

# Case No. VBH-0056

March 6, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Jean G. Rouse

Date of Filing: November 7, 2000

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This Initial Agency Decision concerns a whistleblower complaint filed by Jean G. Rouse (the Complainant) against her current employer, Westinghouse Savannah River Company (WSRC), under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. WSRC is the management and operating contractor at the DOE's Savannah River Site in Aiken, South Carolina. The Complainant alleges that in June 2000, WSRC changed her job classification in retaliation for her having filed a whistleblower complaint against the company in 1998. As discussed below, I have determined that the Complainant is not entitled to relief because she has not met her evidentiary burden in this case.

## 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 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, 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 may file a whistleblower complaint with the DOE and are entitled to an investigation by an investigator from the Office of Hearings and Appeals (OHA), an independent fact-finding and a hearing 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, 708.32.

### B. Procedural History

In March 1998, the Complainant filed a complaint with WSRC's Office of Employee Concerns alleging that WSRC management had retaliated against her by giving her a poor performance evaluation and denying her a salary increase because she had refused to violate WSRC procedures without written orders from her supervisor. WSRC's Employee Concerns Office investigated the Complainant's allegations in April 1998, found them to be meritorious, and suggested a remedy. WSRC had not implemented its investigator's recommended remedy in May 1998 when the Complainant filed a complaint under 10 C.F.R. Part 708 with the DOE's Office of Employee Concerns at the Savannah River site (1998 Complaint). The 1998 Complaint set forth the same allegations previously advanced by the Complainant in her March 1998 complaint filed with WSRC's Office of Employee Concerns. WSRC settled the 1998 Complaint by implementing the remedy the WSRC's Employee Concerns Office had recommended after its own investigation into the Complainant's allegations. The remedy included (1) giving the Complainant a pay increase retroactive to the date of her 1998 Complaint; (2) upgrading the Complainant's performance evaluation at issue; (3) reassigning the Complainant to a different management team; and (4) purging the Complainant's personnel file of all derogatory and inappropriate information dating back to March 18, 1998. See Electronic Mail Message from Jean Rouse dated June 23, 1998 at 9:08 a.m. to Marcia Delmore, DOE Employee Concerns Manager.

On July 24, 2000, the Complainant filed another Complaint against WSRC with the DOE under 10 C.F.R. Part 708 (2000 Complaint). In her 2000 Complaint, the Complainant alleges that WSRC reclassified her Senior Administrative Assistant position from "exempt" to "Selected Overtime Position (SOP)" in retaliation for her having filed the 1998 Complaint against WSRC. On September 20, 2000, the Complainant requested that the issues raised in her Complaint be investigated by the DOE and that she be afforded a hearing on the matter.

On October 10, 2000, the Director of the Office of Hearings and Appeals (OHA) appointed an investigator to examine the issues raised in the subject Complaint. The investigator promptly conducted an investigation and issued a Report of Investigation on November 7, 2000. In her Report of Investigation, the OHA investigator concluded, inter alia, that the Complainant did not meet her burden of showing that her protected conduct was a contributing factor to a retaliation. On the same day that the OHA investigator issued her Report of Investigation, I was appointed the Hearing Officer in this case.

Shortly after my appointment as Hearing Officer, the parties exchanged discovery. Soon thereafter, the Complainant decided that she did not want to proceed to a hearing and asked that I issue an Initial Agency Decision based on all the information already submitted into the record of the case. (1) See Letter from Jean G. Rouse to Ann S. Augustyn, Hearing Officer (January 4, 2001)(January 4, 2001 Letter). WSRC agreed to forego a hearing on the complaint but requested permission to respond to comments made by the Complainant in her January 4, 2001 Letter. See Record of Telephone Conversation between Michael Wamsted, Counsel for WSRC, and Ann S. Augustyn, Hearing Officer (January 4, 2001); Letter from Michael Wamsted, Counsel for WSRC, to Ann S. Augustyn, Hearing Officer (January 12, 2001). The Complainant declined the opportunity to file a reply to WSRC's response to her January 4, 2001 Letter. See Record of Telephone Conversation between Jean G. Rouse and Ann S. Augustyn, Hearing Officer (January 16, 2001). Accordingly, on January 17, 2001, I canceled the hearing that had been scheduled in the case and advised the parties that I would issue an Initial Agency Decision within 60 days in accordance with 10 C.F.R. §§ 708.24(b) and 708.31.

## **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 he or she made a disclosure, participated in a proceeding, or refused to participate as described in § 708.5, and that such act was a contributing factor to one or more alleged acts of retaliation against the employee by the contractor." 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); McCormick on Evidence § 339 at 439 (4th Ed. 1992).

In the case at hand, WSRC stipulated at the investigatory stage of this proceeding that the Complainant made a protected disclosure as defined in 10 C.F.R. § 708.5, but denied that the protected disclosure was a contributing factor to the company’s decision to reclassify the Complainant’s job position.

## **B. The Contractor’s Burden**

If the Complainant meets her burden as set forth above, the burden then shifts to WSRC to prove by “clear and convincing” evidence that the company would have reclassified the Complainant’s job position even if she had not made a protected disclosure in 1998. 10 C.F.R. § 708.29. “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.

## **III. Findings of Fact**

The factual findings set forth below are based on the limited information contained in the record of this case. In a typical Part 708 case, the record is developed extensively during the hearing phase of the proceeding. Specifically, the parties can question witnesses about facts material to the case, and the Hearing Officer can assess the credibility of the witnesses by, among other things, observing their demeanor. In addition, useful insights into the working environment at the DOE facility in question and the relationship between managers and employees can often be gleaned from the testimony of witnesses. In this case, the parties elected to forego a hearing. As a consequence, this record is devoid of potentially relevant testimonial evidence, and it is difficult for me to decide what weight to accord to some of the documentary evidence without being able to probe further into statements contained in those documents. Notwithstanding these challenges, I make the following findings of fact based on the limited record before me.

The Complainant began her career at WSRC in a “non-exempt” clerical position of an unknown grade. According to the Complainant, she was promoted to an “exempt” Senior Administrative Assistant position in 1989. See Record of Telephone Conversation between Jean Rouse and Helen Mancke, OHA Investigator (October 19, 2000). It is not known what salary grade the Complainant held in 1989 and whether she received any grade promotions after that date. The record reflects, however, that in 1996 the Complainant was a Grade 30 Senior Administrative Assistant in an “exempt” pay category. See Memorandum from R. L. McQuinn, Operations Manager, Nuclear Materials Stabilization Program to Jean G. Rouse (September 16, 1996). As part of the Complainant’s duties as a Grade 30 Senior Administrative Assistant in 1997, she prepared reports that tracked “safety surveillances” for certain pieces of equipment. See Record of Telephone Conversation between Helen Mancke, OHA Investigator, and Jean Rouse (October 19, 2000). In December 1997, the Complainant’s management allegedly instructed her verbally to stop preparing the safety surveillance reports. The Complainant refused to comply with the directive absent written guidance because she believed that the DOE had mandated the preparation of these reports during an “Operations Readiness Review” of WSRC. Id.

On March 18, 1998, the Complainant received a low performance evaluation and was denied a salary increase. Id. The Complainant filed a Complaint against WSRC with the company’s Employee Concerns Office, alleging that her supervisors rated her as low/poor performer, based not upon her actual job performance, but as “direct punishment” for her having requested written guidance before complying with instructions to violate company procedures. See Memorandum from the Complainant to Mr. Sokolo, WSRC Employee Concern Program (March 20, 1998). A subsequent investigation by WSRC confirmed the Complainant’s allegations that her management had retaliated against her after she had refused to

violate established company procedures without written instructions. See Investigative Report prepared by Dennis B. Hurshman (April 8, 1998).

In May 1998, the Complainant filed a Part 708 Complaint with the DOE's Office of Employee Concerns, reiterating the allegations she had raised to WSRC's Employee Concerns Office. See Complaint dated May 20, 1998; Affirmation executed by the Complainant on May 30, 1998. Shortly thereafter (June 1998), WSRC and the Complainant settled the matter to the Complainant's satisfaction. As part of the settlement, the Complainant was assigned to work for a different management team. The Complainant's job title (Senior Administrative Assistant), grade (30), and pay category (exempt) remained unchanged, however.

In the interim, WSRC released the results of an internal audit on February 10, 1998 that concluded, among other things, that there is a risk that some WSRC employees may have been incorrectly classified as "exempt" employees under the Fair Labor Standards Act (FLSA). See Inter-Office Memorandum dated February 10, 1998 from Daniel A. Santucci to Larry L. Myers attaching "Position Classification Audit, 97137206." The internal audit recommended that WSRC perform a complete evaluation for compliance with the FLSA of all positions that had been reclassified at the site since October 1, 1996, and all future employee position reclassifications.

Accordingly, in the fall of 1999 and winter of 2000 WSRC conducted an extensive study of all the duties performed by, among others, employees in the Senior Administrative Assistant positions to determine WSRC's compliance with the FLSA. See Affidavit of Sara S. Jones, Manager, Compensation Design and Implementation, WSRC Human Resource Division at 1 (August 8, 2000) (Jones Affidavit). After the study, WSRC's Director of Human Resources reviewed the results and decided that all Senior Administrative Assistants in the Salary Grade 30, not only those who had been reclassified at the site since October 1, 1996, should be classified as non-exempt for purposes of the FLSA. *Id.*

The Complainant's position was among those affected by WSRC's decision to reclassify all Senior Administrative Assistants from exempt to SOP. See Inter-Office Memorandum from G.L. Watters, Manager, WSRC Compensation Department, to Jean G. Rouse (May 8, 2000). Accordingly, on May 8, 2000, WSRC informed the Complainant in writing that a "review of information from all Senior Administrative Assistants showed that a majority of the work being performed was more similar to that of the Selected Overtime Position (SOP) classification," and that her job position would be reclassified from exempt to SOP. WSRC reclassified the Complainant's Grade 30 Senior Administrative Assistant position and that of 26 other Senior Administrative Assistants in the same grade from exempt to SOP effective June 1, 2000.<sup>(2)</sup> In addition, WSRC reclassified one Grade 30 Senior Administrative Assistant from exempt to SOP effective August 1, 2000.

## **IV. Analysis**

### **A. Protected Conduct**

As previously noted, WSRC stipulated that the Complainant engaged in protected conduct when she filed her 1998 Complaint against WSRC. As a result, the Complainant does not need to present any evidence on this point.

### **B. Whether the Protected Conduct Was a Contributing Factor to a Retaliation**

The Complainant may prove that her protected conduct was a contributing factor to an alleged act of retaliation, i.e., her reclassification from "exempt" to SOP, by showing that "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 a personnel action." [Ronald Sorri](#), 23 DOE 87,503 at 89,010 (1993), citing [McDaid v. Dept. Of Hous. and Urban Dev.](#), 90 FMSR ¶ 5551 (1990); see also [County v. Dole](#), 886 F.2d 147, 148 (8th Cir. 1989) (County). Temporal proximity between a

protected disclosure and an alleged retaliation is sufficient as a matter of law to establish the final required element in a prima facie case for retaliation. See e.g. County, 886 F.2d 147, 148 (8th Cir. 1989).

After reviewing the limited evidence tendered by the Complainant, I have concluded that she has not met her burden of proof in this case for several reasons. First, it is not clear from the record that WSRC's reclassification of the Complainant's job position from exempt to SOP constituted an act of "retaliation" under Part 708. "Retaliation" under Part 708 is defined in relevant part as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment)." 10 C.F.R. § 708.2.

According to the record in this case, the reclassification of the Complainant's job did not result in a change in her compensation, salary grade level, benefits, work hours, job title, job description, job duties, work space, quantity and quality of assignments, supervisory chain, or advancement potential. The only discernible consequence of the Complainant's job classification is a potential monetary benefit, not a "negative action," since SOP employees are entitled to overtime pay under the FLSA while exempt employees are not. (3)

Notwithstanding the documentary evidence suggesting that no negative action flowed from WSRC's reclassification of all Senior Administrative Assistants from exempt to SOP, the Complainant contends that there is a social perception within the workplace hierarchy at DOE's Savannah River site that SOP employees are non-professionals. According to the Complainant, SOP positions are viewed as less prestigious than exempt positions at the site. WSRC has acknowledged that this perception is held by some employees at the Savannah River worksite. See Record of Telephone Conversation between Michael Wamsted, WSRC Senior Counsel, and Helen Mancke, OHA Investigator (October 23, 2000).

Whether "loss of prestige" can constitute retaliation involves a fact-bound determination. The evidence in this case is simply not developed enough for me to conclude that any "loss of prestige" the Complainant may possibly have suffered as the result of her reclassification constitutes retaliation for purposes of 10 C.F.R. Part 708. As the record stands, there appears to have been no tangible negative consequence associated with WSRC's reclassification of the Complainant's job from exempt to SOP.

The Complainant also argues that the reclassification of her job should be viewed as a demotion for purposes of Part 708. To support her position, the Complainant points to a May 8, 2000 Memorandum from G.L. Watters notifying her of her reclassification in which the following language appears:

In 1997, the Internal Oversight Division conducted a study of employees who had been promoted from Selected Overtime Positions (SOP) to exempt positions since the latter part of 1996.

While I can understand how the Complainant can infer from the language set forth above that a change from exempt to SOP might be deemed a promotion, it is not clear from the memorandum whether the promotions referred to therein were career ladder promotions or lateral transfers. Since the Complainant did not provide any documentary or testimonial evidence to support her inference that lateral moves from SOP positions in one grade to an exempt position in the same grade constituted a promotion at WSRC, I cannot find that the converse situation is a demotion.

Finally, the Complainant speculates that WSRC's reclassification of her position from exempt to SOP is the first step toward a demotion or discharge. Since the Complainant has not submitted any documentary or testimonial evidence to support her speculation on this matter, I simply cannot conclude based on the evidence that WSRC's reclassification of the Complainant's job constituted a Part 708 retaliation.

Even assuming for the sake of argument that the Complainant's job reclassification could be considered "retaliation" for purposes of 10 C.F.R. Part 708, I find that the Complainant has provided no evidence to establish that her protected conduct was a contributing factor to her job reclassification. There is no

temporal proximity between the filing and settlement of the Complainant's 1998 Complaint and the reclassification of the Complainant's job position in 2000. Moreover, the facts reveal that the internal audit regarding WSRC's compliance with the FLSA predated even the filing of the Complainant's 1998 Complaint. The reclassifications directed by WSRC were wholesale in nature, affecting many similarly situated employees. These facts suggest to me that there was no connection between the Complainant's protected activities and her subsequent job reclassification. Furthermore, on the basis of the record before me, I cannot infer that the official at WSRC who made the reclassification decision affecting all Senior Administrative Assistants made that decision to retaliate against the Complainant for her having engaged in protected activity.(4)

Finally, even if I were to have found that the Complainant had met her burden of proving by a preponderance of evidence that her protected conduct in 1998 was a contributing factor to her 2000 reclassification, I would find that WSRC has met its burden of showing through clear and convincing evidence that it would have reclassified the Complainant's job position irrespective of her protected conduct. First, WSRC submitted documentary evidence showing that it began studying the classification structure of its workforce for purposes of the FLSA even before the Complainant had filed her 1998 Complaint. Second, WSRC has provided documentary evidence that it reclassified 26 other Senior Administrative Assistants from exempt to SOP on the same day it reclassified the Complainant. While the Complainant believes that WSRC reclassified the 26 other Senior Administrative Assistants to mask its retaliatory motive towards the Complaint, I find that the un rebutted evidence in the record does not support the Complainant's belief in this regard. (5)

## V. Conclusion

As set forth above, I have determined that the Complainant has failed to meet her regulatory burden of showing by a preponderance of evidence that her 1998 protected disclosure was a contributing factor to any act of retaliation against her by WSRC. Accordingly, I conclude that the Complainant is not entitled to any relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Jean G. Rouse under 10 C.F.R. Part 708, OHA Case No. VBH-0056, be and hereby is denied.

(2) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy denying the complaint, unless a party files a notice of appeal within fifteen days after receipt of this Initial Agency Decision.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: March 6, 2001

(1)The Complainant stated that she decided to waive a hearing in this matter because WSRC would not provide her with the information she requested in discovery. WSRC responded that it has made a diligent effort to supply the Complainant with all the information she requested during discovery. WSRC's counsel also represented several times during the hearing phase of the case that he and WSRC's Human Resources' personnel were amenable to sitting down with the Complainant and going over any documents about which the Complainant had questions. The Complainant elected not to accept WSRC's overtures in this regard.

(2)Of the 26 Senior Administrative Assistants reclassified from a Grade 30 exempt position to a Grade 30 SOP position on June 1, 2000, four were WSRC subcontractor employees, not WSRC employees. The remaining 22 Grade 30 Senior Administrative Assistants, including the Complainant, worked for WSRC. In addition to the 26 contractor and subcontractor Senior Administrative Assistants reclassified on June 1, 2000, one other WSRC employee was reclassified from exempt to SOP on June 1, 2000 when she was demoted from a Grade 32 position to Grade 30 Senior Administrative Assistant position. Finally, WSRC provided evidence during discovery that one Grade 30 Senior Administrative Assistant was not reclassified to SOP because she received a promotion to an exempt Grade 32 position, the Executive Assistant to the President.

(3)It is conceivable that evidence showing that SOP employees are more vulnerable to reductions-in-force than exempt employees might be sufficient in some circumstances to support a claim of retaliation. However, no such evidence was presented in this case.

(4)Had a hearing occurred, the Complainant could have questioned WSRC's Director of Human Resources, for example, about whether he knew about the Complainant's previous Part 708 filing and whether it affected his decision to reclassify all Senior Administrative Assistants at WSRC. While WSRC filed an Affidavit of Sara S. Jones, a Human Resources Manager at WSRC, who attested that she had no knowledge that the Complainant had ever filed a Part 708 Complaint, the record reflects that it was the Director of Human Resources and not the Human Resources Manager who made the pivotal decision regarding reclassification.

(5)The Complainant contends that she has shown WSRC retaliated against her because WSRC reclassified one Senior Administrative Assistant on August 1, 2000. This argument ignores that 25 other Senior Administrative Assistants were reclassified on the same date as the Complainant.