

# Case No. VBH-0021

February 7, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Case: Eugene J. Dreger

Date of Filing: July 14, 1999

Case Number: VBH-0021

This Initial Agency Decision addresses a whistleblower complaint filed by Eugene J. Dreger (the complainant) against his former employer, Reynolds Electrical & Engineering Co., Inc. (REECO) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. At the time of the incidents described below, Dreger worked at the DOE's Nevada Test Site as a safety inspector. REECO was a primary contractor at the Test Site until December 31, 1995. Beginning January 1, 1996, Bechtel Nevada assumed this responsibility, and it has also assumed responsibility for litigation relating to the prior period, including defending this action. For four years before his employment was terminated in September 1994, Dreger had worked for REECO. He was terminated for "Failure to perform assigned job tasks successfully." Termination Notice dated September 19, 1994. The complainant alleges that REECO retaliated against him for raising safety concerns in the course of his routine job duties. As remedies, Dreger seeks to be rehired, to have his performance appraisals corrected and to be awarded back pay, Social Security credits, and compensation for emotional stress.

## I. Background

### A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated 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 such "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, to a DOE official or to a DOE contractor, 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 are entitled to receive an extensive series of protections. They may file a whistleblower complaint with the DOE. As part of the proceeding, they are

entitled to an investigation by an investigator appointed by the Office of Hearings and Appeals (OHA). After the investigator's report on the complaint is issued, they may request independent fact-finding and an evidentiary hearing before an OHA Hearing Officer. The Hearing Officer issues a formal, written opinion on the complaint. Finally, they may request review of the Hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

## **B. Procedural History**

On February 28, 1995, approximately five months after he was discharged by REECO, Dreger filed a written complaint under Part 708 with the former DOE Office of Contractor Employee Protection (OCEP). OCEP exercised its discretion to waive the 60 day filing requirement contained in the regulations. In 1996, OCEP was absorbed into the DOE's Office of Inspector General (IG). The IG began an investigation of the allegations in the complaint, but had only sporadic contacts with Dreger over the next few years.

The investigation was pending when, on April 14, 1999, revisions to Part 708 took effect. See 64 Fed. Reg. 12,862 (March 15, 1999). Under the revised procedures, investigations on contractor employee whistleblower matters are now conducted by the DOE's OHA, and the revised procedures "apply prospectively in any complaint proceeding pending on the effective date of this part." 10 C.F.R. §§ 708.8, 708.22. The Dreger complaint was such a pending matter. On April 26, 1999, I appointed Thomas O. Mann, a Deputy Director of the Office of Hearings and Appeals, to investigate Dreger's complaint. He promptly conducted an investigation and issued a Report of Investigation on July 14, 1999. In the Report he concluded that in the course of his ordinary duties, Dreger made protected disclosures regarding safety-related matters to his employer. He also inferred that these disclosures were regularly communicated to REECO managers, and that the "cumulative effect of these disclosures was a factor contributing to the decision to terminate him". Report of Investigation, slip opinion at p. 6, Administrative Record of OHA Case No. VBI-0021 ("AR") at 00824.

The Investigator then examined whether REECO would have terminated the complainant in the absence of the protected disclosures. See 10 C.F.R. § 708.29. The Investigator cited in his Report the relatively high burden of proof the contractor has in this regard.

He concluded that REECO fired Dreger for the following reasons: (1) job performance problems, including never having mastered the computer skills that he needed to complete his reports and to use the relatively new deficiency tracking system; (2) a lack of consistency in writing up his reports and in interpreting and applying Occupational and Safety Health Administration (OSHA) standards; and (3) human relations problems, including poor communication and relations with employees at the work sites he inspected.

The Investigator found that REECO had followed its standard procedures in terminating Dreger. The Investigator also found that there was no evidence that Dreger was targeted for termination. On July 14, 1999, I appointed Bryan MacPherson, an Assistant Director of the Office of Hearings and Appeals, to be the Hearing Officer in this matter. However, Mr. MacPherson retired from federal service at the end of September, 1999. Accordingly, on October 1, 1999, as the OHA Director I elected to replace Mr. MacPherson and to act as the Hearing Officer in this matter.

After a number of contacts with the parties and conference calls, I convened a hearing on the complainant's Part 708 complaint in Las Vegas, Nevada on November 15, 1999. At the hearing, Mr. Dreger called nine witnesses to testify, and the contractor called three witnesses. Each side was allotted ample time to question each witness. Ten exhibits were introduced. I received the hearing transcript on December 8, 1999, at which time I closed the record in this case. The official transcript of the hearing will be cited in this determination as "Tr.". Exhibits introduced at the hearing are cited as "Ex.".

## **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. § 708.9(d). See *Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (citing 2 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).

In his whistleblower complaint, Dreger sets forth a variety of allegations. A number are age-based.(1) Taken as a whole, the complaint suggests that Dreger believed he was being treated unfairly by REECO. Most importantly, he complains that the low performance evaluations he received, being placed on a Performance Improvement Plan, and his termination were reprisals for his safety-related disclosures. In the case at hand, REECO never really challenged during either the investigatory or the hearing stages of this proceeding that (1) the Complainant had made protected disclosures as defined in 10 C.F.R. § 708.5, and (2) these disclosures can be considered a factor contributing to REECO's decision to terminate the Complainant. As stated by REECO's counsel at the hearing, “his job was identifying environmental safety and health issues”. Tr. at 292.

These disclosures were proximate in time to the “marginally successful” performance appraisals the complainant received in 1992 and 1993 and to his eventual termination in 1994. *Don W. Beckwith*, 27 DOE Par. 87,534 (1999). The three key REECO officials who testified at the hearing were aware of the complainant's disclosures in the period leading up to his dismissal. Accordingly, the Complainant is deemed to have met his regulatory burden in this case, thereby shifting the burden of proof to REECO.

## B. The Contractor's Burden

Given the complainant's showing, the regulations require REECO to prove by “clear and convincing” evidence that the company would have terminated the complainant even if he had not disclosed safety-related information to the contractor's management officials. “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 REECO has met its burden, I will consider all the evidence in the record of this proceeding. In particular, I will closely examine the strength of evidence in support of its decision to terminate the complainant; the existence and strength of any motive to retaliate on the part of the officials who were involved in the termination decision, and any evidence that REECO has taken similar or different actions against employees who are similarly situated.

## III. Analysis

It is REECO's position that the complainant was terminated “for failure to successfully perform his job”. Tr. at 295. The complainant was hired by REECO on September 25, 1990, as a safety inspector at the Nevada Test Site (Test Site). REECO was the primary contractor at the site during the time when the complainant worked there. Some time prior to hiring the complainant, REECO decided to improve its safety inspections. According to Frank Spenia, the complainant's supervisor, Spenia started the compliance section in response to former Secretary of Energy Admiral James Watkins' desire that DOE facilities follow OSHA safety standards. REECO hired four individuals for this purpose, including Dreger. All of them had OSHA experience. For example, Dreger had experience at the Department of Labor and at OSHA as a safety inspector.

REECO claims that an examination of the complainant's work record shows a history of performance

problems that were documented in performance appraisals issued during the years 1992 through 1994. After this marginally successful performance, REECO implemented a performance improvement plan for Dreger in June of 1994. The plan targeted three areas of Dreger's performance in need of improvement: (1) computer skills; (2) description of deficiencies noted during investigations; and (3) communication with line personnel during investigations. REECO maintains the plan was intended to help the employee succeed. The plan imposed obligations on management as well as on the employee, mandated regular monitoring and evaluation, required interviews with contacts selected by the employee, and specified that regular meetings with the employee be held.

In essence, it extended a full opportunity to the complainant to improve his performance. It advised him "You must understand that if there is no significant improvement by August 1, 1994, disciplinary action, which could include termination, will be taken." Performance Improvement Plan dated June 1, 1994, Ex. 8 at 1.

REECO issued a final report on the plan's implementation on September 12, 1994, and a copy of that report is in the record. This report concludes that the complainant had shown little or no improvement. REECO contends that it reluctantly terminated the complainant on September 19, 1994.

The complainant's position has not changed during the entire course of this proceeding. He believes that he was an outstanding employee who regularly brought significant matters to the attention of management and work site employees. He maintains he received inadequate credit for his targeting of health and safety deficiencies. He contends that the computer-related issues about his job performance were exaggerated, and that other employees who knew his work believed him to be outstanding.

Before I delve into the testimony and other evidence relating to the complainant's work performance, I note some of the complainant's strengths. He is direct and plain speaking. He served in the Navy and has a long record of being a capable safety professional, including working at OSHA for many years.

REECO found problems with Dreger's work during virtually the entire time that the complainant worked at the Test Site. These problems have not changed over time. The first problem area is a failure to master computer skills, which he needed to write up investigations, to complete safety deficiency reports accurately and to enter material into the REECO "Automatic Deficiency Tracking System" (ADTS) system. These matters were a key part of each annual performance appraisal the complainant received. The complainant says REECO is wrong and that his computer skills were at a level comparable to those of the other safety inspectors.

None of the witnesses the complainant called to testify at the hearing had any direct knowledge of his computer skills. Certainly none of them testified that Dreger's computer skills were adequate. Nor did he submit an independent assessment of his skills, which would have been helpful to me. Nevertheless, I believe I have formed an accurate opinion in that respect. Two of the REECO witnesses testified at length at the hearing about his deficiencies in this area, and Dreger did not contradict any of the specifics of their testimony. The complainant's skill at written communication was clearly poor. Notwithstanding, he did not use skill enhancements available on computer programs - e.g. "spell check" or a grammar check program. It was clear that he did not proofread his work, which would have allowed him to make ready use of the computer to make needed corrections. A REECO official testified at the hearing that Dreger would turn off the computer in order to save a document, utilizing the back up copy, because he couldn't master the regular "save" command. Tr. at 215.

Moreover, it was also clear to me from the testimony and the record in this case that the complainant did not ever really care very much about refining or improving his computer skills. The complainant saw his primary function as a safety inspector to be making unannounced visits to work sites, performing OSHA-type investigations and finding safety- and health-related problems. It did not interest him to spend time writing up proper reports.

He never believed they were important or essential, notwithstanding the fact that they alerted those at the

work site to the problems, promoted correction by them of deficiencies, and allowed for proper monitoring and follow through by those at the work site and by management.

Dreger wanted to swoop in and “put the hammer down”, and he never changed this view of his job. See the Witness Statement of Frank Spenia transcribed by the OHA Investigator dated July 8, 1999 (Spenia Witness Statement) at 2 (AR at 00803). Compare [Russell P. Marler, Sr.](#), 27 DOE Par. 87,506 (1998)(*Marler*).

I have reviewed the many deficiency reports, weekly activity reports and status reports written by the complainant that are part of the record in this case. I found them commonly to have typographical errors (see e.g. the Inspection Report dated 3/23/94, AR at 00070) and to be hard to follow (in the Long Form Deficiency (LFD) Report dated 6/9/94, the following appears: “. . . The supervisor has stated; the ergonomic problems are solved, by dating and signing the LFD, that it corrected.” AR at 00095). Often the reports look like a first draft, with clumsy grammar. Individual Deficiency Report dated June 4, 1993: “. . . The ladder hand rails atop both fuel tanks are not permanently afixed [sic] since they pose erratic movements.” AR at 00082. The reader sometimes cannot determine the exact nature of the deficiency Dreger cites. Even the general nature of a deficiency can be elusive in these reports, and the reader must read on into the details for better understanding. [Marler](#) at 89,057-59.

The second area of the complainant’s work deficiencies involves his interpretation of applicable safety and health rules and whether he was consistent in his reports. Management pointed to numerous problems in this regard. Performance Appraisal dated 10/13/92, Ex. 3 at 2 (“Hazards were not properly identified, improper standard used and reports not timely.”), and at 3 (“on occasion SDR’s and/or . . . forms had to be rewritten or rejected for improper standard cited or details in describing violation/hazard.”); Performance Appraisal dated 11/10/93, Ex. 4 at 2 (“Standard interpretation in cases has been opinionated and some times overstated. Personal preferences are sometimes reflected in citations rather than accurate interpretations.”) and at 4 (“In many cases calls have been received from personnel in employee’s areas of responsibilities with questions on interpretations. Interpretations are not always clear and sometimes confusing.”); Performance Improvement Plan Final Report dated 9/12/94 (“Final Report”), Ex. 9 at 2, 5 (“Deficiency reports are at times hard to understand. One deficiency report showed two different responsible managers. Also, found one report that was signed by the employee in the wrong place preventing us from advancing status.”). Witness Spenia noted in a telephone interview that “Dreger would identify a deficiency, agree on a method of correcting it, and then he would go back and reinspect the job and tell them they should have used an entirely different approach. We also got complaints about differences in interpretation of the OSHA standards.” Spenia Witness Statement at 1 (AR at 00802).

The testimony at the hearing on this issue was not at all favorable to the complainant. The witnesses he called did on occasion give favorable comments of a general nature regarding his safety inspections. See the testimony of Terrance S. Holmes (“Mr. Dreger operated the same as all the safety officers out there. I believe in a very professional manner.” Tr. at 21); see also the testimony of Donald McDermott, a maintenance and well crew worker at Area 6 and Area 12 of the Test Site, who when asked by the complainant about his opinion of Dreger’s inspections, said generally “You were held in high regard. You were competent, you [knew] exactly what you were doing.” Tr. at 83.

However, two of the witnesses called by the complainant had very negative and detailed comments about the way he interpreted rules applicable to the workplace. Dudley Russell, an ES&H coordinator for REECO, criticized Dreger for performing misguided inspections. He testified “when issues would be brought forward we were of the opinion that those things, especially minor details could have been taken care of on the spot.

Rather than being tracked on a deficiency system and treated as something that would may have a fine attached to it.” Tr. at 67. By way of example, Russell said that if they had five jars containing the same thing, like mayonnaise, and four jars had proper labels while the fifth jar, with the same contents, had no label, Dreger would “write up” the jar not labeled properly instead of just putting on a new label

indicating the contents. Russell said “. . . you just correct it with a black sharpie and go on. In many instances . . . that wasn't good enough. [Dreger] wanted a label on there that went into excruciating detail and, you know, I just didn't feel that was necessary. It didn't add any value to the project.” Id.

Another witness called by the complainant, Michael Rollins, was a safety specialist for REECO who had duties similar to the complainant's. Rollins clearly believed that the way the complainant approached his job was not valuable for REECO or its employees. He testified that “our roles were different”, Tr. at 52, and that Dreger “was primarily there, for lack of any other term, to play 'gotcha'” at the work site, Tr. at 53. In contrast, Rollins says he worked on building a team which was intent on making safety a daily routine. “We had an incredibly successful safety program at the test site. . . We had safety committees where we worked with the craft people to get them on board. And get them to work with us in the safety program. . . It was sort of probably a hallmark program across the nation as companies started into this thinking. . .” Tr. at 57-8.

The third problem area for REECO management officials with respect to the complainant's work performance involved his communication skills. Repeatedly, he was cited in the performance appraisals by REECO management officials as needing improvement in this area. See e.g. his very first performance appraisal for a full year (Ex. 2) dated January 29, 1992, which stated as follows in the “areas requiring development” section: “Some development in communications skills”. Id. at 4. The performance appraisal dated October 13, 1992, for the period ending on September 30 of that year, states “employee . . . at times interprets in a manner that confuses [sic] the issues. Details of hazard description are not always clear which leaves responsible individuals unclear on proper corrective action.” Ex. 3 at 6. See also Tr. at 128. Dreger never put in any evidence to contradict these negative reports in the performance appraisals about his interpersonal skills. His former colleague G. A. Rodriguez, also a REECO safety inspector, told the Investigator “I worked with Dreger for two years. He and I had a run-in. . . Because of the run -in . . . I tried to avoid him as much as possible. . . I heard that Dreger had problems, and that they were putting him on probation . . . Dreger brought it on himself, because of his attitude. He tried to be a know-it-all.” Witness Statement of G.A. Rodriguez dated July 12, 1999 at 1, AR at 00804.

In addition, a number of employees who testified at the hearing after being called by Dreger discussed in detail what they called his communication problems. For example, Dan Gouker, general foreman of the Area 6 generator shop at the Test Site, testified about his interactions with the complainant. First, he carefully distinguished himself from management (“I'm a craft and that's what I did.” Tr. at 42). His testimony was adverse to Dreger in two important respects, both on the type of inspections he made and in contrasting him with other inspectors.

*The Witness:* [Dreger] would sit in front of a man's toolbox and go through drawer by drawer looking for tools. I know that my crew took personal offense to it because of the fact that he questioned everything in it and why is this like this and what's this and why is that. And my men

at the time did keep one drawer in their toolbox for personal effects, wallets, et cetera, that drawer was not allowed to be looked into but obviously opened to make sure there's nothing in there to be modified; no bad tools, broken tools, et cetera. . . . I know that my men were offended by the type of inspection.

*Hearing Officer [Breznay]:* Is that just normal reaction to a safety inspector coming in?

*The Witness:* Absolutely not, absolutely not. It was the fact that he was going through their personal toolbox. We had inspections all the time. . . . So we were under constant scrutiny to make sure that we come up to both DOE requirements, REECO requirements, OSHA requirements and more importantly the National Electrical requirements. So were never offended by any inspection that came through. . . .

*Hearing Officer:* Can you compare what happened with Mr. Dreger and the men on site to other safety inspectors who came by? Were there similar problems or were they different?

*The Witness:* There weren't problems with other inspectors, they would come in and say I'm here to do

this, they would proceed on and they would do that. . . . Mr. Dreger would contact me, as a general foreman, and say I'm coming by your shop to do an inspection. . . Then my guys would have to come over and say who's that and what is he doing going through my toolbox? So, it wasn't similar at all. . . .It wasn't a matter of whether they liked it or not, it was the manner in which it was done. Without conversation with the employee whose tools are being looked at. . . . toolbox[es] had personal things in it, like wallets, like badges, in the shop the guys were allowed to work without their badge because of the fact they were bending over rotating equipment. . . . It was never a question of looking at tools, we always wanted that. In fact, I took it upon myself for my tool crib man to remove any damaged tool . . . we were never opposed to any type of an inspection to make sure that the tools were safe. It's the manner that these particular inspections were done in going through parts of the toolbox that had no tools in them. That was the problem." Tr. at 36-40.

Frank Spenia, the complainant's Section Chief, testified extensively at the hearing about Dreger's work performance. Spenia was an experienced manager for REECO, and he is currently employed by Bechtel Nevada at the Test Site. He is a certified safety professional. Spenia discussed his "performance notes" which underlie the REECO performance appraisals introduced at the hearing. The performance note dated 12/29/92 records that Dreger had improperly cited a particular work site "for failure to have MSPS for hand cream." Ex. 5 at 3. An "MSPS" is a material safety data sheet, which is typically required for chemicals on the worksite. It states the composition or formula for the particular compound. Under questioning by the complainant, witness Spenia said "I myself wouldn't require somebody to have an MSPS for hand cream. Technically speaking, you're probably correct. . . . [But] I don't think that out on the job site, . . . we would require or cite somebody for not having an MSPS for hand cream." Tr. at 221.

When I asked Dreger for clarification of his position on the matter, I said "So, you thought it was part of your concern to flag this because of the safety hazard to individuals who might be using their hand cream." Dreger responded "Yes, sir. In this specific reason it could be a health hazard." Tr. at 222; see also AR at 00021. I find that the evidence strongly supports REECO's position that Dreger's communication skills, overall judgment and behavior towards employees at the worksite fell short of normal expectations.

These performance shortcomings and other events combined in 1994 to precipitate a crisis at the workplace for the complainant. His last two performance appraisals had been "marginally successful". In addition, on December 6, 1993 Dreger was cited for failing to answer a page, an extremely serious matter.

According to a "performance note" recorded by Witness Spenia, "After looking into circumstances it was determined that Dreger was on duty and had not responded to a 900 page for approximately 2 hrs. This does not meet requirement in [occupational safety and fire protection] internal procedures - reprimand issued." Ex. 6 at 1. The complainant was the assigned duty officer for the particular weekend, and agrees that he did not respond to the page. Tr. at 154. His only comment was that he was either at a movie at Nellis Air Force Base or in a bus somewhere on the Test Site. Tr. at 225. He was properly reprimanded for dereliction of duty. He was also cited on December 12, 1993 for becoming "short" with another employee. Ex. 6 at 1. See Tr. at 156. Spenia testified that at that point, REECO management officials concluded ". . . something needed to be done. We needed to look into this." Tr. at 162.

REECO concluded that the best approach was to implement a "Performance Improvement Plan" (PIP), a vehicle that REECO had used in the past with problem employees. The PIP drafted for use in complainant's case is in the record (Ex. 8). The evaluation period was June 1 through August 1, 1994. REECO officials testified that they worked carefully on drafting the PIP, that it was implemented following regularized procedures, and that it was discussed with the complainant in detail before implementation. The testimony at the hearing was consistent on this point. I conclude that REECO utilized the PIP in a sincere effort to focus the complainant's attention on his problems and to build consensus towards improvement. See Tr. at 163 et seq. At the meeting to discuss it prior to implementation were the complainant, Spenia and Spenia's supervisor, Steve Jones, the department manager for safety and fire protection (who supervised about 60 employees). Jones testified convincingly that "the goal was to work

with employees, to identify areas that they needed to improve at so that we can get them up to a acceptable level of performance". Tr. at 261. Jones, who had 18 years of experience as an OSHA employee in the field and in Washington DC, said "It - it give[s] me no pleasure to point out to employees how they're failing to perform, if it were not for the goal of trying to improve that performance." Tr. at 264. In the PIP, the three areas of special concern were the same ones cited above. At the end of the evaluation period, the PIP states a report would be prepared, the complainant would be notified and a meeting would be held to discuss the results. The PIP warned Dreger that failure to improve would trigger disciplinary action, including a possible termination.

Dreger never fully appreciated the significance of the PIP. For example, at the meeting during which the PIP was discussed and introduced, Dreger informed Jones and Spenia that he wanted to take his summer vacation during the evaluation period and also wanted to attend an "American Society of Safety Engineers performance development conference." Tr. at 181-2. The REECO officials stressed with the complainant the importance of the PIP, and advised the complainant against taking time off as requested, but Dreger refused.

Moreover, Dreger's work performance during the evaluation period fell well short of reasonable expectations. In fact, at the end of week 1 of the evaluation period, the Final Report notes with respect to the PIP that Dreger said he "had not yet had time to read it". Ex. 9 at 2. See Tr. at 184-85. The continuing deficiencies in the complainant's work during the evaluation period are noted and discussed in detail in the Final Report. See Final Report, Ex 9 at 2-5. It was evident to me, based on testimony at the hearing, that the reporting and monitoring function required by the PIP was done carefully and seriously by management.

For example, at week 6 the Final Report notes that "Minor improvement was noticed on report test fields", and it concedes in the "conclusion" section that "Marginal improvement has been made in documenting of deficiencies and investigations." Id. at 4, 6. However, in summing up the complainant's performance during the evaluation period, the Final Report finds that "There was no noticeable improvement in computer skills. This employee has received as much training as anyone on the two programs that he uses most. The employee relies on unorganized notes to recall functions of a different programs rather than reference manuals, books, or asking others in the section for guidance. . . . Rather than retaining to memory and practicing the skills, the employee will scribble down the sequence and when the function is to be used the notes are either lost or not understandable." Id. at 6.

The complainant's reaction at the time to management's comments and urges to improve performance was typically a denial. Or he queried "such as?". Letter (74 pages) to Hearing Officer dated November 5, 1999 ("November 5 Letter") at 50. When I directed him on several occasions prior to the hearing in this case to be prepared to address the PIP in detail, he continued typically to deny its relevance. See November 5 Letter at 43. He called the PIP "ridiculous" (id. at 44), "baloney" (at 43), "fabricated", "unbelievable", and "I don't understand" (at 48-50). He responds to the statement in the PIP that "Everything appears to him as black or white" (Final Report at 2) by saying "[Yes], if you know what you are doing, which I do". November 5 Letter at 44. As for the comment in the Final Report that he makes too many errors in his deficiency reports, his response at one point is "Who are the others who made errors?" (id. at 45). He also quibbles about semantic issues. Pointing out that the concluding section of the Final Report says he "is a very nice person", he seems to feel that it contradicts itself later when it states he "lacks diplomacy, tact and concern for others", since the definition of "nice" includes "showing tact or care". November 5 Letter at 52-3. With respect to the criticism that he viewed his function too narrowly as being there on site to "'put the hammer down' and make them do things his way," Spenia Witness Statement at 2, AR at 00803, the complainant in essence agrees. He says "Well I do have the knowledge and experience to back it up with, don't I!" November 5 Letter at 61. In the end, Dreger was convinced he was right and all others were wrong. He says "my expertize [sic] offends others because they are not as knowledgeable as I". Letter (23 pages) to Hearing Officer dated November 5, 1999 at 13.

Dreger never thought the PIP was worth more than a moment of his time. He never mentioned it in his

original whistleblower complaint, and he hardly addressed it at all in his questioning and arguments at the hearing I conducted. In fact, he never presented a serious discussion of it. At one point he called the 62 day evaluation period a “sham”, “since they are out to terminate me.” November 5 Letter at 42. He continues “they could not assist me since my experiences are beyond theirs.” Id.

Significantly, he chose to focus at the hearing not on the poor ratings he received but on the failure to receive higher ratings in some areas. He asked both Spenia and Jones why he did not receive a rating of 3, on a scale from 1 to 3, “in some of the areas I’m very strong in . . .?” Tr. at 272. Jones replied that “if you were very strong in an area, you would have received a grade of 3. If you received a grade of 2, that means you meet the performance level specified in that criteria.” Id. The complainant also complained that he got no credit for arriving at work on time, Tr. at 206, and for not using much sick leave, Tr. at 199. To the extent he addressed work-related problems directly, such as shortcomings in his computer skills, he would simply offer his disagreement, e.g., “I can’t accept that.” Tr. at 202.

Dreger’s allegation that the whole rating process was a sham was an important matter. I devoted considerable time trying to ascertain whether there was any support for his claim. Since his “marginally successful” ratings began with the second full year performance assessment he received, in 1992, I would have to find that the REECO deception and unfairness began then, years before he was terminated. Moreover, unfairness itself would not be enough for me to find in Dreger’s favor in this proceeding. The unfairness would have to be directed against him in retaliation for a protected disclosure. I am convinced this did not occur. REECO has shown that it was the complainant’s work- related deficiencies that caused the REECO adverse actions.(2)

Returning to the issue of whether he was rated unfairly, I pressed Spenia, the complainant’s supervisor, for more information on this issue: “Mr. Dreger’s allegation is that they weren’t done fairly. That you didn’t give him credit for safety successes that he brought to the fore, the crimping machine . . the Hanta virus episode, where he brought up rodent contamination, that kind of thing. How do you respond to his claim that . . . the deck was stacked against him from the beginning, that this process of rating him was unfair?” Tr. at 195. In response, Spenia readily conceded that Dreger had work-related successes: “Those things that Mr. Dreger, did, as far as identifying a press needed on a crimping machine . . . that’s what he was supposed to be doing. It’s nothing exceptional about that.

Those things were identified in the standards . . . you’re supposed to implement . . . and that’s what he did.” Tr. at 195-6. See also id. at 240, where Spenia says the complainant’s discovery of “poor electrical grounding” at a bulk petroleum facility at the Test Site was a “good call” (AR at 00259), a phrase he also used candidly when asked about the Hanta virus episode (Tr. at 239-40). When I asked Spenia about the rating of the three other safety inspectors (Terrell, Rodriguez and Boucher), his response was “His performance was obviously less than adequate because we didn’t let any of the other people go. . . Mr. Dreger was having more difficulties with our computer systems. He seemed to have problem cooperating, getting his point across to those people that were responsible for corrective actions. I wasn’t experiencing that with the other employees that were in that section at that time.” Id. at 196-7.

Next, I present testimony about REECO’s attitude towards safety. I have accumulated a surprising amount of circumstantial evidence in this proceeding to the effect that REECO was very unlikely to have retaliated against the complainant. According to all of the witnesses called by the complainant who addressed the issue, REECO was an exceptionally safety-conscious firm. Mr. Gouker, the generator shop foreman, said “In my fifteen years working for [REECO], there was never retaliation for safety related things. . . [REECO Division Manger] Flangus, who was in charge [at Mercury] at the time made a firm commitment to us . . . that there would not be retaliation for safety infractions, or safety complaints . . . And I can assure you in my length of time out there, that never happened. . . it was the same philosophy for REECO at the Tonopah test range, that there were not complaints or retaliations for bring[ing] up safety. That’s probably one of the most safety consc[ious] companies I’ve ever worked for.” Tr. at 43; see also id. at 45.

Michael Rollins, the REECO safety specialist called to testify by Dreger, praised REECO for setting up an

employee-driven safety program on the Test Site, which was copied nationally.. Upon being asked by counsel for REECO whether he knew of any retaliation against employees for raising safety concerns, Rollins said “No, in fact, that was probably the thing that was, that was clearly put forth time and time again that made the safety committee concept work as well as it did. Because the employees were truly empowered. They were actually able to pick a representative . . . way of governing safety. . . . It became an honor to sit on these committees . . . If it was a legitimate safety concern they were given all the resources possible. I was flabbergasted frankly, that the company spent as much time and effort as they did. These men were given vehicles, they were given time, their bosses were clearly instructed to give them the resources they needed to go solve these problems. . . I haven’t seen anything of its type since.” Tr. at 60-61.

Dudley Russell, the ES&H coordinator for REECO called to testify by Dreger, denied that reprisals for safety-related issues ever occurred. I queried him on this: “My job is to inquire whether his disclosures resulted in a [reprisal] from management. . . like, lowered performance appraisals or ultimately termination, because he raised safety issues. Does it strike you as something that could have happened [?].”

*The Witness:* No. I would say no, that’s not what we were all about. You know, when somebody brings something of a safety issue, you know, I mean that’s the safest place I ever worked. And I’ve been out there, I’m still there, I’ve been there 16 years. And I spent 10 years in the craft and when I first went out there it didn’t take me long to see that’s the safest place I ever worked. And we - - they were - - safety issues were brought forward, they were corrected and we went on.”

*Hearing Officer:* “And that was in your view the high point on the safety curve, if I understand your testimony. Is that right?”

*The Witness:* Absolutely. We did the best we could and I think we did a damn good job in the realm of safety. And I don’t think anybody -- I don’t think anybody -- to my knowledge there hasn’t been anybody run off for bring[ing] forth safety violations. . . . And I don’t deem this of being one of them.” Tr. at 69-71.

As Dreger’s colleague Milton Terrell said, who was also a REECO safety inspector, “Dreger had quite a few problems at REECO, and most of them were people problems, personality difficulties. He also had a big problem with interpreting the OSHA standards. Gene was very bullheaded, once he made his mind up about something. . . . No one ever retaliated against Gene for any reason. Nobody dared retaliate against any of us - we had a charter to do a safety program.” Witness Statement of Milton Terrell dated July 13, 1999 at 1, AR at 00806.

On the basis of the foregoing testimony and other evidence in this proceeding, I conclude that the contractor has met its burden to show by clear and convincing evidence that it would have taken the same actions with respect to the complainant in the absence of the protected disclosures. *Diane E. Meier*, 27 DOE Par. 87,545 (1999).

## **IV. Conclusion**

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of REECO for which he may be accorded relief under DOE’s Contractor Employee Protection Program, 10 CFR Part 708. I find that the complainant made protected disclosures under Part 708, and that such disclosures were sufficiently close in time to his termination and to other personnel actions adverse to him to be considered potentially contributing factors to those actions. Nevertheless, I find that the evidence clearly and convincingly establishes that REECO would have taken those actions, including rating him “marginally successful” in 1992 and 1993 and terminating him in 1994, in the absence of those protected disclosures. The strength of the evidence supporting the reasonableness of the contractor’s decision to terminate him is overwhelming.

I am convinced that Dreger had serious work performance deficiencies, including a lack of adequate computer skills, poor communication and other interpersonal relations problems, and deficiencies in interpreting and applying applicable safety and health rules. Two of the three other REECO safety inspectors dismissed the idea that REECO may have retaliated against him, and suggested that Dreger was himself responsible for any problems he was having at work. No evidence at all exists in the record to link his termination with his safety disclosures. Based on my observation of the witnesses' demeanor and my assessment of their credibility, I discerned no motive or intention to retaliate by REECO. Nor did I find any evidence which would indicate that REECO's treatment of Dreger was at all inconsistent with its treatment of similarly situated employees. Accordingly, I must deny his request for relief under 10 CFR Part 708.

It Is Therefore Ordered That:

(1) The complaint against Reynolds Electrical and Engineering Co., Inc., filed by Eugene J. Dreger on February 28, 1995, under 10 C.F.R. Part 708 is hereby denied.

(2) This Initial Agency Decision will become the Final Decision of the Department of Energy denying the complaint unless within fifteen days of its receipt, a party files a Notice of Appeal requesting review by the Director of the Office of Hearings and Appeals, in which case the review will be done by his designee, all in accordance with 10 C.F.R. § 708.32.

George B. Breznay

Hearing Officer

Office of Hearings and Appeals

Date: February 7, 2000

(1)The complainant had previously filed an age discrimination complaint with the State of Nevada, but it was dismissed for lack of evidence. AR at 00039. These allegations are not the proper subject of a Part 708 Complaint. Part 708 specifically excludes allegations based on issues of this type. 10 C.F.R. § 708.4(a).

(2)Dreger has never pointed to a particular disclosure which allegedly triggered REECO's retaliation. His claim is that it was all of his safety-related findings which caused REECO to retaliate against him. Based on the testimony and the other evidence in this case, I do not agree. Given the extensive testimony at the hearing about REECO's attitude toward safety, portions of which I quote infra, and testimony about Dreger himself and his work performance, I do not believe he was targeted because of his protected activities.