Case No. VBH-0060

November 1, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Robert Burd

Date of Filing:March 27, 2001

Case Number: VBH-0060

This Decision addresses the complaint filed by Robert Burd (Complainant) against his former employer, Mason and Hangar Corporation (the employer), pursuant to the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. Complainant alleges that the employer wrongfully terminated him for raising safety concerns. For the reasons set forth below, the complaint will be granted.

I. Procedural History

Complainant filed his Part 708 complaint on October 13, 2000 with the DOE Albuquerque Operations Office (DOE/AOO). At all times relevant to the complaint, the employer was the primary management and operating contractor for the DOE's Pantex facility (Pantex) in Amarillo, Texas, where Complainant worked. On January 22, 2001, the DOE/AOO forwarded the complaint to the Office of Hearings and Appeals (OHA) for an investigation followed by a hearing.

On February 1, 2001, BWXT replaced the employer as the management and operating contractor at Pantex. BWXT agreed to assume the employer's defense to the allegations contained in the complaint. Unless otherwise noted herein, assertions raised by BWXT on behalf of the employer will be attributed to the employer.

On March 27, 2001, the OHA investigator issued her report of investigation. On July 26, 2001, the hearing convened. At the hearing, Complainant testified, presented 3 witnesses and submitted 24 exhibits (denoted by numbers). The employer presented 3 witnesses and submitted 11 exhibits (denoted by letters).(1)

II. Findings of Fact

From January 1998 until his termination in September 2000, Complainant worked for the employer as a radiation safety technician (rad tech) in the Non-MAA Section of the Radiation Safety Division at Pantex. The Non-MAA Section engages in activities involving nuclear weapons parts. At all times relevant to the complaint, Complainant's Operations Manager and immediate supervisor was Henry Ornelas.

Complainant and Ornelas' relationship was less than amicable. Both employees had strong personalities and were candid with their opinions. They argued with each other several times over the years. One argument, which led to the termination of both employees, forms the basis of this proceeding.

The incident occurred on Friday, September 8, 2000. At approximately 8 a.m., Complainant and two other rad techs, Kendra Bridges and Phil Franks, were seated in preparation for a meeting in the rad technicians' area. They began discussing the whereabouts of Complainant's partner, Russell West. Bridges revealed to Complainant and Franks that at that time, West was working an overtime shift and had been working for approximately 24 consecutive hours, save for a pre-dawn, 2 hour break. While they were talking, Ornelas approached. He immediately became agitated and made a statement to the effect that overtime issues were "none of their business." Complainant responded that it was unsafe to work for such a long period of time and that the handling of overtime in West's situation was "stupid." Ornelas replied, "Are you calling me stupid?" From there, the conversation quickly became heated, and Complainant's and Ornelas' voices grew louder and louder until Complainant finally told Ornelas to "shut up." Ornelas then ordered Complainant to accompany him to the office of their Department Manager, Wayburn Scott Wilson. At first, Complainant hesitated, repeatedly asking "why." After Ornelas twice reiterated the order, Complainant agreed, and they proceeded toward Wilson's office, with Ornelas following closely on Complainant's heels.

Wilson was not there, however, so Ornelas grabbed Complainant's arm to lead him to the office of their Operations Coordinator, Richard Jones. As the employees approached and entered Jones' office, they were both yelling. The cramped space in Jones' small office forced Complainant and Ornelas to stand close to each other, virtually face to face. They remained standing and continued to yell, despite Jones' request that they calm down and explain the situation. The parties dispute what happened next, but the evidence shows that Complainant stepped toward Ornelas. This action prompted Ornelas to use his chest to bump Complainant away, and in response, Complainant yelled "Don't bump me, Hank." Jones then inserted himself between the employees and again admonished them to calm down. Ornelas finally stepped aside and attempted to telephone Security, while Complainant asked him if he wanted to go to the Human Resources Office. Jones then ordered Complainant to return to the rad technicians' area. Complainant complied, and the altercation ended.

Jones later reported the altercation to Wilson. On the following Monday, September 11, 2000, Wilson and Michael Knight, Manager of the Radiation Safety Department, reported the altercation to Peter Selde, the Division Manager. As discussed below, after various consultations, the decision to terminate Complainant "rested with Mr. Selde.(2) With Selde's approval, Knight and Chris Passmore, another member of radiation management, launched an investigation into the altercation, as well as the overtime issue.

On or around September 18, 2000, Knight and Passmore presented an investigation memo to Selde (the September 18 memo). Attached to the September 18 memo were written statements from Complainant, Ornelas and Jones, summaries of oral interviews with them, and summaries of oral interviews with other rad techs who witnessed the portion of the argument that occurred in their meeting area. In their written statements, Ornelas and Jones agreed that Complainant had moved toward Ornelas before Ornelas bumped him away. However, in his written statement, Complainant made no mention of moving toward Ornelas; instead, he stated that he and Ornelas were "gripping [sic] at each other in close quarters." Exhibit (Exh.) F.

As set forth in the September 18 memo, Knight and Passmore found that (1) Complainant told Ornelas to "shut up"; (2) Complainant "approached Ornelas and got ?face to face' with him"; and (3) "Ornelas pushed Complainant off of him." Exh. F. They further concluded that Complainant and Ornelas' conduct on September 8, 2000 constituted "clear violations" of the Pantex Employee Manual ("the Manual") and Pantex Bulletin 869 (Bulletin 869). Exh. F. The Manual prohibits "general," "safety," and "security" misconduct and lists examples of each. Bulletin 869 sets forth a "zero tolerance policy" regarding physical and non-physical confrontations. The first section of Bulletin 869 provides for automatic discharge of employees who engage in physical confrontations (Bulletin 869(1)). The second section provides for discipline up to and including discharge of employees who engage in non-physical confrontations (Bulletin 869(2)).(3) The September 18 memo did not specify the type of confrontation in which Complainant or Ornelas engaged.

In the following days, Selde consulted several people regarding the appropriate course of action. First, on September 22, 2000, Selde, Knight and Passmore met with Michael Soper, a Labor Relations representative. Pantex procedures require that managers consult Labor Relations when contemplating formal discipline for an employee. During that meeting, Selde requested that Knight further investigate the duration and circumstances leading to the escalation of the confrontation between Complainant and Ornelas.

On September 25, 2000, Knight presented Selde with a second investigation memo (the September 25 memo). In the September 25 memo, which is based upon a follow-up interview with Jones, Knight concluded that (1) the confrontation in Jones' office lasted 6-8 minutes, with Complainant and Ornelas "face to face" for about 1-2 minutes; and (2) Complainant "advanced on Ornelas and got in his face," before Ornelas bumped him away. Exh. G.

Later on September 25, 2000, Selde, Jones, Wilson, Knight, and Soper met with Robert Rowe, the Human Resources Director. During that meeting, Knight, Wilson, and Jones advised Selde that Bulletin 869 did not require termination for either employee; Soper and Rowe advised that Bulletin 869 required termination for both.

Selde next consulted the general manager of Pantex at the time, Dr. Benjamin Pellegrini. Selde sought Pellegrini's position regarding Bulletin 869, since it had been issued and signed by Pellegrini's predecessor. Pellegrini advised Selde that he supported strict enforcement of the policy.

Finally, on September 27, 2000, Selde met with the Personnel Evaluation Board (PEB). Pantex procedures require the PEB to review termination decisions. The PEB consisted of 10 members, including Soper, Rowe, and representatives from the employer's Employees Concerns Office and legal department. Also present as witnesses were members of radiation management, including Jones, Wilson, Knight and Chris Cantwell. Neither Complainant, nor Ornelas attended the meeting, and besides Jones, no other witnesses to the altercation attended. PEB members had been given for review a copy of the September 18 and 25 memos and all attachments, including Complainant and Ornelas' written statements.

The PEB first discussed Ornelas. After short deliberation, Selde recommended that Ornelas be terminated, and the PEB unanimously concurred. Finding that Ornelas engaged in a physical confrontation, by chest-bumping Complainant, and insubordination, by disregarding Jones' order to settle down, the PEB agreed that Bulletin 869(1) called for Ornelas' termination. Ornelas' personnel file contained evidence of two prior disciplinary actions, including a verbal counseling and a documented warning.(4)

The PEB next discussed Complainant. After extended deliberation, Selde recommended that Complainant be terminated, and again, the PEB unanimously concurred. Finding that Complainant engaged in a non-physical confrontation with Ornelas and two acts of insubordination, once by telling Ornelas to "shut up," and again by ignoring Jones' initial order to settle down, the PEB agreed with Selde that Complainant's conduct fell within the purview of Bulletin 869(2). Although Bulletin 869(2) provides for, but does not mandate, termination, the PEB and Selde agreed that Complainant's discharge was warranted, because he was the initial aggressor in the altercation with Ornelas and repeatedly insubordinate. Complainant had no prior disciplinary actions in his personnel file. Except Selde, every radiation safety manager present at the meeting had recommended a lesser form of discipline for both employees.

The following day, September 28, 2000, Selde presented Complainant and Ornelas with draft termination statements, which restated the employer's investigatory findings regarding the September 8 incident. Given the choice between accepting the termination statements or resigning, both employees resigned.

On October 13, 2000, Complainant filed a Part 708 complaint, alleging that the employer effectively terminated him for raising safety concerns regarding overtime practices. The employer does not dispute that it effectively terminated Complainant, but posits that it would have terminated Complainant for violating Bulletin 869, regardless of whether Complainant made a protected disclosure. Complainant seeks reinstatement, back pay, reimbursement of reasonable costs and expenses and interim relief in the form of

reinstatement, pending the outcome of an appeal.

III. Applicable Legal Principles

The DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708, provides an avenue of relief for contractor employees who experience retaliations as a result of making protected disclosures. The program provides for reinstatement, back-pay, transfer preference and such other relief as may be appropriate.

Section 708.29 requires an employee to show by a preponderance of the evidence that (1) he made a protected disclosure or participated in a protected proceeding, and (2) the protected disclosure or conduct was a contributing factor to an alleged retaliation. Preponderance of the evidence is proof sufficient to persuade the finder of fact that a proposition is more likely true than not when weighed against the evidence opposed to it. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1206 (D.D.C. 1990).

If an employee makes the required showing under Section 708.29, then the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. The clear and convincing standard requires a degree of persuasion higher than a preponderance of the evidence, but less than beyond a reasonable doubt. *Hopkins*, 737 F. Supp. at 1204 n.3.

IV. Analysis

A. The Complainant's Burden

1. Whether Complainant Made a Protected Disclosure

The first issue is whether Complainant made a protected disclosure for purposes of Part 708. I find that he did.

Under Section 708.5, a protected disclosure includes information conveyed by an employee to a DOE official or his employer, which the employee reasonably and in good faith believes reveals a substantial violation of a law, rule or regulation; a substantial and specific danger to employees or to public health or safety; or fraud, gross mismanagement, gross waste of funds, or abuse of authority.

Complainant made a protected disclosure on September 8, 2000 (the protected disclosure).(5) That morning, Complainant revealed information to his employer that he reasonably and in good faith believed revealed a substantial and specific danger to employees or public health or safety. More specifically, Complainant raised a concern to Ornelas that working excessive overtime was unsafe.

Although the employer maintains that Complainant was not attempting to articulate a safety concern, but rather was complaining about overtime in general, the record indicates that sincere safety concerns motivated Complainant to speak. Indeed, in recalling the September 8 incident, Ornelas twice recounted that Complainant specifically described excessive overtime practices as "unsafe.(6)

In addition, there is ample evidence that Complainant reasonably believed excessive overtime presented a substantial and specific danger. Bridges testified that the risks of contamination involved in handling nuclear weapons parts can only be exacerbated when a rad tech works while fatigued.(7) Stating his belief that Complainant raised a valid safety concern, Selde testified that employees who work more than 16 consecutive hours "are not alert, they represent an increased risk of injury to themselves or the weapons system.(8) Soper testified that he believes Complainant raised a valid safety concern.(9)

The employer contends that even if Complainant articulated a safety concern, any protected disclosure is

"preempted by his contemporaneous conduct.(10) This argument muddles the distinction between Complainant's prima facie case and the employer's affirmative defense. Complainant's conduct would not "preempt" a protected disclosure; instead, it bears upon the issue of whether the employer would have terminated Complainant absent the protected disclosure, as discussed below.

Based upon the foregoing, I find that Complainant made a protected disclosure on September 8, 2000.

2. Whether the Protected Disclosure Contributed to a Retaliation

I next examine whether Complainant has shown that the protected disclosure contributed to a retaliation. Complainant maintains that the protected disclosure contributed to his termination. As discussed below, I agree.

Section 708.12 defines "retaliation" as "an 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) as a result of the employee's disclosure . . . ." As stated above, the employer admits that Complainant was effectively discharged, and a discharge clearly constitutes an adverse employment action.

In order for an adverse action to constitute a "retaliation," however, a complainant must show that he made a protected disclosure that contributed to that adverse action. A protected disclosure may be considered a contributing factor to an adverse action where 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 factored into such action. *Charles Barry DeLoach*, 26 DOE ¶ 87,509 (1997); *Ronald Sorri*, 23 DOE ¶ 87,503 (1993). Moreover, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

In this case, every person involved in the decision to terminate Complainant knew or had constructive knowledge of the protected disclosure. It is undisputed that Selde, who after consultation with other personnel, made the decision to discharge Complainant, (11) was aware of the protected disclosure.(12) In addition, every member of the PEB that decided to discharge Complainant had been given for review a copy of the September 18 memo, attached to which was Ornelas' written statement that Complainant had "mentioned that it was not safe to work all night long and then have to work the next day." I therefore find that the PEB members had constructive knowledge of the protected disclosure.

In addition, there is a close time nexus between the protected disclosure and Complainant's discharge. The employer terminated Complainant on September 28, 2000, only 20 days after the September 8 incident. The actual or constructive knowledge of the individuals involved in the decision to terminate Complainant, coupled with the temporal proximity between the protected disclosure and his discharge, is sufficient to permit a reasonable person to conclude that the protected disclosure was a contributing factor to his discharge. Therefore, Complainant has established a prima facie case of retaliation.

B. The Employer's Burden

The burden therefore shifts to the employer to show by clear and convincing evidence that it would have terminated Complainant in the absence of the protected disclosure. The employer asserts the following: (1) strict enforcement of Bulletin 869's zero tolerance policy is necessary to ensure the security of Pantex; (2) Complainant had fair notice of the policies set forth in Bulletin 869; (3) the employer conducted a fair investigation into the events of September 8, 2000; (4) the investigation revealed that Complainant engaged in two acts of insubordination and a non-physical confrontation, as prohibited under Bulletin 869; (5) given the severity of Complainant's conduct, Bulletin 869 required Complainant's termination; and (6) the employer applied Bulletin 869 fairly and without improper motives to Complainant. In response, Complainant (1) challenges the integrity of the investigation; and (2) maintains that his termination was a

form of discipline substantially disproportionate to the discipline imposed on other employees for similar conduct. As discussed below, although the employer set forth some evidence that it would have terminated Complainant absent a protected disclosure, it has not satisfied the clear and convincing standard required by Part 708.

As Complainant and the employer recognize, the determination as to whether the employer would have terminated Complainant in the absence of the protected disclosure requires an historical examination of how the employer has disciplined "similarly situated" employees, i.e., employees who have engaged in confrontations and insubordination. (13) In making that determination, I first address whether the employer fairly investigated Complainant's conduct and characterized it as confrontational and insubordinate. As discussed above, the employer relied upon Knight and Passmore's investigation in finding that Complainant engaged in a non-physical confrontation and repeated acts of insubordination. In its draft termination statement to Complainant, the employer explained:

> [T]elling your Operations Manager to "shut up" and your repeated disregard of your Operation Coordinator's direction to lower your voice and calm down, each constitute gross insubordination. Moreover, your advancement, nose-to-nose, with your Operations Manager was both blatantly disrespectful, and in clear violation of Plant work rules, including [Bulletin 869(2)].(14)

Although Complainant does not dispute that he told Ornelas to "shut up" and initially disregarded Jones' order to calm down, Complainant contends that he did not "advance nose-to-nose" toward Ornelas while in Jones' office. Complainant maintains that the confined space of Jones' office, not aggression or a motive to intimidate, forced him to stand within inches of Ornelas. Complainant believes that Jones, who was close friends with Ornelas, reported a version of the September 8 incident that was inaccurate and slanted against Complainant. He further opines that, as evidenced by their heavy reliance upon Jones' statements in their investigation, members of radiation management teamed against him to drive Selde and the PEB toward a discharge decision.(15)

I find that the employer conducted a thorough investigation and fairly characterized Complainant's behavior as confrontational and insubordinate. Knight and Passmore interviewed or obtained written statements from every essential witness to the September 8 incident before presenting their findings to Selde, and, in turn, the PEB. Their heavy reliance upon Jones' description was reasonable, because Jones was the only third party present during the height of the altercation, which occurred in his office. Complainant's argument that Jones made statements designed to protect Ornelas is unconvincing. Jones reported a version of the incident that would later result in the discharge of both employees. Moreover, the September 18 investigation memo presented to Selde and the PEB acknowledges that the "exact details of what transpired differs from person to person," and attaches Complainant's written version of the September 8 incident, as well as the written statements of Jones and Ornelas. Furthermore, regardless of whether Complainant intended to "advance" toward Ornelas in a threatening manner, several rad techs testified that both Complainant and Ornelas employed aggressive mannerisms. In short, I am convinced that the employer conducted an impartial investigation and fairly concluded that Complainant's behavior, although non-physical, was confrontational and insubordinate.

I next examine how the employer has disciplined employees for engaging in confrontations and insubordination. As discussed below, even accepting the employer's description of Complainant's behavior, the employer failed to show with clear and convincing evidence that it consistently discharged employees for similar misconduct.

Because the employer relied upon Bulletin 869 in deciding to discharge Complainant, I focus upon the employer's treatment of similarly situated employees between August 23, 1999, the effective date of Bulletin 869, and September 28, 2000, the date of Complainant's discharge. The employer produced a list entitled "All Disciplines for Misconduct" (the disciplinary list) which shows that between August 23, 1999 and September 28, 2000, the employer disciplined employees for hostile, disruptive behavior

approximately 18 times. Exh. 30.(16) As reflected on the disciplinary list, the employer utilized two forms of discipline short of discharge, which for purposes of simplicity shall be referred to, in ascending order of severity, as Level 1 and Level 2.(17)

Three of the above-described 18 employees, including Complainant, Ornelas and a third employee found to have engaged in a non-physical confrontation (the third terminated employee), were discharged. The remaining employees received either a Level 1 or Level 2.(18) Following are excerpts from written statements the employer issued to the disciplined employees.

(1) Level 1: You and a coworker were discussing pens being sold . . . . A second coworker commented, recommending the pens. You responded . . . in a repeatedly loud, profane, and abusive manner. Exh. 30 at 9.

(2) Level 2: You poked your finger in [a coworker's] chest [in an attempt to engage him in discussion]. This encounter, which you thought was a joke, was not received that way by the employee. Exh. 30 at 10.

(3) Level 2: You became verbally abusive toward [coworkers]. This included raising your voice at employees and using an obscene remark in reference to one of the individuals. Exh. 30 at 10.

(4) Level 2: You addressed [a coworker] in a loud, confrontational manner, verbally ejecting her from your office. Exh. 30 at 11.

(5) Level 2: You initiated a verbal confrontation with a coworker . . . stood over him and chastised him for approximately seven (7) minutes, during which time you shook your finger in his face and voiced profanities concerning this individual, and in comparing him to management. . . . you exacerbated this situation by challenging [the coworker after he suggested a physical action] to try to make good on it. Exh. 30 at 14.

(6) Level 2: You entered [a coworker's] office, verbally objecting to [a management decision] . . . returning repeatedly to reemphasize your protest . . . you told him to advise [another supervisor] that you would "get even," that [he] would regret his action, and you threatened his . . . removal . . . . Your actions . . . were both threatening and disrespectful to those in authority, and constitute serious misconduct. Exh. 30 at 14.

(7) Level 2: You profanely advised [another coworker] that if you were in management you would choke him. On a recent occasion, you threatened another coworker with bodily harm . . . . Exh. 30 at 14.

(8) Level 1: You verbally confronted [coworkers] with your opinions of their shortcomings. [You were instructed to meet with a supervisor later] but to drop it until then. You subsequently went to one of the coworkers' offices and pursued your issue where your tone of voice was overheard by [another individual]. The manner in which you expressed yourself was inappropriate and confrontational and your willful disregard of [a] direction to you is unacceptable. Exh. 30 at 21.

(9) Level 2: You questioned your supervisor . . . in a belligerent manner, i.e., "What's all this [expletive] about us having to do this stuff to help the guys testing the rams alarms?" . . . You continually interrupted him, exclaiming, ". . . yeah, yeah, yeah, that's [expletive]." [You again interrupted repeating the expletive two more times, and] then asserted that management just "lies." Exh. 30 at 27.

Following is an excerpt from the disciplinary statement issued to the third terminated employee:

[After your supervisor saw you take your second morning break and reminded you that the rule is one morning break, you] confronted [him] in his office. You demanded, in a loud agitated voice and pointing your finger at him, to stop "harassing" you. You [then] approached [two other coworkers] in a similar tone and manner. You [then] proceeded back to [your supervisor's] office and, still agitated, persisted in questioning him as to why he challenged your break. Exh. 30 at 21.

The employer maintains that when employees have engaged in insubordinate and confrontational conduct rising to the level of that engaged in by Complainant, they have been terminated. The employer primarily relies upon Bulletin 869(2) in justifying Complainant's termination and maintains that it applied the zero tolerance policy fairly and without discrimination to Complainant. Besides pointing to Ornelas and the third terminated employee, the employer presented evidence showing that in 1998, it terminated two security force personnel pursuant to a zero tolerance policy in effect for only the guard force at the time. Exh. C and D. That policy provided the model for Bulletin 869. The evidence shows that those employees engaged in separate, serious confrontations, one involving repeated racial epithets and the other involving a physical push and challenge to fight. The employer distinguishes Complainant from the above employees who received a Level 1 or Level 2, by maintaining that his non-physical conduct was particularly egregious. Selde testified that "because [he] felt [Complainant] was the aggressor in the case [by advancing toward Ornelas] and that he had failed to comply with Mr. Jones's direction to stop the argument that termination [was appropriate].(19) The Labor Relations representative, who was a member of the PEB, testified that Complainant's behavior differed from that of lesser disciplined employees, because he escalated the conflict with Ornelas and was repeatedly insubordinate. (20)

Complainant contends that his behavior was not unusual for the generally truculent Pantex environment. Indeed, he maintains that he did nothing wrong, was the victim of aggression not the aggressor, and should not have been terminated in any manner. To the extent his behavior was confrontational and insubordinate, he argues that the disciplinary list shows that similarly situated employees have escaped termination. He distinguishes himself from Ornelas and the third employee, both of whom had received a Level 2 prior to termination, because he had never received a formal discipline of any kind.

Complainant further argues that the disciplinary list is not exhaustive, and that numerous confrontations and acts of insubordination were handled "in-house," without even reaching Level 1. Complainant, Bridges and Franks testified that they had heard of several non-physical, verbal confrontations that, to their knowledge, went unpunished. Michael Ford, a member of the radiation safety department, testified that he personally had been involved in a verbal confrontation but received only a verbal counseling.(21) Knight, who was Ford's supervisor at the time, recognized in testimony that Ford was not formally disciplined, but stated that in his opinion, Complainant's behavior was more severe than Ford's. The Labor Relations representative testified that management should consult Labor Relations when it is contemplating formal discipline for an employee, but he further recognized that management may decide not to notify Labor Relations of certain incidents and instead handle them "in-house.(22)

Based upon the foregoing, I find that the employer has not shown by clear and convincing evidence that it would have terminated Complainant absent the protected disclosure. As an initial matter, the employer failed to show with clear and convincing evidence that it consistently invoked Bulletin 869. The employer's own descriptions of several of the above-listed offenses as "confrontational" and "disrespectful to management," indicates that those offenses should have triggered Bulletin 869, yet Selde and Soper testified that they first invoked the zero tolerance policy against Complainant and Ornelas.(23) Moreover, the record indicates that employer conflicts were a near daily occurrence at Pantex, yet several incidents escaped formal review.

The employer also failed to show that it applied Bulletin 869 in a consistent manner. The disciplinary list shows that the termination of Complainant was substantially disproportionate to discipline imposed for similar misconduct in the past. In the nearly two years following Bulletin 869's implementation, numerous employees engaged in non-physical confrontations and insubordination, but besides Complainant, only one other employee had been terminated. All others received only a Level 1 or Level 2.

The employer's attempt to distinguish Complainant from lesser disciplined employees is unconvincing. Although it may be true that Complainant's conduct differed from that of other employees, because he took a step toward Ornelas and was repeatedly insubordinate,(24) one would be hard-pressed to find any two altercations that are factually identical. There is no clear and convincing evidence showing that the general nature of Complainant's conduct is significantly distinguishable from that of other employees who

had "willfully disregarded" instructions and engaged in "verbal confrontations" but were spared termination. The record shows nothing particularly egregious about Complainant's conduct that would warrant singling him out from other employees who disobeyed, repeatedly cursed and yelled at, and threatened violence toward their supervisors or coworkers, but received lesser penalties. See *Dreis & Krump Manufacturing Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) ("communications occurring during the course of otherwise protected activity remain likewise protected unless . . . so violent or of such serious character as to render the employee unfit for further service.").

In addition, I am unpersuaded by the employer's argument that its termination of Complainant is supported by the terminations of Ornelas, the third terminated employee, and the two security force personnel. The employer's assertion that Ornelas was most similarly situated to Complainant is controverted by its own characterization of Ornelas' behavior as a "physical confrontation" and conclusion that therefore he was subject to automatic termination under Bulletin 869(1). By the employer's own reasoning, Ornelas was in an entirely different category from Complainant, who engaged in a non-physical confrontation subject to Bulletin 869(2).(25) With regard to the third terminated employee, evidence that out of numerous employees who had engaged in similar misconduct, only the third terminated employee and Complainant were discharged falls short of establishing with convincing clarity that the employer applied Bulletin 869(2) in a consistent manner. Furthermore, evidence that two security force personnel were terminated offers the employer little support for its position, since the employees were terminated under a different policy and one of the terminated employees had engaged in a physical confrontation.

Although the employer has set forth some evidence showing that it would have terminated Complainant absent the protected disclosure, the clear and convincing standard requires more. I therefore find that the employer has failed to meet its burden in this case and Complainant is entitled to relief as set forth below.

IV. Relief

Section 708.36 sets forth the types of relief that may be granted in initial agency decisions. The relief includes: (1) reinstatement; (2) transfer preference; (3) back pay; (4) reimbursement of reasonable costs and expenses, including attorneys fees reasonably incurred to prepare for and participate in proceedings leading to the initial decision; and (5) such other remedies as are deemed necessary to abate the violation [including reinstatement as] interim relief, pending the outcome of any request for review of the decision by the OHA Director. Complainant requests all of the above.(26) I have reviewed the parties' post-hearing briefs regarding damages and grant relief as follows.

a. Reinstatement and Transfer Preference

BWXT shall offer Complainant a position that is equivalent to the one he occupied when he resigned.

b. Back pay

Within 30 days of the date of this order, Complainant shall provide BWXT with a report which calculates the weekly pay he received for a 40 hour shift. The report shall calculate the back pay as the sum of that weekly pay for every week until BWXT offers him an employment position at the rate equal to the rate he would be earning if he had not been discharged. Interest shall accrue on the back pay at the rate of ½ percent per month starting December 1, 2001. Interest shall compound monthly.

c. Reasonable Costs and Expenses Associated with Prosecuting the Complaint

Complainant seeks over $7,000 for hotel and housing costs, $3,800 in moving and travel costs, and $756.81 in utility costs, all related to his job relocation. These costs are not "reasonably incurred" in bringing his Part 708 complaint, are beyond the scope of relief Part 708 was intended to grant and therefore will be denied. See *Ramirez v. Brookhaven National Laboratory*, Case No. LWA 002, 23 DOE ¶

87,505 (1994). Complainant also seeks to recover $1,883.44 in “time off.” However, all of that time is subsumed in the back pay calculation. Complainant also seeks $11,020.21 in attorneys fees and expenses through July 27, 2001. BWXT stipulates that Complainant has submitted pre- billing worksheets with sufficient itemization of attorney time and expenses.

d. Interim Relief

I have determined that the circumstances do not warrant granting Complainant interim relief in the form of reinstatement. Complainant may seek back pay and other fees and expenses incurred between the date of this order and the outcome of an appeal.

V. Conclusion

As set forth above, I find that Complainant met his burden of establishing by a preponderance of the evidence that he made a protected disclosure that contributed to his termination. I further find that the employer has failed to show by clear and convincing evidence that it would have terminated Complainant absent a protected disclosure. Accordingly, under Part 708, Complainant is entitled to relief.

It Is Therefore Ordered That:

(1) The request for relief filed by Robert Burd under 10 C.F.R. Part 708, OHA Case No. VBH- 0060, is hereby granted as set forth in Paragraphs 2 through 4 below.

(2) BWXT shall reinstate Complainant, provide him with back pay, and reimburse him for the reasonable costs and expenses.

(3) Within 30 days of the date of this order, Complainant shall file a report providing a calculation for back pay. In the event there is no immediate reinstatement offer, the report shall be updated every 90 days.

(4) Within 60 days of the date of this order, BWXT shall pay Complainant attorney fees and expenses, as requested in Complainant’s post-hearing brief regarding damages.

(5) This is an initial agency decision which shall become a final decision of the Department of Energy unless, within 15 days of the date of this decision, a party files a Notice of Appeal with the Director of the Office of Hearings and Appeals.

(6) This decision and order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the decision and order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

Helen E. Mancke

Hearing Officer

Office of Hearings and Appeals

Date: November 1, 2001

(1) In addition to live witnesses, Complainant submitted the deposition transcript of Phil Franks, and the employer submitted the deposition transcripts of Henry Ornelas and Peter Selde.

(2) Employer’s post-hearing brief at 9.

(3) Bulletin 869, which was issued to all Mason & Hanger employees by W.A. Weinreich, then General Manager, on August 23, 1999, specifically states in relevant part:

> Effective immediately, I am instituting a ?zero tolerance' policy regarding confrontations on the Plant site. This means: (1) Any employee proven to have engaged in a physical confrontation with another person will be discharged; (2) Non-physical confrontations will result in appropriate disciplinary action, up to and including discharge .

Exh. 1.

(4) The verbal warning was for failure to control "horseplay" during a work-related class he attended. The documented warning was for leaving work early without permission and submitting an inaccurate time card.

(5) Complainant also maintains that he raised safety concerns to Ornelas in November 1999 and August 2000. I need not address those disclosures here, however, because I find that he made a protected disclosure on September 8, 2000 that contributed to a retaliation. The protected disclosure occurred just prior to the incident that resulted in the dismissal of Complainant.

(6) See Transcript of Ornelas deposition, Exh. K at 15 ("[Complainant said,] 'He shouldn't have been here all night. It's unsafe.'"); Ornelas' written statement to Knight, Exh. F ("[Complainant] mentioned that it was not safe to work all night long and then have to work the next day.").

(7) Hearing transcript at 146-47.

(8) Selde deposition transcript at 56, 60.

(9) Hearing transcript at 40.

(10) Employer's post-hearing brief at 6.

(11) Employer's post-hearing brief at 7.

(12) In testimony, Selde admitted that he knew Complainant had raised "safety concerns" regarding overtime. Selde deposition transcript at 56.

(13) Contrary to the employer's assertion, the relevant group of similarly situated employees is not the other rad techs who raised safety concerns.

(14) Draft termination statement from Selde to Burd, Sept. 28, 2000.

(15) Hearing transcript at 219-20.

(16) The disciplinary list is a compilation of 146 written statements issued to employees for various types of "misconduct" occurring between June 1, 1999 and June 13, 2001 (the disciplinary list). The disciplinary list details a broad range of misconduct, from sleeping on duty, to misuse of email, to violent, physical confrontations. Of the 146 incidents of misconduct, 84 occurred between August 23, 1999 and September 28, 2000, and of those 84, 18 resulted from conduct that reasonably may be characterized as confrontational in nature.

(17) The employer utilized two disciplinary tracks, one for employees considered exempt under the Fair Labor Standards Act and one for members of the Metal Trades Council (MTC) and non-bargaining, non-exempt employees. Exempt employees were subject to, in ascending order of severity, (1) a documented warning, (2) a letter of reprimand, or (3) termination. MTC members and non-bargaining, non-exempt employees, such as Complainant and Ornelas, were subject to, in ascending order of severity, (1) a written

reminder, (2) a decision-making leave, which is tantamount to a suspension (DML), and (3) termination. Because the distinction between the two tracks is irrelevant for purposes of this case, Level 1 includes documented warnings and written reminders, and Level 2 includes letters of reprimands and DMLs.

(18) The employer produced evidence showing that it discharged an employee in November 2000. However, the employer's own characterization of that incident as a physical confrontation indicates that the discharged employee engaged in conduct more severe than that engaged in by Complainant. In addition, I find the circumstances of terminations that occurred after Complainant filed his complaint more relevant than terminations that occurred before.

(19) Selde deposition transcript at 38.

(20) Hearing transcript at 21-37.

(21) Hearing transcript at 200-01.

(22) Hearing transcript at 241.

(23) Selde deposition transcript at 39.

(24) Notably, the repeated acts of insubordination at issue here occurred during a single, heated event and thus this case is distinguishable from other cases finding that repeated insubordination justified an employee's discharge, where the employees was insubordinate numerous times over several months. See *Jiunn S. Yu*, VBH-0028 (July 1999).

(25)Complainant also distinguishes himself from Ornelas and the third terminated employee, because unlike them, Complainant had a clean personnel record prior to termination. However, I find the distinction of no import. Soper, the Labor Relations representative who was a member of the PEB, credibly testified that while the existence of prior disciplinary actions in an employee's file may influence what type of action the employer will impose upon him next, the absence of a prior disciplinary action has no effect. Hearing transcript at 107. Soper's testimony is supported by the fact that most of the Level 2 disciplines cited above were issued to employees who had never received a Level 1.

(26)Complainant requested reinstatement in his prehearing brief and reiterated the remainder of his requests in a post-hearing brief regarding damages.