Case No. VBH-0015

December 1, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Morris J. Osborne

Date of Filing: June 28, 1999

Case Number: VBH-0015

This Decision involves a complaint filed by Mr. Morris J. Osborne (hereinafter the complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The complainant contends that reprisals were taken against him after he made disclosures concerning the lack of electrical inspections at the Idaho National Engineering and Environmental Lab (INEEL). These alleged reprisals were taken by Lockheed Martin Idaho Technologies Company (Lockheed). Lockheed was the managing and operating contractor of INEEL through September 30, 1999. Bechtel assumed Lockheed's management responsibilities at INEEL on October 1, 1999.

I. The DOE Contractor Employee Protection Program

A. Regulatory Background

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensure compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). The program's 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed information that the employee reasonably and in good faith believes reveals a

substantial violation of a law, rule, or regulation; or fraud, gross mismanagement, gross waste of funds, or abuse of authority. See 10 C.F.R. § 708.5(a) (1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an investigation by an OHA investigator, a hearing and independent fact-finding by an OHA hearing officer, and an opportunity for review of the hearing officer's initial agency decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.30, 708.32.

B. Procedural History

On June 22, 1998, the complainant filed a complaint with the DOE-ID Office of Employee Concerns

against Lockheed pursuant to 10 C.F.R. Part 708. On April 16, 1999, the Office of Inspections of the DOE's Office of Inspector General transferred a number of pending complaints, including the subject complaint, to OHA. On April 26, 1999, the OHA Director appointed an investigator to examine the issues raised in the complainant. The investigator promptly conducted an investigation, and issued a Report of Investigation on June 28, 1999. (1) On that same day, the OHA Director appointed me the hearing officer in this case.

On September 14 and September 15, 1999, I convened a hearing on the complaint in Idaho Falls. The transcript of September 14 will be referred to in this decision as TR. I and the transcript of September 15 will be referred to as TR. II.

II. Legal Standards Governing This Case

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. § 708.29. See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th ed. 1992).

B. The Contractor's Burden

In the event that the complainant satisfies his evidentiary burden, the regulations require Lockheed to prove by "clear and convincing" evidence that the company would have terminated the complainant if he had not made a protected disclosure. "Clear and convincing" evidence requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt." See Hopkins, 737 F. Supp. at 1204 n.3. In evaluating whether Lockheed has met its burden, I will consider the strength of Lockheed's evidence in support of its decision to terminate the complainant and any evidence that Lockheed takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

III. Background

A. The Protected Disclosure

The complainant was a quality assurance (QA) inspector for 14 years at the INEEL facility. He was assigned to work primarily within the Idaho Nuclear Technology and Engineering Center, INTEC.(2) The INTEC facility is one of approximately seven sites within INEEL. Six of those sites are gated work areas.

The complainant made several disclosures concerning the lack of safety inspections at the INEEL facility. The disclosure that is relevant to the complainant's discharge was made in February 1998 to the complainant's supervisor. The complainant repeated the disclosure during a March 2, 1998, telephone conversation with the President of Lockheed. That telephone conversation led to a March 5, 1998, meeting with several Lockheed officials. During that meeting the complainant repeated his disclosure that there was a dangerous lack of safety inspections at the INEEL facility. Lockheed has stipulated that the individual's disclosures are protected by Part 708.

B. The Retaliation

During May 1998, two months after his protected disclosure, the department manager requested that Doug Bensen, hereinafter "the internal auditor," review the time card reports of the complainant and the complainant's co-worker. After reviewing the time cards the internal auditor reached the conclusion that the complainant and the complainant's co-worker were reporting the same charge codes during the same periods. TR. I at 26.

The finding that the complainant and the co-worker were charging the same charge codes suggested to the department manager that the complainant and the complainant's co-worker may have been engaging in non work related activities and therefore, may have been improperly charging their time. After discussing the matter with the internal auditor, the department manager directed the internal auditor to arrange for the INEEL security office to investigate the time card charging practices of the complainant and the complainant's co-worker.(3)

The security office investigation was conducted by a "security investigator" and covered the activities of the complainant and the complainant's co-worker for 12 weeks beginning on the date of the protected disclosure, March 2, 1998 through May 18, 1998. AR at 413. (4) The notes of the security investigator indicate that on June 4, 1998, the security investigator briefed the department manager on the information obtained during his interview with the complainant. Those notes indicate that the complainant's supervisor was not briefed on the interview. AR at 416, 419.

The security investigator issued an investigative report on June 10, 1998. AR at 413.(5) The security investigator concluded that the complainant and the complainant's co-worker acknowledge "leaving INTEC for approximately 17 hours,(6) or more each, during the above period [March 2, 1998 through May 18, 1998] to ?goof off' when they had no work to do." AR at 413.

I was convinced by the testimony at the hearing that the complainant did spend time outside the gate engaged in non work related activities. However, I believe the 17 hour estimate is excessive. The testimony at the hearing indicates that the 17 hours estimate in the security investigator's report was based on an assumption that all time outside the INTEC gate with the exception of time spent at the infirmary was not productive work time. However, testimony at the hearing indicates that some of the time outside the INTEC gate was work related.(7) Nevertheless, Lockheed has established that the complainant was outside the gate for 10 hours, during which he was not involved in activities that were related to a specific project and he was not engaged in training activities.

After the security investigator issued his report, the Employee Review Board met on June 11, 1998. Following that meeting, Lockheed's senior ethics officer asked the security investigator to conduct a second investigation to determine if "there actually had been a basis to begin the investigation in the first place." Lockheed's post hearing brief at 5. On June 18, 1998, the security investigator issued his second report of investigation. AR at 478-81.

The Employee Review Board met a second time on June 17, 1998. Complainant's Exhibit 4. During the second meeting the Employee Review Board members agreed that the complainant's activities constituted "time card fraud" and that the complainant should be discharged. Soon after that meeting the complainant was discharged.

IV. Analysis

A. Complainant's Showing

Under Part 708 a complainant must demonstrate by a preponderance of the evidence that he made a protected disclosure. In this case, as stated above, Lockheed concedes that the complainant made protected

disclosures. TR. II at 47. The complainant must also demonstrate that the protected disclosure was a contributing factor in the retaliation by the contractor. 10 C.F.R. § 708.29. In the past, we have presumed that the standard is met when the official taking the action has actual or 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 personnel action. Barbara Nabb, 27 DOE ¶ 87,519 (1999). In the present case I find this standard is satisfied because the protected disclosure, the investigation and discharge all occurred within four months. Indeed, Lockheed does not challenge that the disclosure and retaliation took place within a short period. However, Lockheed raises two arguments in an attempt to overcome the presumption indicating that the disclosure was a contributing factor to the complainant's discharge.

Lockheed's first argument is that the complainant made prior protected disclosures which did not result in retaliation from the department manager. Lockheed believes this indicates that the department manager "was not bent on retaliation." Lockheed's post hearing brief at 11 and 12. Lockheed has not presented any testimony or evidence which would indicate that the department manager did not retaliate or attempt to retaliate against the individual after prior disclosures. Therefore, I find there is no support for Lockheed's argument regarding the lack of prior retaliations. Furthermore, the absence of prior retaliations does not necessarily mean that the department manager did not retaliate after the current disclosure.

Lockheed's second argument is that the department manager was the only one in the disciplinary process to have a reason for retaliating against the complainant, but that the department manager was not a "principal actor in the process leading to the complainant's dismissal." Lockheed's post hearing brief at 12. I generally agree that it is likely that the department manager was the only person in the process who was motivated to retaliate against the complainant. However, I reject Lockheed's claim that the department manager was a mere passive figure in the three investigations (i.e., the internal auditor's investigation and the two investigations by the security investigator) and Employee Review Board deliberations.

During the investigations, the department manager attended all the meetings with the internal auditor and the security investigator.(8) The testimony at the hearing and the documents in the record indicate the department manager was active in characterizing the time card reporting practices and work assignments of the complainant during the investigations. He was also involved in all decisions to seek additional investigations. For instance, the internal auditor testified that he brought the fact that the complainant and the complainant's co-worker were charging the same charge number to the department manager's "attention, and then we had a discussion with Ethics, and we went from there." TR. I at 26. Similarly, the department manager testified that "he asked the investigator to check the card reader at INTEC for two specific people." Tr. I at 245. In a letter dated August 14, 1998, Lockheed's senior ethics officer confirms that the complainant's supervisor bought the matter to the attention of the department manger who "consulted with internal controls." It is clear that the department manager was actively involved in the three investigations.

The department manager was also actively involved in the two Employee Review Board meetings, and his testimony at the hearing indicates that he was an advocate for dismissal of the complainant. For example, at the hearing the department manager testified regarding the relationship of the complainant's time card reports and the time spent outside the gate on March 28, 1998. He stated:

The problem is that the time sheet shows three charge numbers, four hours of NEC/NDT, four hours on the cave . . . and two hours on the coal-fire unit. And that work should have taken place in the facility at INTEC.

TR. I at 250.

It is clear that the coal fire plant is outside of the INTEC gate so that it is not true that all of the work should have taken place inside the gate. The record indicates that this type of characterization was made to the Employee Review Board and clearly affected opinions regarding the propriety of the complainant's time charging practice. For instance, Lockheed's senior ethics officer stated in his letter of August 14,

1998, that it was determined that "there was no reason to have left INTEC." AR at 21. I believe that the only person in the Employee Review Board meeting that could have made such a statement and thereby misled Lockheed's senior ethics officer about the locations of inspections was the department manager. The fact that the department manager misled Lockheed's senior ethics officer and attempted to mislead me during the hearing indicates that he was an advocate for discharging the complainant.

Since the complainant's supervisor was not invited to attend the Employee Review Board meetings, the department manager was the only person in attendance who could comment on the time card reporting practices of QA inspectors.(9) The security investigator's report found time card irregularities while the Employee Review Board found time card fraud, a much more serious matter. In order to reach this conclusion someone at the Employee Review Board meeting must have suggested that the complainant's activities and time reporting were significantly different from other QA inspectors.(10) The only person in attendance at the Employee Review Board meetings with the information and expertise to have suggested that the complainant's time card practices were significantly different from other QA inspectors was the department manager. That fact indicates the department manager had a significant opportunity to characterize the complainant's activities and time card practices and thereby influence the understanding of the other members of the Employee Review Board. Accordingly, I find that Lockheed's argument that the department manager was not influential in the Employee Review Board meetings to be unpersuasive.

I therefore believe that Lockheed has not rebutted my initial finding that the complainant has carried his burden of showing that the time nexus between his protected disclosure and the retaliatory action demonstrates that the disclosure was a contributing factor to the complainant's dismissal.

B. Lockheed's Showing

In light of my finding that the complainant's protected disclosure was a contributing factor to his dismissal, the burden is on Lockheed to show by clear and convincing evidence that the complainant would have been dismissed for his time card reporting practices in the absence of the protected disclosure. It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both the complainant and Lockheed.

In order for Lockheed to prevail, it must submit clear and convincing evidence that it had an independent basis for terminating the complainant. This means that it needs to show that the complainant's time card reporting practices were so unusual or so different from other quality inspectors that they warranted disciplinary action. After considering the documentary information, the briefs of the parties, the testimony given at the hearing, and the parties' post-hearing submissions, I find no reason to believe the complainant's time card reporting was not similar to other QA inspectors and in accordance with the direction he received. There has been no showing that his activities during standby time were not similar to the practices followed by other QA inspectors. Therefore, Lockheed has failed to demonstrate that absent the protected disclosure the complainant would have been discharged.

Three of Lockheed's arguments can be dealt with summarily. Lockheed first contends that the investigation of the complainant was proper. The complainant has not disputed that there was a reasonable basis for Lockheed's determination to investigate him and I believe Lockheed has presented a clear and convincing showing that it would have undertaken that investigation in the absence of the protected disclosure. I also believe that Lockheed has established that it followed its normal disciplinary procedures in terminating the complainant.(11) Finally, I agree with Lockheed that most of the members of the Employee Review Board, based on the information provided to them by the department manager believed that the complainant engaged in improper time reporting, and that they believed Lockheed discharged the complainant for that behavior. However, these conclusions are not dispositive of Lockheed's ultimate burden, which is to show that it would have terminated the complainant even absent the disclosure.

The contention that the complainant was properly discharged for charging time not worked, requires some detailed examination. It is first necessary to understand the function and time card reporting practices of

QA inspectors. The testimony indicates that a QA inspector's function was to respond promptly to requests for inspections from various projects at the INEEL facility. This meant that at some times inspectors had sufficient inspection work to occupy a full workday, and sometimes they did not. Inspectors believed that their productive function was to review work to determine whether it met applicable quality standards. TR. II at 63. The testimony in this case indicates that the complainant was at all times on the grounds of the INEEL facility (either inside or outside of the gated INTEC facility), with his beeper active, and was ready and able to conduct any inspection that he was requested to perform. There was no suggestion that he ever failed to conduct an inspection or was ever unavailable to conduct an inspection. TR. II at 107, 110. The time card reporting practices that led to the dismissal dealt with the periods when the complainant did not have a pending request for an inspection.(12)

The department manager provided written guidance to approximately 15 QA inspectors as to the appropriate time card reporting codes. Complainant's Exhibit #2. In addition to inspection work, which was reported using a code for the project being inspected, the inspectors were given training codes to use to report their time during their normal duty hours when there were no inspections to perform. These instructions meant that when QA inspectors did not have inspections to perform they were to report their time using a training code. The exact definition of training was never provided. However, it clearly includes reading manuals and keeping professional certifications up to date. It also included cross training through consultation and collaboration with other inspectors. Although it is likely that there were periods during an inspector's work day when he was not actively training yet fully available to be called for duty, there was no explicit "standby" code to account for such time. Notwithstanding the lack of a training program or an effort to assist inspectors in identifying training opportunities, the group manager and Lockheed's senior ethics officer testified that Lockheed management expected that QA inspectors would be involved in training activities whenever they had no inspections to perform. Because of the lack of training guidance and oversight, and the unrealistic expectation that 100% of inspector's time would be attributable to inspection and/or training, I do not believe that their testimony regarding their expectation about training was credible.

The issue presented is whether, during those standby periods when there were no inspections to perform, taking breaks and performing nontraining tasks and reporting that time under the training code, constitute the type of time card misreporting that would normally have led to an employee's discharge.

Lockheed has failed to provide any affirmative evidence to support its position that the complainant's time reporting was unusual. For example, Lockheed could have called other QA inspectors to testify they trained continuously during all periods when they did not have inspections to perform. Under Part 708 this was clearly the firm's burden. 10 C.F.R. § 708.29. Lockheed did not call any QA inspectors to provide testimony regarding time card reporting and training practices. Nor did Lockheed present any testimony on the activities of other inspectors during their standby time. Therefore, there is no support for Lockheed's contention that the complainant's activities during the times he had no inspections to perform and his time card reports for those times were different from the activities and reports of other QA inspectors.

In an attempt to compensate for its failure to show that the complainant's time reporting was unusual, Lockheed argues that the complainant's reporting must necessarily be improper. Lockheed reasons that its failure to have a reporting category for standby time - i.e., time in which the inspectors did not engage in productive work or training - compels the conclusion that either the inspectors never had standby time or, if they did, they did not report it. This argument is flawed. The lack of a descriptive reporting category for a particular activity does not mean that the activity does not exist or that it is not reported under another category. In fact, there could be various reasons for the lack of a descriptive category for an otherwise recognized activity. In this case, Lockheed clearly had the authority to establish a code for standby time, since Lockheed controlled the time cards. Lockheed's failure to establish a standby code could have been attributable to a variety of reasons,(13) and therefore, the absence of a standby code does not mean that inspectors did not report such time under existing codes.

No matter how strongly Lockheed asserts that since there was no generally recognized standby category the training category meant an inspector was actually training, Lockheed must provide clear and convincing evidence regarding the normal practice of QA inspectors if departure from that practice is the basis for a personnel action against a whistleblower. Lockheed has failed to do so.

On the other hand, the complainant himself brought forward testimony and evidence regarding the time reporting practices of QA inspectors. The complainant's log and his testimony indicate that QA inspectors thought if they had no inspection to perform they were in a standby mode. TR. II at 52. See also letter from the complainant's co-worker dated September 11, 1998, AR at 111. The complainant's testimony indicated that inspectors thought of being on standby status as a normal activity and they believed that management had directed them to report standby time using a training code. TR. II at 28. In addition to his own testimony the complainant called his supervisor to testify. When asked to describe the activities that would be expected during standby time he indicated "the most desired activity would be to do some sort of retraining . . . [but] there's a limit to how much you can read and reread and reread." TR. II at 94. In view of the candor of his testimony and the fact that the complainant's supervisor has been promoted to supervise a larger group, I viewed this testimony to be unbiased and strong support for the proposition that Lockheed's asserted requirement that standby time could not be reported using a training code was not reasonable and was not being generally followed by QA inspectors. The testimony of the complainant's supervisor also confirmed the testimony of the complainant that there was no formal training program. TR. II at 95. His testimony also supported the complainant's position that standby time was a

generally recognized concept. TR. II at 130. The complainant's supervisor also testified that the policy of charging to training codes only during periods when a QA inspector is involved in training is generally not enforced. TR. II at 134.

In its post-hearing brief Lockheed challenges the credibility of the complainant's supervisor by indicating that his statements at the hearing and his statement to the security investigator that QA inspectors had to "charge only time worked" are inconsistent. Lockheed's post hearing brief at 23. I find these discrepancies to be caused by Lockheed's refusal to acknowledge that the complainant's supervisor recognized that standby time was time worked and a normal work-related activity. Therefore, the discrepancy perceived by Lockheed does not diminish my belief that the testimony of the complainant's supervisor was candid, and consistent with the documentary evidence.

In summary, Lockheed's maintains that the complainant's behavior was improper because he reported he was in training during ten hours of a twelve week period when he was in a standby mode and not actually doing training. However, Lockheed has not shown that any other QA inspector was ever even disciplined for such an act, much less discharged. Lockheed did not bring forth a single inspector to testify that during periods of standby it was consistent practice to constantly review manuals and train. Lockheed did not provide testimony from other inspectors that they did not behave in the same manner as the complainant. Without such evidence,Lockheed has not met its burden of showing by clear and convincing evidence that ten hours of not performing training activities during a twelve week period would normally lead to the complainant's dismissal.(14)

V. Conclusion

Based on the analysis presented above, I find that complainant has made disclosures protected under Part 708, and that Lockheed's dismissal of the complainant was an adverse personnel action that constituted a retaliatory act under Part 708. Therefore, the complainant is entitled to remedial action from Lockheed and Bechtel.

It Is Therefore Ordered That:

(1) The Request for Relief filed by the complainant under 10 C.F.R. Part 708 is hereby granted as set forth below.

(2) Bechtel shall immediately reinstate the complainant to the position of QA inspector at the salary rate calculated in Appendix A.

(3) The complainant shall produce a report that provides information on attorney's fees, litigation expenses and incremental medical costs. The complainant's report shall be calculated in accordance with Appendix A.

(4) Lockheed shall produce a report that calculates the back wages plus interest payable to the individual. Lockheed's report shall be calculated in accordance with Appendix A.

(5) Lockheed shall pay the complainant back wages plus interest, attorney's fees, litigation expenses and incremental medical costs. The amounts of each of these items shall be calculated in the two reports specified in paragraphs (3) and (4) above.

(6) Lockheed shall make retirement fund contributions in the amount calculated in the report specified in Appendix A.

(7) Lockheed shall facilitate the complainant making retirement fund contributions as calculated in its report specified in Appendix A.

(8) Lockheed shall remove all information regarding this proceeding from the complainant's personnel file. The complainant shall have the right to review his personnel file.

(9) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting the complainant relief unless, within 15 days of the date of this Order, a Notice of Appeal is filed with the Office of Hearings and Appeals Director, requesting review of the Initial Agency Decision.

Thomas L. Wieker

Hearing Officer

Office of Hearings and Appeals

Date: December 1, 1999

APPENDIX A

The Part 708 regulations provide that if the initial agency decision determines that an act of retaliation has occurred, it may order: reinstatement; transfer preference; back pay; and reasonable costs and expenses, including attorney and expert-witness fees; and such other remedies as are necessary to abate the violation and provide the employee with relief. 10 C.F.R. § 708.36.

A. Findings

In the complainant's post hearing brief he requests the following relief:

1. Reinstatement to his previous job as a QA inspector.

2. Elimination of information regarding the case from his file.

3. Back wages plus interest from June 22, 1998, until reinstatement (hereinafter the unemploy- ment period).

4. Restoration of sick and annual leave that would have been earned during the unemployment period.

5. Restoration of his retirement account.

6. Payment of litigation expenses.

7. Attorney's fees and expenses.

8. The posting of finding regarding this case at INEEL.

9. Incremental medical expenses.

It is clear that the complainant is entitled to reinstatement, item 1, back wages plus interest from June 22, 1998 until reinstatement, item 3, and attorney's fees and expenses, item 7. He is also entitled to receive actual out of pocket litigation expenses, item 6, and incremental medical costs, item 9. I also believe that elimination of negative information regarding this proceeding from his personnel file is appropriate, item 2.

The complainant is not entitled to restoration of sick and annual leave that would have been accrued since June 22, 1998, item 4. It is likely that the complainant would have used that leave. Therefore, it would amount to double counting to compensate him for all the hours during the unemployment period while permitting him to accrue leave for future use. Of course when reinstated he should be credited with all leave he had accrued and not used prior to his dismissal unless he has been previously compensated for that leave.

I believe it is highly speculative to determine the earnings and the investment pattern of funds that would have been contributed by Lockheed. Therefore, I will direct Lockheed to now contribute any amounts it would have contributed during the unemployment period. In addition Lockheed shall facilitate the complainant's contribution of any amounts he would have contributed had he been employee during the unemployment period.

There is no reason to believe that posting of findings of this case, item 8, at the facility is necessary to abate the violation or provide the complainant with relief. I will therefore not order that form of relief.

B. Lockheed's Calculations

In order to calculate back wages plus interest, retirement fund contributions and leave accrued, Lockheed and/or Bechtel shall make the following calculations and provide them to the complainant within 30 days of the date of this order. (1) In the event that the exact date of reinstatement is unknown Lockheed shall make the calculations through the first pay period ending on or after March 31, 2000.

1. Calculate the number of hours of overtime the average QA inspector earned during each pay period ending during the period January 1, 1999 through June 30, 1999. In the alternative to making such a calculation, Lockheed may use four hours of overtime each week.

2. Provide for each pay period the basic pay rate per hour the complainant would have received per hour. For the period after dismissal until the date that annual pay increases are granted Lockheed shall use the hourly rate the complainant was receiving on June 22, 1998. For periods after the date of annual hourly rate change they shall increase the rate by the average increase that QA inspectors received. In the alternative to making a calculation of the average increase of QA inspectors Lockheed may use 5%.

3. Using the principles described in item 2, provide for each pay period the overtime rate the complainant would have received.

4. Determine the gross wages the individual would have earned by multiplying the basic salary rate (item

2) by forty and the overtime hourly salary rate (item 3) by the number of overtime hours (item 1).

5. Calculate the amount of interest that would have been earned on the gross wages. The interest shall be 10% annually, accrued and compounded semiannually. The calculation shall be made by accruing 5% interest on the balance of the salary accrued (item 3) and the prior interest accrued on December 31 and June 30 of each year.

6. Provide a calculation of the amount Lockheed would have contributed to any retirement account during the unemployment period.

7. Provide information on each retirement or leave benefit that is based on the length of an employee's service. For each such plan, indicate how the firm will adjust the complainant's credited service to compensate for the unemployment period.

8. Calculate the amount the complainant was eligible to contribute to retirement programs during the unemployment period. Indicate how Lockheed and Bechtel will facilitate the complainant's ability to make those contributions.

9. Calculate the amount of accrued leave the complainant will have on the date of his reinstatement.

C. Complainant's Calculation

Within 30 days of this order the complainant shall provide Lockheed the following information,

1. A calculation of the out of pocket litigation expenses and attorney's fees. In calculating attorney's fees, the complainant's counsel should estimate her hours and expenses for this calculational portion of the proceeding. In lieu of estimating her hours and costs for the calculational phase of the proceeding she may use five hours of her time and no expenses. The complainant's attorney shall provide Lockheed with sufficient information to understand how her hours and costs were determined. The complainant shall also provide reasonable information regarding his out of pocket litigation expenses.

2. Records describing the medical expenses the complainant believes would have been paid by insurance if the complainant had not been discharged. Also, the complainant should indicate any change in the complainant's medical insurance cost as a result of his discharge. The change in medical insurance cost will be an offset to the incremental medical bills or an additional recoverable expense.

D. Negotiation Period

The parties will have until sixty days from the date of this order to discuss and negotiate any disputes regarding the calculations. During that period I expect that both parties will provide reasonable information to facilitate the other party's understanding of calculations.

E. Final Report

Seventy days from the date of this order the complainant shall provide a report to Lockheed and the Office of Hearings and Appeals with a summary calculation. The complainant shall describe in detail any matters that remain in dispute. Lockheed will have 15 days from the date of that report to provide a response to that report.

F. Appeal

In the event of an appeal both parties shall follow the above negotiating and reporting steps unless those requirements are specifically stayed by an appropriate official.

(1)The Administrative Record of the OHA investigative proceeding consists of 545 pages and will be referred to as the "AR".

(2)The complainant's direct supervisor during the period was Renie Montoya, hereinafter the "complainant's supervisor." The complainant's supervisor supervised three other QA inspectors as well as several other employees. TR. II at 93. One of the other three QA inspectors is also a key figure in this proceeding. She will be referred to as the complainant's co-worker. The other individual who is a central figure in this proceeding is the supervisor of the complainant's supervisor. He will be referred to as the "department manager." His department consisted of between 28 and 35 employees. TR. I at 232.

(3)There was an intervening meeting with the department manager, the security investigator and Dennis Patterson, hereinafter "Lockheed's senior ethics officer."

(4)In order to enter or leave INTEC each person must put his security card through and electronic card reader. TR1. at ____. The electronic card reader records data which indicates the exact time that each person entered or left the INTEC area.

(5)In order to enter or leave INTEC each person must put his security card through and electronic card reader. TR1. at ____. The electronic card reader records data which indicates the exact time that each person entered or left the INTEC area.

(6)The full text of the security investigator's report is included in the AR at pages 413-82. The investigative report includes: the investigator's conclusions, six pages of investigator's notes, badge activity reports obtained from the electronic card readers, time and attendance reports for the complainant and the complainant's co-worker, a four page summary of the electronic card reader data prepared by the investigator, and weekly diaries of the complainant and the complainant's co-worker.

(7)The 17 hours seems to have been calculated by the investigator by subtracting 14 hours of time spent at the infirmary from the 31 hours spent outside the gate. However, the inspector was unable to indicate which specific hours constituted the 17 hours. After reviewing the record I am also unable to identify exactly which hours the security investigator included in the 17 hours.

(8)Testimony at the hearing indicated that some of the time outside the gate was spent going to the central facility to pick up mill test reports, TR. I at 276, and doing inspections at the coal fire plant and other facilities, TR. II at 31 (coal fire plant) & TR. II at 78 (weld shop). For instance, on March 18, 1998, the complainant and the complainant's co- worker were outside the INTEC gate for 2 hours and 26 minutes. AR at 460. On that day the complainant reports two hours on his time cards under a code for performing an inspection at the coal fire plant. That plant is outside the gate. That period outside the gate was clearly productive work time. The department manager testified at the hearing that the complainant should not have done that inspection because it was outside the INTEC gate. TR. I at 292-94, 309-12. I found that testimony of the department manger to be an attempt to justify his statements to the security investigator and the employee review board. When questioned at the hearing he could not provide any basis for his position that the complainant should not have done that inspection. This self serving and defensive testimony is an example of the department manager's pattern of evasiveness which leads me to believe the department manager did not testify honestly at the hearing.

(9)I am aware the department manager testified that he was not involved in the investigation by the internal auditor. TR. I at 246. However, I believe the internal auditor's testimony on this issue to the contrary. TR. I at 23, 24 and 26. The internal auditor was clearly more credible than the department manager whose recollections were often in error and reflected his self interest.

(10)It is clear from Lockheed's senior ethics officer's testimony that he had no familiarity with the reason a QA inspector might leave the INTEC facility. TR. I at 341.

(11)The testimony of the security investigator and his report are quite clear that he did not find time card

fraud. He clearly indicated that he only found time card inconsistencies. TR. I at 122. He also testified he was not in a position to evaluate whether those time card inconsistencies were improper. TR. I at 148, 150, 156.

(12)The internal auditor did testify that the duty of his office, Internal Controls Office, was to do floor checks, which are audits of the time reporting process. TR. I at 16, 22. This is the type of audit that normally was used to determine whether there was time card fraud. No such audit was performed. I believe that the audit was not conducted because the group manager recognized that the QA inspectors were very mobile and therefore such a audit would not provide useful information.

(13)I believe that the Employee Review Board did not understand the function and the inspection duties and normal time card reporting practices of QA inspectors. Therefore, without adequate guidance from line management, the Employee Review Board would not have been able to evaluate the time card practices of the QA inspectors.

(14)It is my sense here that by providing such a code Lockheed might have been obligated to reveal to the DOE that there were many hours when QA inspectors had no inspections and no productive training to do.

(15)One of the examples of time card impropriety presented by Lockheed was an individual that failed to show up for an entire week and came in Saturday night and filled out his time cards as if he had been present for the entire week. TR. I at 93-96. Another example dealt with an employee who showed up in the morning, left after a short period and submitted a time card indicating she was present for the entire day. TR. I at 323. These examples seem quite different from this situation in which a QA inspector took occasional walks with his beeper active so that he could return if called. In fact, Lockheed's senior ethics officer's testimony makes a distinction between fraud and occasional breaks. He testified that "things such as long breaks, an employee coming in late, those kind of issues . . . wouldn't necessarily result in a formal investigation of time card fraud or mischarging." TR.I at 318.

(1)Lockheed shall also provide the complainant's counsel with sufficient detail for her to determine how the weekly hours of overtime and wage rate increase calculations were made.