewed only the written record developed in this case and did not hear the witnesses' testimony. She therefore could not assess their demeanor. In particular, the Statement contends that although she was not present at the hearing, Hearing Officer Augustyn nevertheless made credibility determinations regarding testimony by Dr. Terr. The Statement further maintains that claims that Benson was irrational are not credible and greatly outweighed by the testimony of Benson's own treating physician, which Hearing Officer Augustyn also did not hear. The Statement concludes that Benson was prejudiced by the reassignment of this case to Ms. Augustyn, and asks that the case be returned to Ms. Lazarus, in accordance with the APA.

B. LLNL's Response

In response to the Benson Statement of Issues, the Laboratory contends that the APA does not apply to proceedings under Part 708. LLNL also argues that the Hearing Officer's decision was not dependent on any credibility determinations, and that Benson could therefore not have been prejudiced in any way by the substitution of a new Hearing Officer.

IV. Analysis

A. Applicability of the APA to Part 708 Proceedings

The applicability of the APA to proceedings under Part 708 is an issue that can be disposed of quickly. After reviewing the APA and relevant case law, I can find no basis for concluding that the Statute applies to proceedings under Part 708. The APA states with respect to adjudications that its provisions apply in cases where adjudication is "*required by statute* to be determined on the record after opportunity for an agency hearing. . . ." 5 U.S.C. § 554(a)(emphasis added). Consequently, this provision only applies if another statute requires the adjudication proceeding. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)(*Wong*). In *Wong*, the Supreme Court stated that "the limitation to

hearings 'required by statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom or special dispensation; not those held by compulsion." *Id.* at 50.

There is no statutory authority requiring that hearings be held under Part 708. The rule was issued pursuant to the broad authority granted the agency by the Atomic Energy Act of 1954 and the Department of Energy Organization Act to prescribe such rules and regulations as necessary or appropriate to protect health, life and property. 57 Fed. Reg. 7533 (March 3, 1992). Neither of these Acts requires that the DOE hold hearings regarding the protection of contractor employees from reprisals by their employers for whistleblowing. Since Part 708 hearings are conducted based solely on authority vested by regulation, they fall squarely within the exception noted in *Wong*. Accordingly, there is no APA or other statutory requirement that the Hearing Officer conducting the Part 708 hearing issue the IAD.

B. Overall Prejudice to the Complainant

Even though no statutory requirement exists, I recognize that it is generally desirable that the person hearing the evidence in these Part 708 proceedings issue the determination on the merits of the case. For reasons not relevant here, I used my discretion and made a determination to depart from that general principle in this instance. See 10 C.F.R. § 708.2 (definition of Hearing Officer and OHA Director), and § 708.25(a). I am nonetheless mindful of the possibility that some prejudice might arise as a result of that decision. Accordingly, if either party were able to establish that it was prejudiced by my decision to appoint a new hearing officer, I would certainly take appropriate measures to correct the detriment.

As I stated above, in the instant case, the Statement of Issues contends that Benson was prejudiced by the reassignment because the new hearing officer did not hear the witnesses' testimony and could not make informed credibility assessments. In particular, the statement cites the testimony of Dr. Terr, the allergy and immunology specialist called by LLNL, and that of Benson's own treating physician as examples of instances in which Hearing Officer Augustyn could not make appropriate credibility determinations regarding their views of the seriousness of Benson's illness and the reasonableness of Benson's belief that there was a danger to her if she entered Building 415.

After performing a thorough review of the IAD, I have concluded, as an initial matter, that the determinations reached therein were unrelated to the credibility of these two experts. As discussed above, the Hearing Officer considered Benson's claims that she was retaliated against for reporting waste, fraud and abuse in the NPEPC program under Section 708.5(a)(1)(iii) and for refusing to participate in a dangerous activity under Section 708.5(a)(3). The Hearing Officer determined that Section 708.5(a)(3) was not designed to protect employees with pre-existing disabilities or medical conditions which prevent them from working in an ordinary office environment. I am in complete agreement with this finding, which is a purely legal determination. As such, it does not depend upon the testimony of the experts. Accordingly, I see no prejudice to Benson due to the fact that the Hearing Officer did not hear the testimony of the two medical experts. 6/

I also find that no prejudice has been shown to exist with respect to Benson's claims regarding retaliation for reporting waste, fraud and abuse in the NPEPC program. I see no issues regarding witness credibility that would make any difference here. As I noted above, the Hearing Officer found four possible retaliations that might have arisen from the complainant's disclosures regarding NPEPC: (i) her reassignment on September 23, 1994 to LLNL's Apprentice Program; (ii) her "less than satisfactory" performance appraisal on September 27, 1994; (iii) the decision to assign her to work in Building 415; and (iv) LLNL's determination to separate her in March 1996.

As discussed below, I will reverse for other reasons the determination regarding the "less than satisfactory" performance evaluation. With respect to Benson's reassignment to the Apprenticeship Program, I am in agreement with the determination made by the Hearing Officer based on the written record. However, I do recognize that it is possible that the determination as to whether the reassignment was a retaliation may be related to the credibility of the testimony of Vergino and

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6/ It is true that the Hearing Officer did proceed to make some additional determinations regarding the reasonableness of Benson's apprehensions about entering Building 415. These determinations did to some extent involve the credibility of the experts. However, these findings are dicta only. They are not a necessary part of the ultimate determination under review.

others who believed that Benson's performance was not satisfactory, and that the reassignment would allow her experience to be better utilized in the program. *Benson*, 28 DOE at 89,154. Benson did provide some testimony as to her views about why she was having difficulty meeting expectations. For example, she explained that she was unable to perform some of the assigned clerical tasks because she did not have the requisite secretarial skills. She also maintained that in spite of several requests, she never received a new job description that gave her a full understanding of the tasks for which she would be responsible. Transcript of Hearing (Tr.) at 102-12.

Nevertheless, after reviewing this issue as a whole, I see no reason to ask the Hearing Officer to hear personally the testimony on this issue. Even at the time of the hearing, there was no meaningful remedy to Benson's objection to her re-assignment. Although she claimed she was demoted, the reassignment did not change her job classification or reduce her salary. Tr. at 156. Therefore, she could not receive any monetary relief for the reassignment. Since, as I find below, she was ultimately properly terminated, I do not see in what way having the Hearing Officer present for testimony about the job reassignment would make any difference at all in this case. I certainly can see no benefit in having the Hearing Officer present for testimony on this point at this time. I therefore find no prejudice to Benson on this issue, and no basis for reopening the hearing.

I turn next to the alleged retaliation regarding assignment of Benson to work in Building 415. I do not believe that there is a credibility concern here. It is preposterous to believe that the entire education program was moved from the Almond School to Building 415 as a retaliatory measure. There is no doubt that the lease on the Almond School expired and was not renewed. There is simply no evidence to indicate that the selection of and move to Building 415 was in any way related to Benson or her protected disclosures. I find the evidence on its face to be overwhelming and unrelated to the credibility of witnesses.

With respect to the termination of Benson, it is uncontested that she refused to work in Building 415. In the termination process LLNL did not challenge Benson's claim that the building made her ill. The decision to terminate her was based on her unwillingness to come to work in Building 415. The Hearing Officer reviewed the extensive factual record showing that for months LLNL attempted to accommodate Benson's medical needs,

including airing out the building and the carpeting, and placing Benson in temporary work sites until this was accomplished. *Benson*, 28 DOE at 89,149, 89,150, 89,155. The Hearing Officer made legal determinations that LLNL was not required by law to make more accommodations than it did and that overall the Laboratory had shown by clear and convincing evidence that it dealt with her inability to work in Building 415 as it would have with any other employee's inability to work at the job site. Ultimately, it is clear that Benson was unable to work in Building 415, and LLNL established that it would have terminated her for this reason, even absent the protected disclosures. I see no credibility issue that forms a part of that determination, and I am in complete agreement with that decision as a matter of law.

In sum, I see no witness in this case whose testimony would lead me to think that the conclusions in the IAD would have been different, if only his demeanor had been observed and considered. I find no reason to reopen the hearing in this case in order to allow a decisionmaker to gauge the demeanor and credibility of a witness.

C. The Contributing Factor Issue

Hearing Officer Augustyn did an outstanding job in making sense of and giving form to a voluminous and heretofore unstructured record developed with little overall planning or forethought by her predecessor. I am extremely impressed with Ms. Augustyn's ability to cull through the record, make findings of fact, identify and focus the relevant legal issues, and craft her conclusions into a well-drafted determination. Her exceptional work has considerably facilitated my review at this phase of the Part 708 proceeding. I did note, however, one finding meriting further discussion and review. The adjustment I am making to the IAD is a minor one, although the conceptual point regarding proper analysis and application of the "contributing factor" standard, as discussed below, is an important one for OHA's Part 708 case law.

As the Hearing Officer stated, a Part 708 complainant must establish by a preponderance of evidence that he made a protected disclosure that was a contributing factor to a retaliation against him by his contractor-employer. 10 C.F.R. § 708.29. As we have acknowledged in a number of previous cases, one of the many possible ways to show that the protected disclosure was a factor in a retaliation is to show that the official taking the

action knew or had constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the retaliation. *E.g. Ronald Sorri*, 23 DOE ¶ 87,503 (1993).

Under Part 708 case law, this "actual or constructive knowledge" does not just mean that the official taking the action personally knew or should have known of the protected disclosure or protected activity. In OHA cases under Part 708, a complainant can also establish the requisite level of "knowledge" by showing that the person taking the alleged retaliatory act was influenced by the negative opinions of those with knowledge of the protected conduct. A complainant can demonstrate this knowledge by showing that the alleged retaliation is based on information that is tainted by the protected disclosure. *Jagdish C. Laul,* 28 DOE ¶87,006 (2000). In this type of situation, we believe it is appropriate to "impute" the knowledge of the protected disclosure or protected activity to the person taking the retaliatory action. *See* 64 Fed. Reg. 12862 at 12865 (March 15, 1999). This is precisely the situation in the instant case. Therefore, as discussed below, I find that the complainant has satisfied the contributing factor element with respect to several aspects of her case.

The relevant facts in this regard are as follows. The complainant made the protected NPEPC disclosures to her supervisor Dr. Perry in early 1993. The complainant also complained about this same matter to her co-PI Dr. Harper. Ms. Vergino testified that she was aware of the animus between the complainant and Dr. Harper. Further, Ms. Vergino, the complainant, Dr. Perry and Dr. Harper had a meeting in July 1993, the same month in which Ms. Vergino was hired as Deputy Manager of the LLNL's education program. At this meeting Ms. Vergino was informed that she would take the complainant's place as co-PI. Ms. Vergino was told that the reason for the replacement was that there was animus between Dr. Harper and the complainant. She testified that she learned that the animus was "not good for the program and not good for the students." Tr. at 630-31. Ms. Vergino also testified that the complainant had shown her a memo that Dr. Perry had written "about some unauthorized procurements associated with the program." Tr. at 632.

Thus, it is clear that Dr. Perry, who was aware of the protected disclosures, told Ms. Vergino of animus between the complainant and Dr. Harper. This animus was in part related to the very subject of the disclosures. In May 1994, the complainant filed

her first Part 708 complaint. In September 1994, Ms. Vergino rated the complainant's performance as unsatisfactory for the year 1993-1994.

I believe that the complainant has adequately established the existence of a work environment tainted by her disclosures and by the filing of her first complaint of retaliation *(i.e.*, participation in a protected proceeding). It is not a requirement that the complainant establish which of several protected actions was the exact cause of the resentment and animus against her. She is highly unlikely to be able to find out what was in the minds of those individuals responsible for the retaliation. *See Jagdish Laul,* 28 DOE at 89,051. As discussed above, it is also not a requirement that the individual taking the retaliatory action have actual knowledge of the protected disclosure or protected activity. *Id.* at 89,052. Therefore, even if she did not have direct and complete knowledge of the protected disclosures or the actual filing of the Part 708 complaint, Ms. Vergino certainly had enough information about the complainant's problems related to her dissatisfaction with the way monies were being proposed to be spent in the NPEPC program to be considered to have imputed knowledge of the protected disclosures and the May 1994 Part 708 complaint for purposes of this proceeding. Accordingly, I find that the complainant has established by a preponderance of evidence that Ms. Vergino had imputed knowledge of the complainant's protected disclosures and protected activity. I will therefore consider the effect of that conclusion on the alleged retaliations.

1. The September 1994 Performance Appraisal

The "less than satisfactory" performance evaluation of September 27, 1994, was provided only four months after the filing of the individual's Part 708 complaint. This short time period certainly would allow a reasonable person to conclude that the filing of the complaint was a factor in the retaliatory performance appraisal. Accordingly, the less than satisfactory performance evaluation, coming as it did about four months after the filing of the Part 708 complaint, fulfills the second prong of the contributing factor aspect of the complainant's burden of proof. 7/

7/ As the IAD noted, this May 1994 Part 708 complaint was dismissed for lack of jurisdiction, because at that time LLNL had not yet agreed to be bound by the DOE's contractor

(continued...)

The IAD finds that LLNL would have provided the same rating to the complainant in the absence of her disclosures. In this regard, the IAD cites that fact that Ms. Vergino and the complainant exchanged seven memoranda regarding the complainant's job description, complainant's poor job performance and time and attendance problems.

I agree with the finding of the IAD that "LLNL appears to have been completely justified in giving the complainant a less-than-satisfactory performance evaluation in September 1994." However, this is not the standard in Part 708 cases. The standard to be applied is whether the contractor has shown by clear and convincing evidence that it would have taken the alleged retaliation in the absence of the protected disclosure.

I do not agree with the IAD that LLNL has established that it would have taken this same action in the absence of the protected activity. In order to make such a showing LLNL could have provided evidence regarding how the Laboratory treated other similarly situated employees. However, there is no evidence establishing how LLNL treated other employees who had performance problems, and how soon after performance problems were identified their performance appraisals were downgraded. Accordingly, I find on the basis of the present record, that LLNL has not clearly and convincing shown that it would have taken this same action in the absence of the complainant's protected disclosures.

The complainant is entitled to relief for this action. Accordingly, LLNL shall remove this performance review from the complainant's file.

7/ (...continued)
employee protection program. However, on September 23, 1994, LLNL did agree to comply with the provisions of Part 708. Accordingly, beginning on that date, any LLNL reprisals for protected activities or disclosures would violate Part 708. Therefore, even though the May 1994 complaint was dismissed for lack of jurisdiction, any retaliation by LLNL for the protected activity of filing a Part 708 complaint would be a violation of the regulations as of September 23, 1994. See 10 C.F.R. § 708.5(b).

2. Reassignment of the Complainant to the Apprentice Program

The Hearing Officer found that since Vergino had no knowledge of the protected disclosures, the complainant had not established that her disclosures regarding the NPEPC were a contributing factor to LLNL's decision to reassign her to the LLNL's Apprentice Program on September 23, 1994. Since, as discussed above, I find that Vergino did have imputed knowledge of the protected disclosures, and the reassignment came only four months after the complainant filed her first Part 708 complaint, I have concluded that the complainant has made a showing that the protected disclosures/activity were a contributing factor to the reassignment. However, I agree with the Hearing Officer's determination that LLNL has convincingly shown that it would have reassigned her to the Apprentice Program in the absence of the protected disclosures.

3. Assignment of the Complainant to Building 415 and Termination

The IAD cites Barry Goldman, Linda Dibble, and Eileen Vergino as among the LLNL personnel involved in the decision to assign the complainant to Building 415 and ultimately terminate her. Nevertheless, the IAD concludes that none of the LLNL personnel involved had any knowledge of those disclosures, and therefore finds no contributing factor has been established by the complainant. However, as discussed above, Ms. Vergino did have imputed knowledge of the protected disclosures/activity. The IAD indicates that Linda Dibble was hired by Ms. Vergino to handle personnel issues in the education program, and that within two weeks of being hired, Vergino asked for Dibble's assistance in dealing with the complainant. Goldman also had meetings with Dibble regarding the complainant. Tr. at 789, 796. These interchanges all occurred within the months before the move to Building 415. Thus, applying the principles enunciated above regarding imputed knowledge of the protected disclosures and time nexus, I find that there is an adequate demonstration that the protected disclosures were a contributing factor to the aforementioned alleged retaliations.

Nevertheless, I am in complete agreement with the IAD that LLNL has clearly and convincingly shown that even in the absence of the protected disclosures, the Education Program would have been moved to Building 415, and the complainant would have been assigned to work in that building. I further agree with the IAD that LLNL has clearly and convincingly shown that ultimately the complainant was terminated because she was unable to work in the building. Accordingly, I see no reason to disturb the IAD on these issues.

V. CONCLUSION

As indicated by the above discussion, with the exception of the less than satisfactory performance appraisal, the instant appeal is denied and the IAD is affirmed. In addition to the removal of the appraisal from her personnel file, Benson is entitled to attorney fees and costs in this case. 10 C.F.R. §708.36(a)(4).

It Is Therefore Ordered That:

(1) The Appeal filed by Janet K. Benson on June 10, 2002 (Case No. VBA-0082), of the Initial Agency Decision issued on May 22, 2002, is hereby granted as set forth below.

(2) Within 30 days of the date that it receives notice of this determination, LLNL shall remove the September 1994 "less than satisfactory" performance appraisal from Benson's personnel file. LLNL shall file a certification with Benson's attorney and the OHA that this action has been taken.

(3) LLNL shall compensate Benson for the costs and expenses incurred in this proceeding. Within 30 days of the date she receives notice of this determination, Benson's attorney shall submit a detailed statement showing her costs and fees and justification therefor. The statement shall be served on the attorney for LLNL.

(4) LLNL shall be permitted to submit comments on the statement of costs and fees. The comments shall be due 10 days after receipt of the statement.

(5) 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: August 21, 2002