March 15, 2004
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Elaine M. Blakely

Date of Filing: July 9, 2003

Case Number: VBA-0086

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on June 25, 2003, involving a Complaint filed by Elaine M. Blakely (Blakely or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her Complaint, Blakely claims that her former employer, DOE contractor Fluor Fernald, Inc. (FFI or the contractor), retaliated against her for engaging in activity that is protected by Part 708. In the IAD, an Office of Hearings and Appeals (OHA) Hearing Officer determined that Blakely engaged in activity that is protected under Part 708, but that FFI showed that it would have taken the same personnel action in the absence of the protected activity. Blakely appeals that determination. As set forth in this decision, I have decided that overall, the determination is 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. 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).

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 Blakely 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. *Elaine M. Blakely* (Case No. VBH-0086), 28 DOE ¶ 87,039 (2003)(*Blakely*). For purposes of the instant appeal, the relevant facts are as follows.

Blakely worked as a general engineer for FFI at the DOE's Fernald, Ohio site. She was terminated by reduction in force (RIF) on April 4, 2002. On April 9, 2002, Blakely filed a Complaint under 10 C.F.R. Part 708 with the Manager of the DOE Ohio Field Office, claiming that she was terminated in retaliation for filing a prior Complaint of Retaliation in February 2001, which was dismissed in March 2002. 1/

After completion of an investigation pursuant to 10 C.F.R. § 708.22, Blakely requested and received a hearing on this matter before an Office of Hearings and Appeals Hearing Officer. The hearing lasted three days. After considering the hearing testimony and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

II. The Initial Agency Decision

The IAD set forth the burdens of proof in cases brought under Part 708. The IAD stated that 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

1/ That dismissal was upheld on appeal in a determination that I issued on April 3, 2002. Case No. VBU-0080.

The IAD further noted that if 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. The IAD then proceeded to consider the application of these elements to the Blakely proceeding.

A. Protected Disclosures or Protected Activity.

The IAD first considered Blakely's contention that she made a protected disclosure in October 1998, when she submitted a note to the Waste Pits Remedial Action (WPRAP) project manager stating that she could not support him in connection with a review of hazard calculations, and that she would not act contrary to her conscience. The Hearing Officer found that there was nothing in the note that one could reasonably believe revealed 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. Thus, the Hearing Officer concluded that the note was not a protected disclosure under Part 708, and that prior to October 2000, Blakely had no other conversations that constituted protected disclosures regarding the WPRAP.

The IAD found that Blakely made several protected disclosures beginning in October 2000. These included a memorandum and a follow up E-mail to FFI management, with copy provided to the DOE Inspector General (IG). The subject of these disclosures was safety concerns regarding the WPRAP.

The IAD also found that Blakely participated in an activity protected under Part 708 when she filed the above-mentioned complaint of retaliation in February 2001. 2/

2/ In that Complaint, Blakely alleged that she was reassigned to a different project in March 1999, after making the alleged protected disclosures in 1998. The complaint, filed in February 2001, was dismissed because it was filed more than 90 days after the alleged retaliation. Section 708.14 provides that complaints must be filed by the 90th day after the date the complainant knew or should have known of the alleged retaliation.

B. Contributing Factor

As the IAD stated, a protected disclosure may be a contributing factor in a personnel action where the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude the disclosure was a factor in the personnel action. The IAD noted that Blakely was terminated as part of an ongoing process of downsizing at the Fernald site. The IAD further found that neither the overall RIF nor the decision of FFI management to reduce the number of engineer positions by five was motivated by a desire to terminate Blakely. The IAD noted that Shelby Blankenship was Blakely's supervisor at the time of the RIF, and was the official who ranked Blakely for purposes of the RIF. The IAD pointed out that Blakely received the lowest rating of all 23 employees who were ranked in the engineer job category.

The IAD next considered whether Blankenship had actual or constructive knowledge of Blakely's protected activity (filing the Part 708 Complaint in February 2001). In response to the question, as to whether he was aware that Blakely filed a Part 708 complaint with the Department of Energy in February 2001, Blankenship replied "I don't know if I was aware of this in that time frame or not." Transcript of December 10, 2002 Hearing (hereinafter Tr.) at 860. Based on this testimony the IAD indicated that Blakely had not met her burden of proof. The Hearing Officer stated that he could not find that Blankenship was aware of the February 2001 complaint. The IAD determined that Blakely's protected activity could therefore not have been a contributing factor to her low rating in the RIF process.

In my view, this determination was not well founded. After reviewing the record, and based on my knowledge of how DOE contractor workplaces function, I believe that Blakely's participation as a complainant in a Part 708 proceeding that lasted for approximately 13 months is in and of itself sufficient to permit a finding that it was a contributing factor in her termination, which took place within a matter of days after that initial Part 708 proceeding was concluded. I believe it is appropriate to impute knowledge of this earlier Part 708 proceeding to Blankenship, given the fact that he did not deny that he knew about it after being given the opportunity. Tr. at 860. Moreover, other FFI management officials were aware of the filing of the

complaint. 3/ See, *Jagdish Laul* (Case No. VBA-0010), 28 DOE ¶ 87,011 (March 9, 2001). However, as indicated below, this error does not affect the overall outcome of this case.

The IAD also found that Blankenship became aware of Blakely's complaints to the DOE/IG in either December 2000 or January 2001, shortly after he became her supervisor. Blankenship filled out Blakely's RIF form approximately 13 months later. The IAD concluded that this period is not sufficiently short to infer a connection between the protected activity (filing a complaint with the IG) and the adverse personnel action. The IAD also found that Blakely presented no other evidence to support a conclusion that her disclosures to the DOE/IG were a contributing factor to her termination.

C. Whether FFI would have terminated Blakely absent the Protected Activities

Even though the IAD found that Blakely had not shown by a preponderance of evidence that her protected disclosure and protected activity were a contributing factor to her termination, the Hearing Officer nevertheless went on to consider whether FFI showed by clear and convincing evidence that it would have "riffed" Blakely absent the protected activity. Overall, the Hearing Officer was convinced by Blankenship's testimony that the low rating he gave to Blakely in the RIF process was based on his judgment that she was relatively unproductive, needed too much supervision and tended to be argumentative. The IAD therefore found clear and convincing evidence that Blakely would have been terminated whether or not she engaged in protected activity under Part 708.

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

III. The Blakely Statement of Issues and the FFI Response

Blakely filed a statement identifying the issues that she wished the Director of the Office of Hearings and Appeals to review in this

---

3/ Dennis Carr and Robert Nichols deny that Blakely's filing of the complaint played a role in the termination, but do not deny knowing about it. Tr. at 404-05, 505. Blankenship testified that prior to Blakely's beginning to work for him, he had heard that she was difficult to work with. Tr. at 909.

appeal phase of the Part 708 proceeding (hereinafter Statement of Issues or Statement). FFI filed a Response to the Statement. 10 C.F.R. § 708.33.

A. Statement of Issues

1. The Statement first maintains that other FFI officials besides Blankenship were involved in the decision process that led to Blakely's termination. In particular, the Statement cites Dennis Carr, FFI Executive Vice President and Senior Director of Projects, as one member of a management team that reviewed the employee rankings and decided which employees from the list would be laid off. Tr. at 404. The Statement also points out that Carr knew about Blakely's 2001 Part 708 complaint, because he said he did not take this into account in the termination decision. *Id.*

2. The Statement then claims that the IAD erred in finding that Blankenship had no knowledge of Blakely's 2001 Part 708 complaint. The Statement cites Blankenship's testimony that he did not know of the Complaint in the February 2001 "time frame," and then points out that Blankenship never denied knowing about the complaint at a later time. The Statement argues that it should be deemed admitted that Blankenship knew of the 2001 complaint at the time of the RIF.

3. The Statement contends that the Hearing Officer incorrectly determined that the time between Blankenship's knowledge of Blakely's protected disclosures and the RIF action was too long to establish a causal connection. In this regard, the Statement claims that from time to time, Blakely reminded Blankenship about her DOE/IG and Part 708 complaints. The Statement also points out that since Blankenship learned of the 2001 Part 708 complaint sometime after it was actually filed, less than 13 months elapsed from the time he learned of it to the time that Blakely was terminated.

4. Citing some purported inconsistencies in the RIF ratings process, the Statement maintains that overall Blakely has proven by a preponderance of evidence that her protected activities were a contributing factor in her termination.

5. The Statement argues that the Hearing Officer erred in concluding that FFI had proved by clear and convincing evidence that it would have terminated Blakely in the absence of the protected disclosures. In support of this contention the Statement contends that the Hearing Officer incorrectly placed the burden of proof on Blakely to show that FFI would have terminated her absent the disclosures, whereas, under the regulations this burden lies with

FFI. The Statement cites to portions of the hearing transcript in which the Hearing Officer spoke to Blakely about the necessary showing. For example, the Statement cites the Hearing Officer's statement "the question is whether [Blankenship] would have reached the same conclusions absent the protected activity." Tr. at 934. *See also* Tr. at 934, 935, 936. The Statement concludes from this assertion and other similar assertions by the Hearing Officer that he improperly shifted the burden from FFI to Blakely to establish by clear and convincing evidence that she would have been terminated in the absence of her protected disclosures.

6. The Statement also maintains that there are inconsistencies and unexplained gaps in the RIF and other ratings data provided by FFI. The alleged anomalies include incorrect translation of the employee ratings from the individual employee rating form (IERF) to the overall employee comparison document (the Functional Ranking Report or FRR). The Statement cites as unfair the fact that the FRR does not include the names of any of the engineers to whom Blakely was compared, thus depriving her of the opportunity to cross-examine the decision makers about the ratings of these other employees. The Statement contends that there were "unacceptable" blanks in some of the comment fields in the FRR. Tr. at 506. The Statement also points out employees who were rated as weak in some areas, but who overall received a higher rating that Blakely. The Statement appears to argue that these anomalies and inconsistences establish that FFI has not shown by clear and convincing evidence that Blakely would have been terminated absent the protected disclosures.

B. FFI's Response

1. In response to the Statement's assertion that the Hearing Officer erred in determining that Shelby Blankenship was the official taking the action in connection with the Blakely RIF, FFI admits that other FFI officials had input into the RIF process. However, the FFI Response contends that Blankenship's role was the critical one in the selection of Blakely for termination.

2. The Response contends that Blankenship's testimony indicated that he did not know when he became aware of Blakely's 2001 Part 708 Complaint. The Response argues that since it was Blakely's burden to establish that Blankenship knew of the protected activity when he terminated her, Blakely has not met her burden with respect to the contributing factor showing.

3. The Response agrees with the IAD's conclusion that the 13 month period between the time that Blankenship learned of the DOE/IG

communication and the RIF is too long to establish a causal connection between the protected activity and the adverse personnel action.

4. The Response supports the overall conclusion in the IAD that Blakely failed to show that her protected activities were a contributing factor to her termination.

5. The Response maintains that the IAD correctly found that FFI would have riffed Blakely in the absence of her protected disclosures/activity.

IV. Analysis

As is evident from the above description of the filings in this case, the arguments are numerous, complex and involve some complicated factual contentions. However, after fully reviewing the voluminous record in this case, as well as the arguments raised in the Statement of Issues, I find that there is no basis for overturning the result in this case. As previously discussed, I believe that the complainant has shown that filing the prior Part 708 complaint was a contributing factor to her termination by FFI. However, as indicated below, I find that FFI has established by clear and convincing evidence that it would have terminated Blakely absent the protected activity.

The Statement argues that during the hearing, the Hearing Officer incorrectly placed the burden of proof on Blakely to show that FFI would have terminated her absent the disclosures. The Response cited several portions of the transcript for this proposition. Tr. at 932-37. As an initial matter, the argument that Blakely could or would be expected to make such a showing is illogical in the context of Part 708. It should thus be summarily dismissed as non-sensical. Nevertheless, in order to be completely fair to Blakely, I have reviewed the citations referred to in the Statement, and can find no indication that the Hearing Officer in any way improperly assigned the burden of proof.

The interchange cited by the Statement took place during the examination of Blankenship. As the Statement pointed out, the Hearing Officer made the following statements to Blakely: ". . . it's really to determine what influence your protected activities had on these conclusions,. . . whether [Blankenship] would have reached the same conclusions absent the protected activity." Tr. at 934. The Hearing Officer also stated "I want to know whether

[Blankenship] was improperly influenced by your protected activity in reach that conclusion." Tr. at 936.

In the cited portions the Hearing Officer was simply reviewing in plain language for Blakely's benefit the type of information he thought should be educed during the examination of Blankenship. I see no evidence whatsoever that the Hearing Officer was attempting to place the burden of this showing on Blakely. In fact, the Hearing Officer prefaced this discussion with Blakely with the following statement: "assuming that you can show that your disclosures were somehow a contributing factor to anything Mr. Blankenship did with respect to you, then Fluor Fernald would have to show that he would have done the same thing whether.. . you had made protected disclosures or engaged in protected activity or not." Tr. at 931-32. Thus, it is clear that the Hearing Officer understood the burdens of proof in this case. There is simply no evidence that the Hearing Officer incorrectly apportioned the burden of proof on this issue.

The Statement also maintains that there are inconsistencies and unexplained gaps in the RIF and other ratings data provided by FFI. The Statement argues that when these deficiencies are taken into account, FFI will not have met its burden of proof.

The Statement first points out that Blankenship's ratings of Blakely in her annual performance assessment (PA) dated January 15, 2002, were inconsistent with his rating of her for the RIF (Individual Employee Rating Form or IERF), which took place only one month later, on February 19, 2002. As an example, the Statement indicates that in the PA, Blankenship rated Blakely as "meets expectations" in the "Initiative" category, but in the IERF, he rated her in that same category as "occasionally fails to meet standards and expectations." The Statement claims the same inconsistency for the "Quality of Work," "Technical Knowledge," and "Communication Skills" categories.

After reviewing the hearing testimony on this very point, I find no inconsistency. The PA and the IERF are different. As FFI Program Director of Administration Paul Mohr explained, the performance assessment process looks at an employee's performance over the past 12 months and the rating serves as a point of discussion between the employee and supervisor on areas of improvement and employee strengths. This rating does not compare employees. However, in performing ratings for the involuntary separation process (RIF), the focus is quite different. In the RIF process the rating official will assess the types of work that will need to be performed in the

future, and how a particular employee's skills fit into future skill mix requirements in comparison to other employees. Thus, the two ratings can be different for the same employee for the same period. Tr. at 666-73.

Darlene Gill, who was FFI Human Resources Manager for Workforce Restructuring during 2001, also testified on this point. She stated that the skills assessment for the RIF was designed to evaluate behavior and skills necessary for closure and completing the Fluor Fernald/DOE project. She indicated that workforce restructuring is "looking at behaviors that are needed today, or that will be needed to help meet the goal [of] closure." On other hand, she stated that "performance assessments are looking at behaviors that happened for the past year performance and [on] evaluating goals, behaviors of the work that was done." Tr. at 683.

Based on this testimony, I find there was a clear and convincing reason for the different ratings of Blakely in the PA and IERF.

The Statement argues that there may have been some transcription errors in transferring ratings from the IERF to the Functional Ranking Report (FRR). The Statement argues that Blakely's rating in particular was inaccurately transcribed as 2.15 instead of 2.35. The Statement speculates that other ratings may have also been inaccurately transcribed. The Statement suggests that it is possible that Blakely was not among the lowest ranked employees, and should therefore not have been terminated. 4/

As an initial matter, the Statement does not provide any calculation that would allow me to evaluate that assertion. On the other hand, the FFI Response has laid out a fully documented calculation that indicates that the 2.15 rating was correct. FFI Response at 17.

In any event, the assertion that there may have been errors in the transcription of the scores of other employees is merely speculative, and I will not reopen the record at the point in the proceeding to test that possibility. In this regard, I note that the focus of our efforts here is to insure that an employee was not unfairly treated as a result of protected activity. These claims

---

4/ Even at the 2.35 rating level, Blakely was still the lowest ranked of all employees on the relevant FRR. FFI Exh. J. Thus, in order for Blakely not to be among those terminated, there would have to be errors committed with respect to rankings of other employees.

of unintentional error fall more within the purview of an employer's human resources operation. It is not the purpose of the Part 708 process to investigate and correct mathematical errors, transcription mistakes or other unintentional errors that appear unrelated to a retaliation against an employee for a protected disclosure/activity. Based on the record, there is no reason to believe that even if there were any errors, they were committed intentionally to insure the termination of Blakely.

The Statement then raises the possibility of overall discrepancies and inconsistencies in the Functional Rating Report. The FRR was entered into the record without identifying by name the individual employees who were rated and ranked, except for Blakely. The Statement questions the fairness and accuracy of the rankings of these other unidentified employees. The Statement points out that whether Blakely should have been retained instead of other employees cannot be fairly considered without knowing the identities of each rated employee and his qualifications.

It is true that Blakely's ability to challenge the ratings of FRR is limited by the fact that the names of the other employees are deleted from this material. Usually this information is deleted in order to protect these other employees from an unwarranted invasion of their privacy. However, this information could have been provided to Blakely under a protective order. If Blakely wished to probe the accuracy and fairness of the FFI ratings of other employees, she should have asked for an un-deleted version of this material prior to the hearing. There is no evidence that she ever made a request for this information. At this stage of the proceeding, it is far too late to reopen the record on this point. Accordingly, I will not give her assertions on this issue further consideration.

The Statement also mentions that Blankenship performed a "skills assessment" for Blakely, but did not perform one for another engineer, "John McCoy." 5/ The Statement speculates that the failure to perform this assessment for this employee may have allowed him to be retained instead of Blakely. FFI explains that this employee was not assigned to a group that fell into a declining category and therefore no skills assessment for him was necessary. Statement at 19. In this regard, Blankenship testified that he "only had one person in the engineer category that was shrinking." Tr. at 852. I therefore find this objection to be without merit.

5/ The correct surname of this employee is McCloy.

The Statement also raises a series of anomalies and discrepancies in the FFR. These include, for example, that a "comment area" on the FRR with respect to Blakely was left blank, in spite of the fact that it was allegedly unacceptable to leave blank any comment areas on the FRR. I am not persuaded by this argument. Overall, a RIF tends to be a long and complicated process, during which there may well be some inconsistencies and anomalies. This fact alone, an area left blank, does not mean that the RIF was unfair, or that it was performed in such a way as to target or eliminate a particular employee. In this case I see no reason to believe, nor has the Statement shown, that a minor deviation, such as failing to fill in all the blanks, suggests an error in the Hearing Officer's determination that there is clear and convincing evidence that the contractor would have riffed the complainant in the absence of the protected disclosure/activity.

Finally, the Statement alleges that FFI had a policy of reviewing lay-off candidates to see if there were any company job openings in which these employees could be placed. The Statement argues that FFI did not present evidence regarding whether this failure to place Blakely in another position was part of a retaliation effort. The FFI response included an affidavit from Ms. Gill to the effect that Blakely did not qualify for any of the open positions. I am inclined to accept that assertion. In any event, Blakely should have pursued this issue at the hearing if she believed that the failure to place her in another position was part of the firm's effort to terminate her because of her protected activities. The fact that FFI did not find her another job does not in and of itself mean that the firm has failed to meet its burden of proof. Thus, overall, the Statement has simply not raised any issues that even suggest that the Hearing Officer's determination regarding the contractor's clear and convincing showing was incorrect.

Further, from my review of the record as a whole, I believe that the Hearing Officer's determination regarding FFI's showing was well-founded. With respect to the clear and convincing showing, he based his determination largely on Blankenship's assessment that Blakely was relatively unproductive, needed too much supervision and tended to be argumentative. These were first hand opinions derived from working directly with Blakely, and were the basis for his low rating of her on the IERF. The IAD cited hearing testimony from Blankenship explaining and supporting his judgment that Blakely was argumentative, unproductive and needed excessive supervision. IAD at 17-19. I will not revisit the Hearing Officer's findings of fact on this issue. I believe that they are adequately supported. In fact, I note other testimony in the record suggesting that at least

one other FFI manager found Blakely difficult to work with. Mark Cherry, FFI project manager for the WPRAP, testified that he worked with Blakely beginning in January 2000. Tr. at 170. Cherry testified that he found Blakely "very difficult" to work with. Tr. at 188. He stated that she refused to accept closure of issues. Tr. at 202. He indicated that Blakely was seeking "an admission of guilt on somebody's part and on saying you [i.e. Blakely] were absolutely right." Tr. at 203. There is some testimony in the record from other witnesses who stated that they did not have problems working with Blakely. However, these same witnesses also indicated that they did not have any significant interaction with her. *E.g.*, Tr. at 230, 235, 243. Thus, these witnesses do not lend meaningful support to Blakely's position that Blankenship judged her unfairly. 6/

In sum, I am convinced that there was sufficient evidence in the record in this case to support the hearing officer's conclusion that FFI clearly and convincingly established that it would have terminated Blakely absent her protected activity.

V. CONCLUSION

As discussed above, I see nothing in the Blakely Statement of Issues that would cause me to overturn the IAD in this case. Accordingly, the instant appeal should be denied and the IAD affirmed.

It Is Therefore Ordered That:

(1) The Appeal filed by Elaine Blakely on July 9, 2003 (Case No. VBA-0086), of the Initial Agency Decision issued on June 25, 2003, be and hereby is denied.

6/ Another witness who found her to be competent and was satisfied with her performance, nevertheless thought her manner could be "abrasive" and "irritating." Tr. at 756. Overall, I believe this testimony tends to support Blankenship's assessment.

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

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 15, 2004