August 5, 2002
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: William Cor

Date of Filing: February 1, 2002

Case Number: VBH-0079

This Decision involves a whistleblower complaint filed by William Cor under the Department of Energy's (DOE) Contractor Employee Protection Program. From August 1998 to September 2001, Mr. Cor was employed as a glovebox systems engineer at Los Alamos National Laboratory (LANL), one of three national laboratories operated by the University of California (UC) for the DOE. Mr. Cor alleges that LANL management retaliated against him for activity protected under the DOE Contractor Employee Protection Program.

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 purposes are 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.

B. Procedural History

On August 1, 2001, Mr. Cor filed a complaint with the DOE's Albuquerque Operations Office (DOE/AL). After attempts at informal resolution were not successful, DOE/AL referred the complaint to the DOE's Office of Hearings and Appeals (OHA) for a hearing without an investigation. Memorandum from Michelle Rodriguez de Varela, Employee Concerns Program Manager, DOE/AL, to George B. Breznay, Director, OHA (January 23, 2002). On February 1, 2002, the OHA Director appointed me hearing officer in this matter. I convened a hearing held at Los

Alamos, New Mexico on April 10-12, 2002. The OHA received post-hearing submissions from the parties and closed the record on June 7, 2002.

II. Analysis

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 under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708.29. If the complainant meets his burden of proof by a preponderance of the evidence that his protected activity was a "contributing factor" to the alleged adverse actions taken against him, "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, participation, or refusal." 10 C.F.R. § 708.29. Accordingly, in the present case, if Mr. Cor establishes that a protected disclosure, participation, or refusal was a factor contributing to his termination, UC must convince me that it would have taken the action even if Mr. Cor had not engaged in any activity protected under Part 708.

After considering the record established in the investigation by the parties' submissions and the testimony presented at the hearing, for the reasons stated below I have concluded that Mr. Cor has met his burden of proving by a preponderance of the evidence that he engaged in protected activity that contributed to certain actions taken against him, including his termination. However, I find that UC has shown by clear and convincing evidence that it would have taken these same actions absent Mr. Cor's protected activity.

A. Whether Mr. Cor Engaged in Activities Protected Under 10 C.F.R. § 708.5

Mr. Cor worked for the Nuclear Materials Technology (NMT) division of LANL as an engineer responsible for gloveboxes in Technical Area 55 (TA 55) of the lab. Mr. Cor was a member of the TA 55 Facility Operations Group (NMT-8).

> TA-55, among other things, is involved with the handling of nuclear and other hazardous materials, and one of the ways in which those things are handled is in a special facility, and within that special facility there are . . . approximately 300 gloveboxes . . . .
>
> Gloveboxes come in all different sizes and all different configurations, and they're just like they sound: they're big or somewhat smaller boxes, you stick your hands inside in gloves and you manipulate materials.
>
> . . . .
>
> A glovebox is basically a simple structure in concept. It's made up of mostly stainless steel, glass and rubber sealing materials, but there's a lot that can go wrong

> with them and there's also a lot of penetration that can be made in and out of, including electrical connections, piping, utility connections. There are locks to transfer materials in and out, back ports, so on, so there's a lot of accouterments and sub-assemblies that are often attached to and become part of the structure.

Transcript of Hearing (Tr.) at 13, 22.

In March 2000, there was an accident in the PF 4 facility of TA 55, in which a worker inadvertently jiggled a loose fitting on a pipe leading to a glovebox, causing a leak of plutonium. "Because of the exposure to workers, the accident was considered a serious one. The DOE convened a Type A Accident Investigation Board that converged on TA 55 with selected experts to determine the cause of the accident and impose corrective actions." Respondent's Post-Hearing Brief at 5.

Mr. Cor alleges that a number of activities in which he engaged are protected under Part 708. The Part 708 regulations states that the following conduct by an contractor employee is protected from reprisal by his employer:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your employer, or any higher tier contractor, information that you reasonably believe reveals--
>
> (1) A substantial violation of a law, rule, or regulation;
>
> (2) A substantial and specific danger to employees or to public health or safety; or
>
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if you believe participation would --
>
> (1) Constitute a violation of a federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public.

10 C.F.R. § 708.5. I address each of Mr. Cor's alleged protected activities below, in chronological order, and find that Mr. Cor engaged in protected activity on three occasions.

1. March 1999 - Initiated Pressure Testing for Glovebox Utility Piping

Mr. Cor states that in March 1999, he initiated a "policy to pressure test new and modified glovebox utility piping to [a] higher degree prior to certification for service." Complainant's Exhibit 0.2. The complainant presents an April 2000 e-mail message in which he refers to the fact that "we have been requiring much higher pressures in leak tests of most of the new and modified piping to gloveboxes and equipment." Complainant's Exhibit 2.-.[1] He contends that the initiation of the new policy was protected activity under 10 C.F.R. § 708.5(a)(2). Complainant's Exhibit 0.2. I disagree. Mr. Cor has not demonstrated that he made a disclosure of any safety concern in conjunction with this action, let alone that he made a disclosure of a "substantial and specific danger to employees or to public health or safety" protected under Part 708. 10 C.F.R. § 708.5(a)(2).

2. May 1999 "Request for Work"

On May 17, 1999, Mr. Cor submitted a standard LANL form entitled "TA 55 Request for Work," in which he initiated a work order to "[d]evelop and implement methods for safe maintenance access and restraints on top of gloveboxes, trolley tunnels, and upper level gloveport locations, . . ." Complainant's Exhibit 1.1. Mr. Cor contends that this action was also protected activity under 10 C.F.R. § 708.5(a)(2). Complainant's Exhibit 0.2. Again, however, Mr. Cor raised no safety concern in this work order. For example, the work order does not indicate that there was a safety problem with gloveboxes, but rather proposes "to verify that each can support the live load of workers on top" and "to verify support capability of inside/outside restraints for heavy equipment." Complainant's Exhibit 1.1. Attached to the form are minutes from a March 24, 1999 meeting of Mr. Cor, his co-worker Curtis Sandoval, and two employees of Johnson Controls Northern New Mexico (JCNNM). The minutes refer to a discussion of "developing methods for safe access to perform maintenance on top of gloveboxes," "safe maintenance access issues," and the possibility of "permanent installation of some safe access features." However, nothing in the documents refers to what could be called a "substantial and specific danger to . . . health or safety." 10 C.F.R. § 708.5(a)(2).

3. June - September 2000 Input to DOE Type A Accident Investigation

As discussed above, in the summer of 2000 a DOE Type A Accident Investigation Board conducted an on-site investigation in the aftermath of a plutonium leak in the PF 4 facility of TA 55. Mr. Cor contends that he offered input to the investigators through his line management, and that this input constitutes a disclosure protected under 10 C.F.R. § 708.5(a)(2). However, Mr. Cor points to no information that he provided to the investigation board (or to his line management with the intent

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1/ Mr. Cor marked his exhibits to correspond to a numbered listing of allegations of protected activity and retaliation. Complainant's Exhibit 0.2. Thus, the first exhibit relating to his first allegation was labeled Exhibit 1.1, the second exhibit related to the first allegation was labeled Exhibit 1.2, etc. This pattern was generally followed for the remaining allegations, except that in some cases, later-added exhibits were not assigned a number to the right of the decimal point. For example, Exhibit 2.1 is followed by Exhibit 2.-.

that it be presented to investigators) that discloses a "substantial and specific danger" to health or safety.

4. October 2000 Appointment to Chair Glovebox Specifications Committee

In an October 12, 2000 memorandum, the NMT Division Director, Tim George, announced the formation of a working group to respond to one of the "Judgments of Need" identified by the DOE Type A investigation, specifically the need "to develop and implement a process to assure that effective quality assurance practices are in place to verify that existing glovebox and airlock auxiliary systems (such as argon and dry vacuum) are in compliance with applicable codes and requirements." Complainant's Exhibit 5.1. NMT management appointed Mr. Cor to chair this working group (referred to often in the record as the "glovebox committee"). *Id.* Mr. Cor points to his participation in this group as protected activity under sections 708.5(a)(2) and 708.5(b) of the Part 708 regulations. I find no evidence that Mr. Cor made any disclosures during his work with the group that revealed a substantial and specific danger to health or safety, the type of disclosure that is protected under section 708.5(a)(2). In addition, his participation was not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation" and therefore is not protected under section 708.5(b).

5. November 2000 Request for Additional Resources

The complainant states that in early November 2000 he met with the TA 55 Facility Manager and NMT-8 Group Leader "to request time, staff and computer support for added duties responding to [the] DOE judgments of need." Complainant's Exhibit 0.2. He also cites a memorandum to his team leader in which he states,

> I would like you to help us stress at every opportunity, that we are spread very thin in terms of staff, software, and training, in order to handle the tasks before us. We will make every effort to reach milestones, but have not obtained sufficient support over the past year to feel at all comfortable with the mission.

Complainant's Exhibit 6.1. Mr. Cor claims that these communications were protected activity under sections 708.5(a)(2) and 708.5(b) of the Part 708 regulations. First, nowhere in the memorandum quoted above, or in Mr. Cor's description of his November 2000 meeting with management, is there any mention of a health or safety issue. And these communications clearly were not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation" and therefore are not protected under section 708.5(b).

6. December 2000 AM111 Employee Complaint

On December 11, 2000, Mr. Cor filed an employee grievance under LANL policy AM111. In the AM111 complaint, Mr. Cor notes, "Even though the attention was not sparked by a glovebox failure, the DOE declared a number of glovebox related judgments of need in July 2000. NMT committed

to corrective actions with dates certain, . . .” Complainant’s Exhibit 8.1 at 2. Mr. Cor stated that the job of chairing the glovebox specifications committee “and many other new tasks were delegated to the same individual . . . .” *Id.* He contended that “NMT reorganized in a way that multiplied the supervision of the glovebox systems engineer for NMT-8,” and after listing those to whom he reported, Mr. Cor asserted, “This is simply too much direction for one individual, or even a small team.” *Id.*

Describing NMT’s corrective action plan as going “beyond the current state of the art,” Mr. Cor concluded

> Although the systems engineer has the capability to manage the changing needs, in an area where subject matter experts are rare, this results in a workload that is too demanding for the current staff and resources. Requests for additional staff and resources over a year have been met with the consistent response that no budget is available. Requests for additional time have been refused because of DOE urgency. Placement within an individual facilities group is proving to be inappropriate for the high level of interest and scrutiny. LANL should instead open an office of glovebox technology, reporting to the director’s office, and appoint the NMT-8 glovebox engineer to manage the office.

Id. at 3.

Mr. Cor also proposed that he receive a 25% increase in salary. *Id.* Mr. Cor contends that his AM111 complaint was a protected disclosure revealing a “substantial and specific danger to employees or to public health or safety” and “gross mismanagement . . . .” 10 C.F.R. § 708.5(a)(2), (a)(3). I do not agree. Mr. Cor’s complaint never refers to health or safety issues. Neither does the complaint reveal what Mr. Cor could reasonably believe was “gross mismanagement.”

> “Gross mismanagement” is more than de minimis wrongdoing or negligence. *Embree v. Department of Treasury*, 70 M.S.P.R. 79, 85 (1996). It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. Id. There must be an element of blatancy. Therefore gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission. Id.

Roger H. Hardwick, 27 DOE ¶ 87,539, Case No. VBA-0032 (1999). Mr. Cor’s AM111 complaint faults NMT management for saddling him with “a workload that is too demanding,” subjecting him to “too much direction,” and not providing him with sufficient staff and resources. Though seeming to recognize the time constraints imposed by “DOE urgency,” he implies that less strict deadlines could have been negotiated, stating that “NMT and LANL must negotiate with the DOE at arms length in the area of glovebox systems, with reasonable expectations of costs, time, and quality of

services."[2] However, while the complaint suggests that Mr. Cor was personally suffering what he felt was an adverse impact due to management's action (or inaction), the complaint does not reveal "a substantial risk of significant adverse impact upon" NMT or LANL's "ability to accomplish its mission." Thus, I find that the AM111 complaint does not reveal "gross mismanagement," and Mr. Cor has articulated no basis for reasonably believing that his complaint revealed such information.

Mr. Cor also asserts that his AM111 complaint is protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). However, since Mr. Cor's complaint never references any refusal by him to participate in any activity, the complaint cannot be so protected.

7. January 2001 "Walk-Around" Database Entry

On January 11, 2001, Mr. Cor submitted an on-line form for entrance into a "walk-around" database, a system for the reporting of safety problems observed by employees. In this form, he contends the DOE's Type A accident investigation was

> fundamentally flawed. The investigators did not interview the current glovebox systems engineer, . . . Yet the report identifies several broad areas of glovebox related needs . . . . This disconnect has caused great confusion in attempting to plan and implement corrective actions. For example, in one case the DOE appears to have been unaware of the quality assurance process for glovebox and auxiliary systems that NMT has had in place for years. In the confusion of attempting to respond to this need, it was assumed until recently that DOE was aware of the existing process and was not satisfied. As a result, plans were laid to go beyond the state of the art in glovebox specification, in an unreasonably short period of time. Even if the misunderstanding is resolved, the time allowed to respond may still not be adequate or appropriate.

2/ When asked at the hearing about the need to negotiate with DOE "at arms length," Mr. Cor provided the following explanation:

> A . . . . My view of this relationship between the laboratory and the DOE is that the Department of Energy represents the owner of the institution and the laboratory is a contractor or a building manager for the facility; there's a contractual relationship between the two and they shouldn't be confused and merged together such that the owner's interests necessarily become what the contractor agrees to perform.
>
> Q So are you saying then that the lab shouldn't always do what the DOE tells it to do?
>
> A The lab must comply with the mission of the DOE but at the same time there has to be a recognition that the resources and the budgets and the conditions of the work are negotiated on a periodic or even a continuing basis, particularly in light of a emergency -- or not an emergency but a serious accident such as occurred in 2000.

> NMT is rushing to respond to several of the glovebox related needs, relying on limited engineering resources, and apparently resisting long-standing requests for additional support and time. This is dangerous because of the obvious risks of miscommunication combined with inadequate support in responding to such serious findings.
>
> In the meantime the findings of the Type A investigation have diverted attention and resources from addressing an even greater glovebox safety hazard than those which led to the March 16, 2000 multiple intake. *The greater safety hazard is by the crafts and technicians in attempting to gain access to the top and sides of PF-4 gloveboxes for construction, maintenance, and surveillance. In many cases it is not possible to place adequate lifts, tie-off points or scaffolding for glovebox systems access, yet the access may be required for compelling reasons. The gloveboxes have either not been structurally analyzed to accommodate the activity and weight, or design of built-in scaffolding has not been initiated. Stress and activity upon relatively fragile glovebox structures, whether in use or isolated, could result in deflections sufficient to cause surprising release and exposure to hazardous materials.* NMT management has been aware of this hazardous condition since well before the Type A investigation.

Complainant's Exhibits 11.1, 11.-.

The above excerpt summarizes what appears to be the crux of Mr. Cor's complaints. I find that Mr. Cor's entry of this information into the "walk-around" database is a disclosure to his employer protected under Part 708 since it contained information that Mr. Cor reasonably believed revealed a substantial and specific danger to employees or to public health or safety. 10 C.F.R. § 710.5(a)(2).

UC argues that no incidents such as that posited by Mr. Cor in his complaint ever occurred, that there were existing systems to avoid such an incident, that the issue had been known to management for some time, and that Mr. Cor did nothing to actively pursue this issue from the time he submitted the May 1999 work order discussed above, until he again raised the issue in the January 2001 walk-around database entry. Respondent's Post-Hearing Brief at 4-5.

I am not persuaded by UC's arguments. First, the fact that no such incident as that posited by Mr. Cor has yet occurred does not logically rule out the possibility of a future occurrence; nor does it necessarily make unreasonable a belief that there is a substantial and specific risk of such an occurrence. *Rosie L. Beckham*, 27 DOE ¶ 87,557, Case No. VBA-0044 (2000) ("[F]or purposes of Part 708, it does not matter whether the information a putative whistleblower disclosed is ultimately factually substantiated."). Second, regarding the adequacy of existing systems to address this issue, UC points to "the use of on-site scaffolding, rails and ladders or other portable platforms that allowed the desired access." However, a reasonable question as to the adequacy of these systems is raised by the following testimony of the former deputy group leader of NMT-8, Tom Blum:

Q Let me go back, then, to what you've already discussed about the access to glovebox upper reaches, shall we say, by both -- well, initially this came about from the crafts representing Johnson Controls maintenance workers. Is that correct?

A Yes. It's Johnson Control crafts people.

Q Okay. Is it fair to say that the gloveboxes in the PF-4 facility are fairly congested?

A You mean they have a lot of surfaces that go to them? Is that what --

Q Well, in addition to that, but there is just a lot of clutter in the area, limited space for all of the work that's going on in there?

A Well, the rooms have a lot of equipment in it. I don't -- I think we do a good job of keeping the aisleways clear between the boxes. There's certainly a lot of surfaces that go to the boxes, there's a lot of surfaces above the boxes. But --

Q Is it possible that there are some or many instances where it's so congested that it's not possible to bring scaffolding and ladders to bear on the surface that needs to be accessed?

A There are -- no. I will say that the boxes against the walls of the laboratories are -- the rear of the boxes are pretty much inaccessible, very difficult to get to. But in other cases, I think -- it's a requirement that the corridor, if you will, or the spaces between the boxes be clear so that you can move a box in and out of the room once it's decommissioned.

Q Well, so --

A I mean, that's always been one of the requirements, that you have a -- I don't know what that spacing is. I don't remember. But --

Q Well, so was it your understanding, then, that the complaint or the concern of these crafts was more to the inconvenience of having to bring in temporary scaffolding and bringing it to bear on the surface rather than the inability to access certain parts even with scaffolding?

A A little bit of both. Part of it is, it delayed -- or it was time consuming to erect scaffolding, to get that scheduled and in place, as well as, once the job is done, to take it down. A lot of work was going on, and scaffolding would have to be moved and located in other areas of the facility. In addition to that, I don't want to say

> inaccessible because they were working on ladders, as well. But in many cases a ladder wasn't adequate, as you well know.
>
> Q Okay.
>
> A There were places in -- to finish answering your question, there are places that are fairly inaccessible, and most of those deal with boxes that are up against the walls of the laboratory rooms.

Tr. at 350-52. Clearly, there was a disagreement between Mr. Cor and others as to whether existing systems were in fact sufficient to address the concern Mr. Cor raised. The fact that Mr. Cor initiated a work order in 1999 indicates that he believed something needed to be done at that time. The fact that the proposed work was never approved indicates that LANL did not consider to be a high enough priority. While the ultimate merits of Mr. Cor's concern is not at issue in this case, the evidence in the record leaves room for reasonable disagreement as to whether the situation then existing presented a legitimate safety concern.

Third, this office has rejected an interpretation of the word "disclosing" that would only encompass providing information not already known by management. *META, Inc.*, 26 DOE ¶ 87,504, Case No. VWZ-0007 (1996) ("Imposing the interpretation [respondent] suggests would require an employee to first ascertain whether his or her information is unknown to DOE or the contractor in order to assure his or her protected status and that process could be an elaborate and difficult one. In any case, it would tend to inhibit employees from freely coming forward with sensitive information and concerns.").

8. January 2001 Submission of List of Roles and Responsibilities

On January 5, 2001, the NMT-8 systems engineering team leader, Stuart McKernan, directed the members of his team, including Mr. Cor, to "work up a draft list of what you feel your roles and responsibilities are. Submit these to me via e-mail by Friday the 19th. The idea is to formalize job content for our positions." Complainant's Exhibit 10.-. On January 18, 2001, Mr. Cor provided to Mr. McKernan a "draft for glovebox engineering, in Excel format." Mr. Cor contends that his response to Mr. McKernan's directive was protected under 708.5(b) of the Part 708 regulations. However, since this submission was clearly not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," it is not protected activity under section 708.5(b).

9. February 2001 E-Mail Rebuttal to Management's Response to AM111 Complaint

On February 6, 2001, Mr. Cor submitted to a LANL Human Resources employee a rebuttal to NMT's response to his December 2000 AM111 complaint. As did the original AM111 complaint, the rebuttal focuses on what Mr. Cor alleged was his "excessive" workload, and criticizes NMT's "efforts to bring more resources to glovebox engineering" as reflecting "an intent to micromanage

the priorities and activities of the glovebox manager." Complainant's Exhibit 15.1. Mr. Cor maintains that this rebuttal constitutes protected activity under section 708.5(a)(2) and 708.5(b). However, the rebuttal only mentions safety in a vague reference to "a glovebox safety concern" and the lack of resources available to address the issue. Thus, the rebuttal did not reveal a substantial and specific danger to employees or to public health or safety, and therefore is not protected under section 708.5(a)(2). And, again, since this submission was not part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," it is not protected activity under section 708.5(b).

10. February 2001 Request for Family and Medical Leave

On February 20, 2001, Mr. Cor submitted to his employer a request for Family and Medical Leave. Complainant's Exhibit 16.1. The complainant contends that this request is protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). Mr. Cor contends that his request was related to a "concern of injury to self." However, given several choices on the form for indicating the purpose of the leave, Mr. Cor chose "Care for parent, child under age 18 (or age 18 or older if incapable of self-care because of a mental or physical disability), or spouse with serious health condition." He did *not* choose "Your own serious health condition that makes you unable to perform the functions of your job." In a March 19, 2001 e-mail to the Systems Engineering team leader, Mr. Cor states, "Due to some current family issues, combined with stress of office workload, I plan to be taking some intermittent leave under FMLA, beginning March 20th." Complainant's Exhibit 16.-. Even if I were to determine that "the stress of office workload" was the primary basis for Mr. Cor's leave request, I cannot equate the need to alleviate stress with a fear of injury to self, let alone a fear of serious injury. Thus, I reject the contention that this request constitutes activity protected under Part 708.

11. February 2001 Request for Decision on AM111 Complaint

After NMT management declined the opportunity for informal resolution of Mr. Cor's AM111 complaint, discussed above, Mr. Cor, on February 21, 2001, requested that a decision on his complaint be made by "the next higher-level manager in the chain of command," Steven Younger. Complainant's Exhibit 17.1. Mr. Younger was LANL's Associate Director for Weapons. Mr. Cor claims that this request is protected activity under section 708.5(a)(2) and 708.5(b) of the Part 708 regulations. I reject this contention for the same reasons I found above that Mr. Cor's rebuttal of NMT management's response to the complaint was not protected under these provisions.

12. March 2001 Notification of Medical Condition

In a March 21, 2001 e-mail to his systems engineering team leader, Stuart McKernan, Mr. Cor stated, "The purpose of [my family and medical] leave has gotten more complicated in the meantime. ESH-2 recently ran some tests as part of my annual physical, and found some problem with my blood. They say it suggests cancer, but I don't think it is that serious at this point. More tests will tell."

Complainant's Exhibit 19.1. Mr. Cor contends that this notification is activity protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). I disagree, as this notification simply provides further basis for his family and medical leave, and nowhere does the notification mention that Mr. Cor was taking leave to avoid serious injury to himself in the workplace.

13. May 2001 Attempt at Mediation of AM111 Complaint

According to his contemporaneous records, Mr. Cor met with the NMT Division Director, Tim George, and the NMT-8 Group Leader, Ray Wallace, as part of an effort to mediate his AM111 complaint. Mr. Cor noted in his calendar for May 14, 2001,

> Mediation effort this afternoon with NMT went badly, as I was afraid it would. Tim George, Ray Wallace seemed determined to agree to nothing I proposed, and only insisted on micromanaging me as a solution. Went on for two hours, and I thought both were very arrogant, dishonest and manipulative. The mediators appeared intimidated by them also. No doubt that I will need to proceed with formal complaint resolution.

Complainant's Exhibit 21.1. As he does regarding his February 2001 rebuttal to NMT's response to the AM111 complaint, Mr. Cor characterizes this as activity protected under 10 C.F.R. § 708.5(a)(2), (b). I disagree for the same reasons I found above that Mr. Cor's original AM111 complaint and his rebuttal of NMT management's response to the complaint were not protected under these provisions.

14. May 2001 Amendment of FMLA Request and June 2001 Return to Work

On May 16, 2001, Mr. Cor submitted to his employer a revised request for Family and Medical Leave. Complainant's Exhibit 24.1. In this request, from the choices on the form for indicating the purpose of the leave, Mr. Cor chose "Your own serious health condition that makes you unable to perform the functions of your job." *Id.* Also submitted was a "Certification of Health Care Provider" signed by a physician, describing Mr. Cor's "fatigue, emotional distress, medical evaluation of anemia." Complainant's Exhibit 24.2. On June 21, 2001, Mr. Cor "returned to work on [a] limited schedule." Complainant's Exhibit 0.2. Mr. Cor contends that this request and return to work is activity protected as a refusal "to participate in an activity, policy, or practice if you believe participation would . . . [c]ause you to have a reasonable fear of serious injury to yourself, other employees, or members of the public." 10 C.F.R. § 708.5(c)(2). I disagree, as this notification simply provides further basis for his family and medical leave, and nowhere does the notification mention that Mr. Cor was taking leave to avoid serious injury to himself in the workplace. And clearly, his return to work on June 21, 2001, was not a refusal to participate in any activity.

15. June 2001 Participation in American Glovebox Society Conference

In June 2001, Mr. Cor made plans to participate as a presenter at the American Glovebox Society (AGS) Annual Conference. Complainant's Exhibit 26.1. The planned presentation was titled "Insuring Proper Installation & Testing of Piping Systems; Use of Teflon Seated Valves in Nuclear Applications." *Id.* Although Mr. Cor ultimately did not attend this conference (discussed as an alleged retaliation below), he states that he nonetheless engaged in protected activity under Part 708 in connection with the conference, specifically sections 708.5(a)(2) and 708.5(b). However, Mr. Cor has not shown that he made any kind of disclosure in this regard. Even if he had presented at the conference, there is no reason to believe his presentation would have contained information that revealed a "substantial and specific danger to employees or to public health or safety." And his participation in the conference would not have been part of "a Congressional proceeding or an administrative proceeding conducted under this regulation," and therefore would not have been protected activity under section 708.5(b).

16. July 2001 Complaint of Retaliation for Filing AM111 Complaint

In a July 3, 2001 e-mail to LANL human resources personnel, Mr. Cor cites "many instances of retaliation, abuse of authority, slander and bad faith on the part of some of my line management in recent month, . . ." Complainant's Exhibit 28.1. Mr. Cor contends that this e-mail is a disclosure of information revealing "abuse of authority" by LANL management. In response, UC argues that "disputes over grievances are not evidence of mismanagement or evidence of an abuse of authority" and that there "was no capricious exercise of power that would have adversely affected some right that Mr. Cor had or that would have resulted in personal gain to his supervisors in this instance." Respondent's Post-Hearing Brief at 29.

It is important to note here that to determine whether this communication by Mr. Cor contained protected disclosures does not require a determination as to whether LANL management *in fact* abused its authority. The question is whether Mr. Cor believed the information he was conveying revealed an abuse of authority, and whether that belief was reasonable. 10 C.F.R. § 708.5(a)(3). An abuse of authority occurs when there is an "arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993) (interpreting Whistleblower Protection Act). Among the allegations leveled in Mr. Cor's e-mail was that there "has been such a climate of fear fostered by the NMT-8 group leader, that one of my witnesses to the fact finder [appointed to investigate Mr. Cor's AM111 complaint] has asked to be excused from being interviewed." Complainant's Exhibit 28.1. I conclude that Mr. Cor's e-mail reflects his genuine belief as to the events that were occurring. His allegation of a "climate of fear" resulting in the intimidation of witnesses reveals what is at least arguably an "arbitrary or capricious exercise of power . . . that adversely affects the rights of" Mr.

Cor. Thus, while venturing no opinion as to the truth of Mr. Cor's allegations, I find that the allegation was a disclosure protected under Part 708.[3]

17. August 2001 Filing of Part 708 Complaint

On August 1, 2001, Mr. Cor filed his Part 708 complaint with the DOE's Albuquerque Operations Office. There is no question, and UC does not dispute, that the filing of a Part 708 complaint, and therefore participation in "an administrative proceeding conducted under this regulation," is conduct protected under the Part 708 regulations. 10 C.F.R. § 708.5(b).

In summary, I find that Mr. Cor engaged in activity protected under Part 708 on the following three occasions: (1) his January 11, 2001 entry into the Walk-Around Database; (2) his July 3, 2001 e-mail to LANL human resources, and (3) the filing of his Part 708 complaint on August 1, 2001. I will next review Mr. Cor's allegations of retaliation.

B. Whether Mr. Cor's Protected Activity Was a Factor Contributing to Retaliation

Under the Part 708 regulations,

> Retaliation means 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) as a result of the employee's disclosure of information, participation in proceedings, or refusal to participate in activities described in § 708.5 of this subpart.

10 C.F.R. § 708.2.

Mr. Cor alleges many instances of retaliation. Complainant's Exhibit 0.2. As an initial matter, I will not consider any allegation of retaliation occurring prior to January 11, 2001, the date of what I found above to be Mr. Cor's first protected disclosure. I will now address the remaining allegations in chronological order to determine whether they are actions of the type described in the definition of retaliation above. I find below that two of the alleged instances of retaliation are actions of the type described in the definition of retaliation, and that Mr. Cor's protected activities were contributing factors in both of these actions.

3/ I disagree with UC's contention that *Thomas Dwyer*, 27 DOE ¶ 87,560, Case No. VBH-0005, stands for the general proposition that "disputes over grievances are not evidence of mismanagement or evidence of an abuse of authority." In *Thomas Dwyer*, I made a finding specific to that case that the grievances at issue did "not contain disclosures that evidence mismanagement or abuse of authority."

1. January 2001 Response to Walk-Around Database Entry

Mr. Cor contends that in late January 2001 the NMT Division Leader, Tim George, "closed out [my] entry in Management Walk Around Database, without addressing any merits and indicating to [the] employee that entry was inappropriate." Complainant's Exhibit 0.2. The complainant relies on an e-mail response from Mr. George in which he states,

> Some of the issues you raise in your finding certainly bear further investigation. However, I don't believe that the management walkaround system is the appropriate venue for raising or resolving these issues. We are already actively evaluating most of these issues as part of your recent [AM111 complaint], and expect to be in a position to address these concerns by January 31.

Complainant's Exhibit 12.1. The e-mail then goes on to address the merits of Mr. Cor's concern, precisely what Mr. Cor claims Mr. George did not do. *Id.* No sanction was applied to Mr. Cor. I find no basis for an argument that Mr. George's action in his e-mail response or in closing out the concern was "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. Therefore, this action cannot be retaliation as defined in Part 708.

2. February 1, 2001 Memo from NMT Division Leader

In January 2001, Mr. Cor submitted a draft memo to his supervisors entitled "Establishing Requirements for Glovebox Auxiliary System Configuration, LANL TA-55 Corrective Action Plan Item CAP05076." Complainant's Exhibit 13.-. On February 1, 2001, Tim George issued a revision of that memorandum. Complainant's Exhibit 13.2. Mr. Cor complains that Mr. George made "minor changes to content," "removed employee's name entirely from document, issued the memo under his own name, and did not even copy the employee on distribution." Complainant's Exhibit 0.2. However, Mr. George testified that it was not uncommon for him to issue memoranda, even though drafted by subordinates, under his own name, and to not include the subordinate on the memorandum's distribution list. In any event, the act alleged here by Mr. Cor clearly is not in the category of a "negative action with respect to the employee's compensation, terms, conditions or privileges of employment." This action therefore cannot be retaliation as defined in Part 708.

3. NMT's January 2001 Response to AM111 Complaint

On January 30, 2001, the NMT-8 Group Leader issued a memorandum responding to Mr. Cor's AM111 complaint. Mr. Cor contends that this response contained "false and misleading statements" and constitutes retaliation against him. First, I note that I found above that Mr. Cor's AM111 complaint did not contain disclosures protected under Part 708. In any event, I need not address the factual accuracy of NMT's response in order to find that the response does not constitute a "negative

action with respect to the employee's compensation, terms, conditions or privileges of employment." And even though the response finds unwarranted Mr. Cor's request to be made director of a LANL-wide glovebox technology office and to receive a 25% increase in salary, I would need to stretch the definition of "retaliation" too far to bring within its scope NMT's refusal to agree to what was by all appearances an extraordinary request.

4. LANL Management's Request for Fact Finder on AM111 Complaint

As discussed above, in February 2001, Mr. Cor requested that a decision on his AM111 complaint be made by "the next higher-level manager in the chain of command," Steven Younger. Complainant's Exhibit 17.1. The memorandum from LANL human resources relaying this request states that management or Mr. Cor could request that the issues be submitted to a "neutral Fact Finder . . ." Mr. Cor did not ask for the appointment of a fact finder. LANL management, however, did, and one was appointed. Complainant's Exhibit 18.1. Mr. Cor characterizes the request by LANL management for a neutral fact finder, "with no provision of intermediate relief," to be retaliation. Complainant's Exhibit 0.2. I disagree, and find nothing in LANL's request that could be accurately described as a negative action with respect to Mr. Cor's employment.

5. April 2001 Refusal to Allow Work at Home

Mr. Cor states that, in April 2001, NMT management refused his "offer to work at home, and threatened to disallow time already worked at home, even with prior notification to supervisor." However, without some evidence that his management treated Mr. Cor differently from any similarly situated employees in this regard, I cannot find that NMT's failure to approve Mr. Cor's work from home is a negative action with respect to his employment.

6. May 2001 Work Load Management Memorandum

As discussed above, on May 14, 2001, Mr. Cor met with the NMT Division Director, Tim George, and the NMT-8 Group Leader, Ray Wallace, as part of an effort to mediate his AM111 complaint. On May 16, 2001, Mr. George issued a memorandum stating,

> Pursuant to my meeting on May 14, 2001 with Mr. William Cor, one of the issues he faces is a large number of competing demands on his time. I told him that this issue could be resolved best by having his Team Leader set all priorities for his work.
>
> I hereby direct that the NMT-8 Systems Engineering Team Leader [Stuart McKernan] review with Mr. Cor all of the work demands that he faces, and make a decision on which work requirements Mr. Cor will respond to and accomplish each week. Mr. Cor will not work on any tasks not set by his Team Leader.

Complainant's Exhibit 23.1. Mr. Cor contends that the issuance of the memorandum was an act of retaliation, though he testified that the solution proposed in the memorandum was never

implemented. Complainant's Exhibit 0.1; Tr. at 296-97. Nonetheless, the memorandum itself is an action by Mr. Cor's employer with respect to the terms and conditions of his employment, and therefore is the type of action described in Part 708 definition of retaliation. 10 C.F.R. § 708.2.

7. Failure to Authorize Attendance at Conference

As noted above, in June 2001, Mr. Cor made plans to participate as a presenter at the American Glovebox Society (AGS) Annual Conference. Complainant's Exhibit 26.1. The NMT Group Leader, Ray Wallace, testified regarding his decision whether to approve Mr. Cor's travel to the conference.

> I got a travel request from Mr. Cor to attend it, and I signed it. And as I was putting it into my out box, I realized that this went for five days, Monday through -- you know, Monday to Friday, leave Monday and come back Friday.
>
> At the time, under the FMLA, he was working only three days. Well, the Occupational Health & Safety rules at the lab are pretty strict. If they say three days, that's all you best be doing.
>
> So he at the time was out, he was home. I called and left a voice mail message on his phone, saying, Hey, I -- you know, this is for five days. I need to talk to you about this. You're only authorized three. Let's discuss it.

Tr. at 458-59. Mr. Cor returned Mr. Wallace's phone call and left a voice mail message. On Friday, June 29, 2001, Mr. Wallace sent an e-mail to Mr. Cor stating, "Bill, I got your voice mail re: attending the AGS conference. Please see me Monday morning." Mr. Cor responded as follows by e-mail on Monday, July 2, 2001:

> I understood through Larry that you gave prior approval for this some time ago. Upon that condition I agreed to take part in the presentation for the AGS training seminar.
>
> As I explained on the phone this is not a factor in my limited working hours, if they are still in place at that time.

Complainant's Exhibit 27.-. About one hour later, Mr. Wallace responded with an e-mail stating, "come talk to me, please." *Id.* Mr. Cor responded by e-mail approximately one and one-half hours later:

> Ray -
>
> You need to understand that I have long since been advised not to meet on short notice in your office in a peremptory way, without taking certain precautions. Under

> present circumstances I must take this position with my line management, not just yourself. Most people are content to communicate with me without force, and that is the way it should be at a national laboratory.
>
> I would like to work out whatever your concerns may be, so I invite you to choose between phone, e-mail, or coming by my office when I am in. If we really need to meet in your office, then we could also arrange an appointment with sufficient advance notice and agenda that I may invite my representative.
>
> Sorry if this is inconvenient for you.
>
> - Bill Cor

Id. After receiving this e-mail, Mr. Wallace

> called Pat Trujillo, the Chief of Staff, and said, This is what just transpired. You know, I've never had this happen before. Give me some advice.
>
> And he said, This is management of the group. This is not disciplinary. He said, If a person under lab policy is being disciplined for something, he or she rates having a representative there of their choice. But this isn't discipline, this is just regular operation of the group.[4] That's [not applicable]. Thank you.
>
> So I called Mr. Cor back and said, Come down and see me, and told him basically that, You don't rate a representative. We're talking just general group operations. He wouldn't come.
>
> And so I invited him to go tell that to the Chief of Staff. He did, and subsequently left the lab.

Tr. at 460-61. Mr. Cor describes what happened next:

> What followed immediately after that, as I did go to Mr. Trujillo's office, he insisted that the orders should stand, that I should go without delay to Mr. Wallace's or suffer a possible charge of insubordination or being AWOL. And I tried to explain my concerns again with Mr. Trujillo, to no avail.

4/ To support his contention that he was entitled to have a representative while meeting with Mr. Wallace, Mr. Cor relies on a LANL memorandum stating that "managers and supervisors must allow employees, on request, to have a representative with them in meetings or interviews of an investigative nature . . . when a purpose of the interview is to obtain facts which could lead to disciplinary action that is probable or that is seriously considered." Complainant's Exhibit 27.-. Mr. Cor has not shown, and I do not find, that the LANL memorandum entitled Mr. Cor to have a representative present with discussing his travel request with Mr. Wallace.

Tr. at 91-92. Following this meeting, Mr. Cor left the work site, and never returned. Tr. at 463.

Mr. Cor contends that Mr. Wallace's refusal to approve his travel, as well as Mr. Wallace's insistence that Mr. Cor go to his office, was retaliation. What the documentation produced by Mr. Cor indicates, however, is that while Mr. Wallace was certainly considering disapproving the travel, he wanted to speak to Mr. Cor before making the decision. Once Mr. Cor left the lab on July 2, 2001, and did not return, whether NMT would approve his travel to the conference obviously became a moot point. Thus, while a decision to not allow Mr. Cor to attend the conference arguably is the kind of action described in the Part 708 definition of retaliation, such a decision apparently was never made. Moreover, I do not find that Mr. Wallace's insistence that Mr. Cor report to his office to talk is an action with respect to Mr. Cor's compensation, terms, conditions or privileges of employment, and therefore falls outside the definition of retaliation. 10 C.F.R. § 708.2.

8. September 2001 Termination

As will be discussed in more detail below, Mr. Cor was terminated from employment on September 21, 2001. Clearly, termination is an action with respect to Mr. Cor's employment, and therefore would fall within the Part 708 definition of retaliation.

I have therefore identified above two actions by NMT management that are the type of actions defined as retaliation in the Part 708 regulation, the proposal by Tim George in his May 2001 memorandum regarding managing Mr. Cor's workload, and Mr. Cor's September 2001 termination.[5] The next question is whether any of the following activities by Mr. Cor (already found above to be protected under Part 708) was a contributing factor to either Mr. George's memorandum or Mr. Cor's termination: (1) his January 11, 2001 entry into the Walk-Around Database; (2) his July 3, 2001 e-mail to LANL human resources, and (3) the filing of his Part 708 complaint on August 1, 2001.

In prior decisions of the Office of Hearings and Appeals, we have established that,

> A protected disclosure may be a contributing factor in a personnel 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 was a factor in the personnel action."

5/ Mr. Cor also contends that LANL retaliated against him by "refusing to respond to [his] Part 708 complaint" and by finding, in a December 11, 2001 letter from LANL Human Resources, no "evidence to support your claim that NMT management's actions toward you constituted retaliation." Complainant's Exhibit 0.2. However, in this regard, Mr. Cor makes no allegation that LANL took any action with respect to his employment. Indeed, the first allegation concerns a "non-action" and the second a letter issued by LANL after Mr. Cor had already been terminated.

Charles Barry DeLoach, 26 DOE ¶ 87,509 at 89,053-54 (1997) (quoting *Ronald Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993)); *Ronny J. Escamilla*, 26 DOE ¶ 87,508 at 89,046 (1996).

After reviewing the events from the time of Mr. Cor's first protected activity on January 11, 2001, through Mr. Cor's termination some eight months later, I conclude that there is close enough temporal proximity to find, under the circumstances, that Mr. Cor's January 2001 protected activity was a contributing factor in the proposal in Tim George's May 2001 memorandum regarding Mr. Cor's workload. For the same reason, I also find that all three of Mr. Cor's protected actions (in January, July, and August 2001) were contributing factors in the September 2001 decision to terminate Mr. Cor.[6] Looked at in context, all of the relevant events, both protected activities and alleged retaliation, were not isolated occurrences, but instead were part of a continuing and growing dispute between Mr. Cor and his management over an eight month period.

Notwithstanding these findings, it is clear that a large part of the dispute had nothing to do with Mr. Cor's protected activities. Moreover, as I discuss below, UC has proven by clear and convincing evidence that Mr. George would have issued the May 2001 memorandum and LANL would have terminated Mr. Cor in the absence of Mr. Cor's protected activities.

C. Whether LANL Would Have Take the Alleged Retaliatory Actions Absent Mr. Cor's Protected Activities

The primary issue of contention between Mr. Cor and his management, throughout the last eight months of his employment, appears to have been related to workload, i.e., Mr. Cor's contention that there was too much work and not enough resources, and that the deadlines for the completion of work were unrealistic. Variations on this theme can be found in Mr. Cor's AM111 complaint, his walk-around database entry, and his requests for FMLA leave due in part to stress at work. However, as I found above, Mr. Cor's communications and actions related to this issue are not protected under 10 C.F.R. § 708.5. Nonetheless, I have also found that Mr. Cor made protected disclosures related to a safety issue in his January 2001 walk-around database entry.

The temporal proximity between this disclosure and Mr. George's May 2001 memorandum regarding managing Mr. Cor's workload is such that I cannot rule out his January 2001 protected disclosure as a factor in the decision to issue the memorandum. But it is abundantly clear to me that Mr. George would have issued this same memorandum even if Mr. Cor had made no protected

---

6/ The record indicates that Mr. George, the individual responsible for both the May 2001 memorandum and Mr. Cor's termination, had the requisite knowledge of Mr. Cor's protected activities. As discussed above, Mr. George responded to Mr. Cor's January 2001 walk-around database entry. And, prior to making his decision to terminate Mr. Cor, Mr. George was provided, among other relevant documentation, a copy of messages authored by Mr. Cor. One of those messages contained his July 2001 protected disclosure, and another referred to the fact that he had filed a complaint under Part 708. Respondent's Exhibit 138.

disclosure. The genesis of the memorandum was Mr. Cor's AM111 complaint, which I have already found was related primarily to the workload issue and contained no protected disclosures. It was in the context of attempting to mediate the AM111 complaint that Mr. Cor met with Mr. George and Ray Wallace, the NMT-8 Group Leader. Not surprisingly, in his memorandum Mr. George states that one of the issues discussed was "a large number of competing demands on his time. I told him that this issue could be resolved best by having his Team Leader set all priorities for his work." Complainant's Exhibit 23.1. Mr. George testified credibly at the hearing that he issued the memorandum in an attempt to "pinpoint the actual specific duties that were amounting to this inordinate workload." Tr. at 650. Because I find that it was the "workload" issue that prompted Mr. George's memorandum, I am convinced that the memorandum would have been issued even if Mr. Cor had raised no safety issues in his January 2001 walk-around database entry.

What is even more clear to me is that Mr. Cor would have been terminated from his job in September 2001, his protected activities notwithstanding. As noted above, Mr. Cor left the workplace on July 2, 2001, after refusing to report to his Group Leader's office.

> MR. GOERING: Okay. As I understand, July 2, 2001, Mr. Wallace says, Come to my office. You refuse to go. You go to -- Mr. Wallace says, Okay, go to Mr. Trujillo's office.
>
> You go to Mr. Trujillo's office. Mr. Trujillo says, you know, You've got to go -- if Mr. Wallace asks you to go to his office, you've got to go to his office. And you, I guess believing that was wrong, left the workplace on July 2 and never returned. Is that right?
>
> THE WITNESS: That's correct.
>
> MR. GOERING: What I'm trying to understand is, what was it about the request to meet with Mr. Wallace that precluded you from showing up to work? Why couldn't you show up to work even though there was this pending request to see Mr. Wallace?
>
> THE WITNESS: Well, my understanding from Mr. Trujillo that the mere refusal to meet with Mr. Wallace was the source of their contention that I was insubordinate, if I --
>
> Since I was still under this Family Medical Leave Act and still had an iron deficiency, I could -- it appeared to me like I could invoke that, go home, and rely on that as a means of possibly ameliorating the situation, whereas if I had simply remained in the office and refused to meet under these circumstances, it would have been increasingly uncomfortable and confrontational.

MR. GOERING: Okay. As I understand it, though, as of July 2, the medical recommendation was that you could -- obviously, you know, that he couldn't foresee what happened on July 2. But the diagnosis was -- the recommendation was that you could return to work three days a week?

THE WITNESS: (No audible response.)

MR. GOERING: Okay.

THE WITNESS: This was the first day of the week.

MR. GOERING: Okay. Now, once you -- you indicated in a later exhibit, or in a later E-mail, which I think is Item 27, that -- yes -- 27.2, which doesn't seem to have a date as to when you wrote this. But -- or actually, no. I'm sorry. I'm talking about the part you wrote, which is August 12.

And you say that it may be you've exhausted your legal allowance of unpaid leave under FMLA.

My question is, once you had exhausted your FMLA leave, then, what did you think would be the effect of continuing not to go to work?

THE WITNESS: Well, I had hoped for some intervening relief or action through either some combination of Human Resources, the fact-finder, DOE, or some other authority above Mr. Wallace in the intervening time. I was going on hope here.

And at the same time, I was trying to make do with the situation as I had become enmeshed in at that point of trying to support the family. I continued to try to do what I could outside of the office, including responding to phone messages. And I was making contributions and not getting paid for them at this point.

But I didn't have an answer for what I could rely on at the expiration of my FMLA leave. But it's clear that I wasn't being offered any olive branch.

MR. GOERING: Right. But if -- and I'm not trying -- I don't mean to sound like I'm dismissing your concerns, but I'm just looking at it from the side of management.

If management says, We want you to come back to work, and then you've exhausted all your legal ability to be out of work, you realize you're at the end of that rope, I understand that you hoped for something that would intervene.

But at the point where your FMLA leave expired, it would seem to me that you might think, Well, I could really endanger my job if I don't go back to work when I'm supposed to go back to work and my leave has expired.

Isn't it reasonable for management to think, Well, he is AWOL if he doesn't show up and he doesn't have any reason -- he has no leave, he's not showing up to work?

THE WITNESS: Well, I think -- under the circumstances, I don't think that's a reasonable position for the management to take, given what they knew or appeared to be conveniently forgetting about the reasons for how this all came about, going over, as we've gone over here, a period of a couple of years at least.

MR. GOERING: But it sounds like the precipitating event on July 2 was Mr. Wallace wanted you to meet with him in his office. That's what caused you to leave on July 2?

THE WITNESS: Yes.

MR. GOERING: And then you said that you -- I asked you why that prevented you from coming to work, and you said, well, you figured you could use your FMLA leave and it might ameliorate the situation.

Once your FMLA leave is gone, then, what keeps you from, you know, maintaining your dispute, you know, and claiming to be in the right, understandably --

THE WITNESS: Yes.

MR. GOERING: -- but going to work and saying, you know, I'm going to --

THE WITNESS: Well, as a practical matter, I was already in South Carolina, nearly 2,000 miles away at that point, upon the expiration of my FMLA leave.

MR. GOERING: Okay. And so you couldn't go back?

THE WITNESS: Well, as a practical matter, I couldn't --

MR. GOERING: Okay.

THE WITNESS: -- at least not immediately.

Tr. at 260-64. Mr. Cor was in South Carolina by August 2001 because he had moved to accept employment with another firm. In the meantime, on August 6, 2001, Ray Wallace sent a certified letter to Mr. Cor, informing him that he was required to report to work by August 13, 2001, or else Mr. Wallace would "consider that you have abandoned your position and we will proceed with appropriate administrative action." Respondent's Exhibit 138 at Attachment D. In an August 12, 2001 e-mail to Ray Wallace, Mr. Cor stated that he

> cannot allow the false impression to foster or linger that I have abandoned my employment. It may be that I have exhausted my legal allowance of unpaid leave under FMLA, but in the meantime you are well aware that the primary cause for my absence has shifted due to your abusive and retaliatory actions manifested up to July 3rd, and continuing to date.

Complainant's Exhibit 27.2. Mr. Wallace responded by e-mail and regular mail, stating,

> Since you have failed to provide a legitimate basis for being absent from work, the Laboratory has determined you to be absent without leave and is following the procedures set forth in Laboratory policy AM 319 Absence Without Leave. Application of this policy could result in termination of your employment. If you have a legitimate reason for being absent from your work you should contact me immediately with that information so that it can be considered in light of the Laboratory's application of AM 319.

Id.

NMT management then referred the matter to a Case Review Board, an "advisory body to advise the cognizant manager on the appropriate managerial response to whatever situation there is." Tr. at 721. Philip Kruger, LANL's deputy director for human resources and group leader for staff relations, sat on the board. Mr. Kruger testified at the hearing and described the board's conclusion regarding the case of Mr. Cor.

> The case review board was unanimous that this was insubordination. This was a situation in which management was telling Mr. Cor to return to work, was telling him if he had a medical reason, to send that through the medical folks.
>
> Basically, the reason that he was giving was that he felt he was being mistreated by his supervisor and would not work for this man and would not even meet to talk about anything with this person without a representative there.
>
> He was told on repeated occasions that he didn't have that option; that there were ways he could complain about treatment and so forth, but to simply say, No, I'm

not going to go to work because I will not report to this man, was in fact insubordination and that we wouldn't live with it. And that went on for several weeks.

Mr. Kruger was questioned regarding LANL's policy and practice in cases of insubordination.

Q Is insubordination in fact an offense that's taken seriously by the Laboratory?

A We take it extremely seriously. We have --

Q And why?

A Well, as any operation would, people have to -- managers have to be able to maintain order in their workplace. People have jobs to do. Somebody has to oversee that. And in that sense, we're not -- we're no different than any other place.

But when you look at the Laboratory here, we have enormous safety and security -- there are enormous safety and security implications with virtually everything that we do. We cannot have a situation where people feel that, Well, I'll follow the orders that I want or I'll work for the people I want and if I don't like the orders or I don't like the people, I'm not going to do it.

If we have work that is unsafe or we have work that is not secure, people have the right to stop work. But they don't have the right to stop work simply because they don't particularly like the person they're working for.

Q Other employees have been terminated from the Laboratory for insubordination?

A I would -- there are lots of ways of characterizing any particular case. I would say absolutely, there are other employees who have been terminated for insubordination. When you look at records, you may see something -- for example, we just recently had one where it would be insubordination and performance.

In Mr. Cor's case, we'd probably describe it as insubordination and absent without leave, so forth. Generally speaking, this is, in my short tenure at the Laboratory, the first case I have come across where an employee basically has said, Yes, I understand the order. I'm supposed to go into work and meet with this -- with my supervisor, and I'm not going to do it.

> And having been told, You put your job at risk if you don't do it, do you understand we will fire you if you continue along this path, and the person still continues along the path, in fact, in the some 25 years that I've been doing this kind of work, this is kind of unique that way. I have not run across many cases like that.
>
> Q This was a clear-cut case is what you're saying?
>
> A No doubt in my mind.

Tr. at 726-27. It is clear to me that the driving force behind Mr. Cor's termination was his refusal to report to work. Even if Mr. Cor had engaged in no protected activity, I am convinced that events would have transpired almost precisely as they did, resulting in Mr. Cor's termination. In sum, I find that with regard to both Mr. George's May 2001 memorandum and Mr. Cor's termination, UC has met its burden of proving "by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29.

IV. Conclusion

As set forth above, I have found that the complainant has met his burden of proof of establishing by a preponderance of the evidence that he engaged in activity protected under 10 C.F.R. Part 708. I also have determined that the complainant's activity was a contributing factor in actions taken against him, including his termination. However, I found that UC has proven by clear and convincing evidence that it would have taken the same action absent his disclosures. Accordingly, I conclude that the complainant has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted.

It Is Therefore Ordered That:

(1) The request for relief filed by William Cor under 10 C.F.R. Part 708 is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless a party files a notice of appeal by the fifteenth day after receipt of the decision.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: August 5, 2002