March 28, 2003
DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Robert Burd

Date of Filing: March 13, 2003

Case Number: VBX-0060

On November 16, 2001, BWXT Pantex, as successor to Mason & Hanger Corporation (M&H) (collectively referred to as "the contractor"), filed an appeal of an Initial Agency Decision (IAD) issued by an Office of Hearings and Appeals (OHA) Hearing Officer under the Department of Energy (DOE) Contractor Employee Protection Program, 10 CFR Part 708. *Robert Burd*, 28 DOE ¶ 87,017 (2001). The IAD found that the contractor terminated Robert Burd (the complainant), a former employee at the DOE's Pantex nuclear weapons plant, in retaliation for making disclosures protected under Part 708. The IAD ordered the contractor to reinstate Burd, provide him with back pay, and reimburse him for the reasonable costs and expenses of prosecuting his complaint. *Id*. at 89,113. It further directed the complainant to file a report providing a calculation for back pay, and if there is no immediate reinstatement offer, to update that back pay report every 90 days. *Id*.

On August 5, 2002, I issued an Appeal Decision affirming the IAD in part, and reversing the IAD in part. *Robert Burd*, 28 DOE ¶ 87,025 (2002). 1/ Specifically, the Appeal Decision modified the IAD in two respects: (1) ordering that the contractor pay restitution to the complainant for all travel, lodging, and relocation expenses incurred as a result of the complainant's having to move to Los Alamos, New Mexico to find comparable employment after being wrongfully terminated in September 2000, and (2) ruling that the contractor not be required to offer reinstatement to the complainant at the Pantex Plant. The Appeal Decision also awarded the complainant $3,477.12 for lost holiday pay, based on the Complainant's Damages Brief submitted in response to the IAD, and awarded the complainant $2,318.08 in "back pay without any offsets from the date of

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1/ The DOE's National Nuclear Security Administration (NNSA) reviewed both decisions, pursuant to a Memorandum of Understanding (MOU) by which NNSA authorized OHA to adjudicate for NNSA whistleblower complaints brought by employees of NNSA contractors under 10 CFR Part 708. Under the MOU, NNSA is responsible for implementing a final decision issued under Part 708.

discharge, September 29 through October 20, 2000, which corresponds to the period during which he was out of work after being terminated by the contractor" (hereinafter referred to as "period one"). Appeal Decision at 12, 28 DOE ¶ 87,025 at 89,199. In addition, the Appeal Decision directed the parties to confer with each other and agree upon a proper calculation of back pay for the period from October 20, 2000 through the date of the Appeal Decision, taking into account the average number of overtime hours worked by radiation control technicians at the Pantex Plant during that period (hereinafter referred to as "period two"). The Appeal Decision also directed the complainant's attorney to submit an updated, itemized statement, and confer with the contractor to agree upon a proper amount of attorneys fees and expenses. Finally, the Appeal Decision order the contractor to pay interest "at the rate specified in the IAD, one-half percent per month, on all monies paid to the complainant." *Id.* at 13. Neither party challenged this interest rate during the course of the appeal.

The parties have conferred at length and reached agreement on all but two of the remedy issues remanded to them by the Appeal Decision. *See* February 14, 2003 Letter from Richard Thamer, Attorney for BWXT Pantex, to Michael A. Warner, Attorney for Robert Burd and Thomas O. Mann, OHA Deputy Director; February 17, 2003 E-Mail Message from Warner to Thamer and Mann; February 19, 2003 Letter from Thamer to Warner and Mann. The items on which the parties were able to agree are set forth in the stipulation below. OHA is issuing this Supplemental Order to resolve the remaining remedy issues in this case.

I. Areas of Agreement

The complainant and contractor have stipulated to the following facts for purposes of calculating the remedies in this case. *See* February 14, 2003 Letter from Thamer to Warner and Mann. 2/

1. Back Pay from discharge through Oct. 20, 2000 (period one)
   $2,318.08

2. Time off work for Travel
   $1,883.44

3. Attorney's Fees
   $23,510.22

4. Medical Insurance
   $3,449.08

2/ While the parties have reached agreement on the numbers in their stipulation, they retain the right to seek further administrative or judicial review of the final order issued by the OHA Director in this appeal. See 10 CFR §§ 708.34,35.

5. Incidental Expenses
   $23,438.12

II. Areas of Disagreement

First, the parties cannot agree on the holiday pay calculation. Complainant submitted a damages brief seeking $3,477.12, representing that he lost pay for the following 24 days: Nov. 10, 2000; Nov. 23-24, 2000; Dec. 25, 2000 through January 1, 2001; January 15, 2001; February 19, 2001; May 28, 2001; and July 4, 2001. The Appeal Decision adopted this figure from the Complainant's Damages Brief without discussion.

The contractor challenges the amount of lost holiday pay stated in the Appeal Decision for the reason that M&H did not provide 24 paid holidays. Instead, the contractor claims that M&H paid for 10 holidays between the time Burd was discharged and OHA issued the IAD: Oct. 16, 2000; Nov. 23 and 24, 2000; Dec. 25, 2000; Jan. 1, 2001; Apr. 6, 2001; May 28, 2001; July 4, 2001; Sep. 3, 2001; and Oct. 15, 2001, for a total of $1,448.80. The contractor is the best source of information about the number of paid holidays it gave its employees. Moreover, the complainant has not submitted any new evidence to contravene the latest information from the contractor on the number of paid holidays lost by Burd during the period concerned. The complainant no longer worked at Pantex during that period, and the numbers in his damages brief appear to be incorrect. For example, the dates listed in the complainant's damages brief do not add up to 24 days. Accordingly, I will rule for the contractor on lost holiday pay, and reduce the amount of damages awarded for that item from $3,477.12 to $1,448.80.

Second, the parties cannot agree on what they call "the lost overtime offset" for period two. The parties have reached agreement on the amount of overtime that the complainant would have earned at Pantex and the amount of compensation he has earned at his subsequent employer, both in his base salary and in overtime pay. But they have not been able to agree whether or to what extent the contractor is entitled to offset these subsequent earnings against the compensation the complainant could have earned at his old job. 3/

The disagreement has arisen because the complainant earns a higher base salary at his new job than he did at Pantex. Standing alone, this disparity would mean that the complainant would not be awarded any back pay for the period after he began his new job. *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993). However, the complainant maintained that the back pay calculation for period two should take into account the amount of overtime pay he would have earned at Pantex, which, when added to his Pantex base salary, would exceed his new base salary. The complainant

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3/ We understand that the contractor does not seek to offset any subsequent compensation earned by the complainant in period two–after he began his new job–against the amount of back pay awarded "without offset" for period one. Thus, the back pay award for period one–from Burd's termination on September 29 through October 20, 2000 when he began his new job–is not in contention.

asserts that the back pay calculation for period two should not include the amount of overtime he earned at his new job.

The contractor argues that the amount of back pay for period two after the complainant began his new job should be determined by comparing his total compensation (base salary plus overtime) at his new job to the total compensation he would have earned from his old job. According to the contractor, "back pay is an equitable remedy subject to offset by subsequent earnings, including overtime, and Burd's subsequent earnings exceed his [Pantex] earnings." February 14, 2003 Letter from Thamer at 2.

As authority for their respective positions, each party cites decisions issued by the Merit Systems Protection Board (MSPB) dealing with damages awarded to Federal employees for retaliation under the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at scattered sections of 5 U.S.C.), as amended. One case is directly on point. In *Deskin v. United States Postal Service*, **http://www.mspb.gov/decisions/1999/ch342rdo.html,** the MSPB held that "overtime pay in interim employment can be deducted from a back pay award, if and to the extent that the overtime pay replaced compensation that would have been earned in the desired position." Applying that principle to the present case, I agree that the overtime pay Burd earned at his new job should be taken into account in determining whether he should be awarded back pay after he started his new job, because it replaced the overtime pay he would have earned at his old job. I take notice of the fact that radiation control technicians who work for DOE contractors at both Pantex and Los Alamos routinely earn a substantial amount of overtime pay. Thus, to be equitable, a comparison of Burd's compensation at his new job with the compensation he would have earned had he remained at his old job must compare the total amount earned from base salary plus overtime under both scenarios. Since Burd's total compensation at his new job is greater than the compensation he would have earned had he not been terminated at Pantex, he should not receive a damage award for back pay covering the time after he began his new job. This result is consistent with prior OHA decisions on back pay. *See Ronald Sorri (Sorri)*, 23 DOE ¶ 87,503 (1993) (no back pay awarded for period two–after Sorri's new job began).

The complainant interprets *Deskin* to mean that Burd may use his current base salary to offset any overtime compensation that he would have earned at Pantex, but the overtime from his current employer should not be included in the offset "because it is not overtime compensation that would have been earned in the desired position." February 17, 2003 E-Mail Message from Warner. I reject this view. The complainant's interpretation runs counter to the principle of comparability applied in *Deskin*, since the overtime pay Burd earned on his new job replaced the overtime pay he would have earned at his old job.

III. Conclusion

After considering the joint stipulation of the parties on the damage items remanded to them by the Appeal Decision, and considering their respective arguments on the two items remaining in

dispute, I will direct the contractor to pay the complainant and his attorney the sum of $56,047.74, representing back pay, restitution for other reasonably foreseeable monetary damages incurred by the complainant as result of his termination, and attorneys fees and costs. The amount of each item included in that sum is set forth in the ordering paragraphs below. The contractor shall pay interest on that amount calculated at the rate of one-half percent per month.

It Is Therefore Ordered That:

(1) BWXT Pantex and Mason & Hanger Corporation (collectively referred to as "the contractor") shall pay to Robert Burd the following amounts as restitution for actions taken against him in violation of 10 C.F.R.§ 708.5:

> (a) $2,318.08 for back pay without offset from Burd's discharge on September 29, 2002 through the beginning of his employment with Duratek on Oct. 20, 2000;
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> (b) $1,883.44 for time off work for travel reasonably incurred to bring his complaint under Part 708;
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> (c) $3,449.08 for replacement of medical insurance and related benefits lost as a result of his discharge by complainant;
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> (d) $23,438.12 for reasonably foreseeable incidental expenses to mitigate his damages incurred as a result of his discharge by complainant;
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> (e) $1,448.80 for holiday pay lost as a result of his discharge by complainant;
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> (f) $23,510.22 for attorney's fees for services rendered by Michael A. Warner to bring Burd's complaint under Part 708; and .
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> (g) the contractor shall pay interest on those amounts calculated at the rate of one-half percent per month.

(2) This is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving this supplemental order.

(3) This Supplemental Order and the Appeal Decision issued on August 5, 2002, *Robert Burd*, 28 DOE ¶ 87,025 (2001), have been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of a petition for Secretarial review or upon conclusion of an unsuccessful petition for Secretarial review, the Appeal Decision as modified by

this Supplemental Order shall be implemented by each affected NNSA element, official or employee and by each affected contractor.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 28, 2003