September 24, 2003

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Interlocutory Order

Name of Petitioner: Steven F. Collier

Date of Filing: June 11, 2003

Case Number: VBZ-0084

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued on May 20, 2003, involving a Complaint filed by Steven F. Collier (Collier or the Complainant) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his Complaint, Collier claims that Fluor Fernald, Inc. (FFI), the prime contractor operating the DOE's Fernald, Ohio site and his former direct employer, Coleman Research Corporation (CRC), an FFI subcontractor, terminated him in retaliation for making disclosures that are protected under Part 708. The termination came as part of a site-wide reduction in force (RIF) conducted by FFI. In the IAD, the Hearing Officer determined that CRC had shown that it would have terminated the Complainant, even in the absence of the protected disclosures. Collier filed a Statement setting forth the issues he believes should be considered in this review. CRC and FFI filed responses to the Collier Statement of Issues.

As set forth in this decision, I disagree with the IAD and have tentatively decided that the contractors have not made the requisite showing. However, as discussed below, I will allow the contractors to provide comments on this preliminary determination. I will also reopen the hearing to accept additional testimonial evidence, if the contractors convince me that such an unusual step would be productive. Because of this unusual approach, the instant determination is being issued as an Interlocutory Order.

I. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy'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 or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have retaliated against an employee for such a disclosure, will be directed by the DOE to provide relief to the complainant. See 10 C.F.R. § 708.2 (definition of retaliation).

The DOE Contractor Employee Protection Program regulations establish administrative procedures for the processing of complaints. Under these regulations, review of an Initial Agency Decision, as requested by Collier in the present Appeal, is performed by the Director of the Office of Hearings and Appeals (OHA). 10 C.F.R. § 708.32.

B. History of the Complaint Proceeding

The events leading to the filing of Collier's Complaint are fully set forth in the IAD. *Steven F. Collier*, 28 DOE ¶ 87,036 (2003)(*Collier*). I will not reiterate all the details of that case here. For purposes of the instant appeal, the relevant facts are as follows.

Collier worked for CRC as a Senior Operations Specialist, one of five employed at the Fernald site. With a background in nuclear safety, Collier was hired in December 1994 to monitor the conduct of operations at Fernald. His responsibilities included identifying and reporting operations or conditions that were not in compliance with the many statues, regulations and policies that govern the activities conducted at Fernald. Collier claimed that between October 10, 2000 and February 7, 2002, he made fourteen disclosures that are protected under Part 708. Collier also alleges that there were two retaliatory actions against him: (i) on November 8, 2001, FFI recanted on a previous approval for him to receive training and (ii) on February 28, 2002, CRC terminated his employment through a Reduction in Force (RIF).

Collier filed a Complaint under Part 708 which was transmitted to the DOE's Ohio Field Office (DOE/OFO). The DOE/OFO accepted overall jurisdiction of the complaint. 1/ The complainant rejected the option that he had under 10 C.F.R. §§ 708.21 and .22 for an investigation of his allegations. Instead, he requested that a hearing be scheduled without an investigation. 10 C.F.R. § 708.22(a). Accordingly, an OHA Hearing Officer conducted a hearing on this matter. Including the complainant, there were 15 witnesses who provided testimony during a hearing that lasted three days. After considering the testimony at the hearing and other relevant evidence, the Hearing Officer issued the IAD that is the subject of the instant appeal.

C. The Initial Agency Decision

The IAD cited the burdens of proof under the Contractor Employee Protection Regulations. They are as follows:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure. . . and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure. . . .

10 C.F.R. § 708.29.

As the IAD further noted, Section 708.5(a) provides that a disclosure is protected if an employee reasonably believes that he is disclosing 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. 2/

1/ The DOE/OFO found that the training denial claim was untimely filed. This finding was reconsidered in the hearing phase.

2/ The regulation provides: "If you are an employee of a contractor, you may file a complaint against your employer alleging that you have ben subject to retaliation for: (a) Disclosing to a DOE official, a member of Congress, or any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, your

(continued...)

The IAD then noted that Collier claimed that he made fourteen disclosures related to Section 708.5(a). The IAD found that the disclosures could be grouped into six categories: (i) Waste Pits Remedial Action Project (WPRAP); (ii) Respirator Issuance Program; (iii) Nuclear Project Startup; (iv) "Smoking Train;" (v) Chemical Management; and (vi) Silos Project. The IAD named the person to whom Collier purportedly made the disclosures and described in detail the nature of the health and safety concerns that were allegedly involved in these disclosures. 3/ The IAD then found that most of the disclosures clearly took place as described. The IAD did not specifically analyze whether the nature of the disclosures themselves made them protected for purposes of Part 708. Rather the IAD "assumed" for purposes of analysis that the disclosures were protected. The IAD then proceeded to consider the alleged retaliations. *Collier,* slip op. at 8.

The IAD noted that Collier alleged two instances of retaliation that took place as a result of his protected disclosures: (i) on November 8, 2001, Joel Bradburne, the FFI manager of the Silos project, to which Collier was then assigned, informed him that his request to attend Plant Automation Equipment training had been denied; and (ii) on February 8, 2002, his employment with CRC was terminated.

In considering the denial of training claim, the IAD pointed out that Section 708.14(a) requires that complainants file their complaint "by the 90th day after the date [they] new or should have known of the alleged retaliation." The IAD indicated that Collier did not file his complaint of retaliation until March 26, 2002, more than 120 days after the denial. Collier stated that it was not until January 14, 2002, when Bradburne "suddenly" told him that his performance was deficient, that he realized that the training denial was retaliatory. The IAD noted that Collier made a notation

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2/ (...continued)
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." 10 C.F.R. § 708.5(a)(1), (2) and (3).

3/ It will serve no purpose to recount the specific nature of each of those concerns. The nature of the concerns and whether they fall within the purview of Part 708 is not at issue here.

in his diary on November 8 that he thought the timing of the training denial was "fishy." The IAD therefore concluded that Collier actually realized at that point that the training denial was retaliatory. Accordingly, the IAD found that Collier had waited too long to file the complaint regarding this alleged retaliation.

The IAD determined that Collier met the regulatory time frame in filing his Complaint regarding the termination of employment and that this termination fell within the Part 708 definition of retaliation. The IAD further found that several CRC managers were aware of Collier's protected disclosures and that the termination took place in close enough temporal proximity to the protected disclosures to permit the conclusion that the protected disclosures were a contributing factor to the termination.

The IAD next considered whether CRC had shown that it would have terminated Collier in the absence of the protected disclosures. In this regard, the IAD reviewed the RIF process through which Collier was terminated. The IAD found the performance assessment he was given was reasonable and factually supported. The IAD stated that of the eight skills that were evaluated, Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork and customer satisfaction. The IAD gave detailed consideration to the testimony of CRC manager William Previty, who worked directly with Collier and performed the assessments. The IAD noted Previty's testimony that Collier had fallen below the levels of the other employees in these skills. The IAD considered this testimony regarding Collier and that of FFI managers to be highly credible. The IAD concluded that the weight of the evidence was convincing that "the CRC employee assessment process was fairly developed and administered and that Mr. Collier was fairly rated as the lowest of the employees, and that CRC clearly would have terminated Mr. Collier's employment even if he had not made the protected disclosures. . . ." *Collier*, slip op. at 18.

II. The Collier Statement of Issues and the CRC and FFI Responses

A. Collier Statement of Issues

1. Denial of Training

The Statement objects to the finding in the IAD that Collier knew or should have known before January 14, 2002, that the denial was retaliatory. The Statement indicates that in November 2001, when the training was canceled, Collier weighed the possible reasons for

the cancellation and came to the incorrect determination at the time that it was not retaliatory, based on "ill-placed" faith in Joel Bradburne, his Silos project boss. The Statement further indicates that previously all of the retaliatory indicators had come from FFI or CRC management or people related to the WPRAP project, not from individuals associated with the Silos project. The Statement therefore contends that Collier did not "know" that the denial was a retaliation. The Statement points out that Section 708.14(a) requires that a Complaint be filed by the 90th day after "you knew or reasonably should have known of the alleged retaliation." The Statement argues that Collier simply did not "know" that there was a retaliation, even though he may have suspected it. The Statement maintains that a Complainant is not obligated to report "suspected" acts of retaliation. The Statement maintains that in November 2001, Collier's suspicions did not yet rise to the level of "knew or reasonably should have known."

2. Collier's Termination Through Reduction in Force

The Statement makes the following assertions about the RIF and cites the following errors in the IAD leading to the determination that Collier would have been terminated absent the protected disclosures:

(a) The IAD incorrectly found that disagreements between Collier and CRC were unrelated to his protected disclosures and were caused by dissatisfaction with his communication style. To the contrary, the Statement argues that the disagreements were solely the result of CRC dissatisfaction with Collier's continued protected disclosures.

(b) The Statement contends that the highly developed RIF criteria were simply a means to deflect the focus away from what was really controlling the RIF process: FFI's interest in terminating Collier because he was a whistleblower. Furthermore, according to the Statement, the testimony of the key witness, Previty, is vague and evasive on why two CRC RIFs were handled differently. The Statement goes on to argue that if the two RIFs were handled similarly, CRC and FFI would have submitted evidence to support that fact.

(c) It was predetermined for Collier to be fired, even before the preparation of the termination procedures. The Statement cites to testimony by Previty that an FFI Silos project manager sent him a note stating "you should please consider firing this employee." The Statement dates this note to late in the year 2000. *See* Transcript of Hearing (Tr.) at 209.

(d) The IAD did not sufficiently consider the extent to which testimony by CRC and FFI witnesses was evasive. Examples include Previty's failure to be forthright and to indicate that Collier's protected activities were in line with CRC corporate ethics policy. Collier maintains that "Mr. Previty was upset with me. . . on a professional level because he was concerned about the affect (sic) my protected disclosures would have on the future of the CRC contract with FFI if I did not shut up." Statement at 21. The Statement also maintains that Bradburne's testimony about Collier's mediocre performance was vague, uncertain and evasive.

(e) The selection process was unfair to Collier, since it was entirely due to his protected activities that he was given a lower rating.

(f) The IAD incorrectly stated that Collier did not contend that the performance appraisal process used to rate him in 2000 was unfair. The Statement cites to evidence in the record that allegedly shows Collier did believe his performance appraisal for the year 2000 was not fair.

(g) The IAD give no weight to the animus shown towards Collier by FFI and CRC. In this regard, the Statement mentions that FFI and CRC purportedly did not give Collier appropriate, challenging work assignments. The Statement claims that Previty was offended by Collier's comments regarding inadequate safety measures.

B. The CRC and FFI Responses

1. CRC Response

CRC did not address the denial of training issue since it did not participate in that matter. CRC generally argues that the Statement of Issues failed to show that the factual determinations of the IAD were erroneous. Accordingly, CRC maintains that the decisions of the IAD should not be disturbed.

2. FFI Response

With respect to the denial of training issue, FFI claims that Collier's own contemporaneous diary shows that on November 8, 2001, he had formed a suspicion that the cancellation might be retaliatory. Accordingly, FFI argues that he should have filed the complaint of retaliation within 90 days of that time. While FFI does not believe that the cancellation of training actually was an act of retaliation, it does believe that for purposes of invoking the 90 day filing provision of Section 708.14(a), the "suspicion"

indicates that Collier "reasonably should have known" that the cancellation was possibly an act of retaliation.

With respect to the termination issue, FFI makes the following responses. FFI rejects the Statement's assertion that Collier was pre-selected for termination in late 2000 by an FFI manager. FFI claims that a request from a project manager to "please consider firing this employee" cannot be equated to a direction from FFI to CRC to fire Collier. If that had been the case, FFI argues that CRC would have taken more immediate action and would not have waited more than one year.

FFI rejects the assertion that Previty and Bradburne were evasive witnesses. FFI argues that Collier's inept questioning of the witnesses led to unclear responses. FFI addressed the assertion in the Statement that the CRC process used to select Collier for termination was unfair because it considered his lowered performance rating that was caused by his protected disclosures. FFI's response was that Collier had not presented any evidence that the problems that he was having with FFI managers were in any way related to his disclosures.

FFI also claims that virtually all of Collier's alleged protected disclosures occurred after his 2000 performance appraisal, and that Collier's 2001 performance appraisal reflected higher ratings. FFI argues that this is inconsistent with Collier's allegations of continuing retaliation.

With respect to the Statement's allegation of animus by Previty, FFI argues that Collier did not provide evidence that even if Previty was "offended" by Collier and biased against Collier, the animus was related to protected disclosures.

III. Analysis

Before beginning my evaluation of this case, I believe that a discussion of the factual development of the proceeding case is in order. As I indicated above, after the DOE/OFO accepted jurisdiction of his Complaint of Retaliation, Collier opted to proceed immediately to a hearing, and skip the normal route of having an investigation of his complaint. This approach, while authorized by the regulations, is, except in the most unusual cases, not one which will lead to a prompt resolution of a Complaint of Retaliation. For almost all cases, Part 708 envisions a four-prong development of these complaints: a jurisdictional phase, which is undertaken by a DOE field office; an investigation by an OHA investigator; a hearing by an OHA hearing officer; and,

through appeal, a review by the Director of the Office of Hearings and Appeals. 4/ Our experience indicates that each step in this process narrows and focuses the contested issues, each successive step building in an orderly, logical fashion upon the prior step. We believe that this process produces a final determination sooner than opting for a process that shortcuts or combines some of the steps.

Under Part 708, the first level of inquiry at OHA is the investigation. 10 C.F.R. § §708.21,.22, .23. At this level, an OHA investigator interviews individuals who have information about the complaint. The investigator develops information regarding the nature of the alleged protected disclosures/activities, and when they were made. He finds out the nature of the retaliation that the complainant is claiming. He interviews contractor management officials regarding the retaliation to find out their reasons for taking the personnel action about which the employee has made a complaint. The investigation is neither comprehensive or protracted.

The investigator writes up a report providing his findings and conclusions. The report of investigation sets out whether it appears that (i) the complainant has established by a preponderance of evidence that he made any disclosures that are protected or engaged in any protected activity under Part 708; (ii) the complainant has shown that he was subject to a negative personnel action which constitutes retaliation as defined in Section 708.2; (iii) the complainant has shown that the protected disclosures/activity contributed to the retaliation; and (iv) contractor officials have shown by clear and convincing evidence that they would have taken the negative action absent the protected disclosure/activity.

The Report is helpful in identifying the key issues for the hearing phase of the proceeding. For example, the Report may indicate that the complainant has made the requisite showing with respect to a protected disclosure or disclosures that were a contributing factor to an act or acts of retaliation. Based on a review of the Report, the contractor and the complainant will often agree with many of the findings of fact made by the investigator. This makes it possible for the hearing officer to focus the hearing on the issues

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4/ A fifth prong, a review by the Secretary of Energy, is reserved for cases involving only the most extraordinary circumstances. 10 C.F.R. § 708.35. To date, the Secretary has never accepted a case to review under this section.

that remain in dispute. At this point, the contractor may be willing to stipulate that a protected disclosure or disclosures have been made. *E.g. Gary Vander Boegh*, 28 DOE ¶ 87,040 (2003); *Ronald White*, 28 DOE 87,029 (2002); *Lucy Smith*, 28 DOE ¶ 87,001 (2000); *Morris J. Osborne*, 28 DOE ¶ 87,542 (1999); *Roy Moxley*, 27 DOE ¶ 87,546 (1999). The Report can also alert the complainant and/or the contractor to matters where considerably more effort is required on their part to convince the Hearing Officer.

The investigation and the resulting Report of Investigation play a vital role in the Part 708 scheme: they enable the Hearing Officer and the parties to more closely focus the issues and to direct their energy to important contested issues in the case. At the hearing phase, the hearing officer is able to build upon and refine the tentative information on disputed issues developed by the investigator in the investigatory phase.

In the instant case, in which no investigation was performed, it was the hearing officer who had to undertake this initial identification and evaluation of what events took place, which events were important, what disclosures had been made, what retaliations took place and what the parties' positions were. Many of these determinations were made through taking evidence at the hearing itself. As it turned out, the hearing and the IAD devoted considerable attention to consideration of what the protected disclosures were. Yet, ultimately, these have turned out not to be an area of controversy. After all, it was Collier's job to monitor operations and compliance at the site. I am convinced that this entire Part 708 process could have been streamlined had Collier opted for an investigation. Had there been an investigation, I believe that it would have been quite evident that Collier made protected disclosures and there would have been very little need to focus attention on them at the hearing. It then would not have been necessary for the hearing and the IAD to devote such effort to identify and examine the nature of the disclosures.

The fact that the parties expended so much energy on the protected disclosures had an effect beyond consuming extra time. It meant that they devoted less time than necessary to determine the validity of the contractors' showing: that Collier would have been terminated in the absence of the disclosures. I believe that the hearing officer did a commendable job, given this rather unruly case involving 14 protected disclosures. But it is also clear that the evidence in this case would have been more fully developed had Collier elected to proceed with the normal development envisioned by Part 708, which includes the investigatory phase. Collier did himself and this proceeding a disservice by failing to request an

investigation. It resulted overall in an inadequate record, as explained below, with respect to the contractors' showing. Avoiding the investigation stage ultimately saved neither time nor effort here because, ultimately, as discussed below, I will ask the contractors for their comments as to why the IAD should not be reversed, and I intend to issue a new determination on the complaint after considering the comments. Further, I will provide them with an opportunity to show that the hearing should be reopened to take additional testimonial evidence about the critical issue of whether Collier's performance of his duties was deficient.

As is now evident from the Statement of Issues and the Responses, there are two main issues left in this case: (i) whether Collier should reasonably have known prior to January 14, 2002 that the November 8, 2001 denial of training was a retaliation; and (ii) whether FFI and CRC have clearly and convincingly shown that Collier would have been terminated in the absence of his protected disclosures.

A. Denial of Training

Collier argues that he did not know until January 14, 2002, when Bradburne told him that his performance was deficient, that the training cancellation was retaliatory. This is simply unconvincing. Collier was not a naive employee, unfamiliar with the whistleblowing process. As he indicates in his Statement: "my purpose in writing the November 8 diary entry was to weigh and document the evidence in favor of the act being retaliatory so that I would have the documentation to support a retaliation charge were I eventually to make one." Statement at 2. Thus, he was a sophisticated employee who was on the look-out for retaliations. I believe he thought that this cancellation was a retaliation and that his diary entry was designed to support that contention at some later date.

Moreover, he admitted in his diary that he was very suspicious. He stated in the diary entry: "I think the timing of [Bradburne's] canceling this training for me. . . is fishy, particularly after my meeting yesterday afternoon with Dennis Riley [about the smoking train issue]. To get to Riley's office, I have to walk through Admin building where all the top Fluor offices are located, so it's not unreasonable to assume they've seen me travel that path a lot lately and put two and two together, as they prepare for their Nov 14 enforcement conference in Washington on the WPRAP issues." Complainant's Ex 12 at 61. Thus, it is obvious that Collier was

more than suspicious. He actually linked up in his own mind the cancellation and his whistleblower activity.

Collier now suggests that there was a reason for him not to believe the action was a retaliation: Bradburne was his friend, whereas previous "retaliatory indicators" came from senior FFI or CRC managers. This seems to me a rather belated rationalization. The fact that there existed a possibility, however small, that the cancellation may not have been a retaliation is not sufficient here. The rule Collier would have us apply--a subjective test based entirely on what he believed--would violate one purpose of the regulation. Section 708.14(a), which requires filing of a complaint promptly, i.e. within 90 days of when the complainant knew or should have known of the alleged retaliation, is intended to alert the parties that a dispute exists, so that they can identify and preserve evidence at a time as close to the events as possible. The totally subjective rule that Collier advances would defeat this purpose.

In any event, based on Collier's own words in his diary, which was prepared with whistleblower litigation in mind, I am convinced that he concluded that there was a relationship between the cancellation and his disclosures. Thus, I believe at the time Collier wrote the November 8 diary entry, he did have a reasonable belief that the cancellation was retaliatory, and his 90 day filing period began on that date. Accordingly, raising the issue for the first time in his March 26, 2002 complaint of retaliation was untimely. The training cancellation claim is therefore denied.

B. Termination of Employment

As the IAD indicated, Collier's position is that CRC retaliated against him beginning in October 2000, by giving him lower performance ratings than in previous years on his appraisals for October 1999 through September 2001. Previty considered the last three annual performance appraisals in the RIF process for those employees who had worked that long. 5/ Further, Previty testified that in addition to the annual performance appraisals, he

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5/ In this case, there is no question that the overall RIF was site-wide and not designed to target Collier. Further, given that FFI reduced its own personnel at the site by about 33 percent, the decision that CRC's staff of five employees should be reduced by two does not raise any red flags. *See* Stipulation of Steven F. Collier and Fluor Fernald, Inc; CRC Ex at 1-2; Tr. at 395-400.

also assessed for the RIF process the employees' performance for the most recent four months (for which no performance appraisals had been made) by seeking the comments of the FFI managers to whose project the CRC personnel had been assigned and by reflecting on his own observations. Tr. at 204. *Collier,* slip op. at 15.

The RIF procedures themselves involved a determination of core skills and job specific skills for individual employee evaluation. The core skills identified were communication skills, teamwork, quality of work, and work habits. The job specific skills were job technical knowledge, skills applicability, skills transferability and customer satisfaction. CRC Ex, at 00005. The IAD noted that of the eight skills identified, Collier's scores were the lowest of the five assessed employees in the areas of quality of work, communication skills, teamwork and customer satisfaction. The IAD found credible Previty's testimony regarding how the scoring on these elements was performed. In this regard, the IAD cites Previty's testimony about why Collier's performance appraisal for the year 2000 was lower than in previous years. Previty stated that "there were too many senior managers that Collier could not work with," and that Collier could not "pull this team together." Previty testified: "your communications were down. Your team work was down. . . . I lowered your grade [in] customer orientation because you no longer had a happy customer, and that's why you had a significant drop because of your performance in those areas." Tr. at 214-16; *Collier,* slip op. at 16.

With respect to Collier's communication skills, Previty testified: "I'll go back to early events that you had with Mr. Paige. Your verbal discussion with him and e-mails were so controversial that I was called to the Deputy Director of the site and [told] if I could not get the Coleman people in order and act professionally, we'd be out of here, specifically the individual. [That was in] ninety-six, '97, I don't know. In August, September, October 2000, I met with the [WPRAP] project director, the operations oversight Manager, the Project Engineer at Fluor. . . and Con Murphy in the IT project who was their project manager. Your relationship with those people was extremely stressful. They had great difficulty in doing business with you. I was out there and I made my own observations and I sensed that your relationship . . . with Mr. Murphy was poor." Tr. at 207-09. *Collier,* slip op. at 17.

The Hearing Officer was convinced by this testimony and found evidence to the contrary to be circumstantial. He cited several farewell electronic mail messages that praised Collier's work at Fernald. The Hearing Officer also pointed out that Collier's ratings for years prior to 1999 were somewhat higher than 1999-

2001, the years which were included in the RIF consideration. However, the Hearing Officer concluded that the overall range was relatively small: 3.42 to 4.43 on a scale of 5. *Collier,* slip op. at 18.

After reviewing this matter, I find that the record regarding Collier's allegedly deficient performance is not well supported. Even though the Hearing Officer was convinced by Previty's testimony that Collier had lower effectiveness in communication, teamwork and customer satisfaction, the testimony was both hearsay and very general, for the most part. 6/

With respect to communication issues, Previty cited an exchange of E-mails between himself and Collier that he believed demonstrated poor communication. Tr. at 215. But the thrust of Previty's testimony seemed to be that he downgraded Collier because Collier's allegedly poor communications resulted in an unhappy customer: FFI. In this regard, Previty cited two examples. He referred to one incident in 1996 or 1997 with Mr. Paige. That incident seems to me to be too far in the past to be relevant here. Mr. Previty also refers to a specific FFI IT manager, Con Murphy. Previty stated that he made his own observations and "sensed" that the relationship between Collier and Murphy was poor. Tr. at 208. Previty stated that Collier was the only person who had a "personality conflict" with Murphy. Tr. at 192.

However, there was testimonial evidence that suggests that other employees had difficulty relating to Murphy. Dennis Carr, FFI senior projects director, testified that Murphy "has a very strong personality" and a "very aggravating personality," and "quite a few of us had a personality conflict with Con Murphy from the beginning, including me." Tr. at 317. Tim Huey, FFI operations manager for the Silos Project, testified that he saw other people who had difficulties working and dealing with Murphy. Tr. at 263. Mark Cherry, FFI employee project director for WPRAP, stated that he saw other employees who had "personality conflicts" with Murphy. Tr. at 304. Thus, this particular allegedly bad relationship between Collier and Murphy does not seem to me to be an especially convincing reason on which to base the "poor communication skills," "poor customer satisfaction," or "poor teamwork" assessment, since

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6/ Hearsay testimony is admissible in Part 708 hearings. 10 C.F.R. § 708.28(a)(4). However, it still suffers from its usual infirmity of inherent unreliability. Therefore, hearsay evidence must be carefully weighed and accorded the utmost scrutiny.

there were other employees who encountered similar difficulties with Murphy. The contractors did not provide testimony from Murphy as to whether he believed the complainant was a poor communicator. Providing such testimony to the Hearing Officer in support of the contractors' position is one of the key reasons for holding an evidentiary hearing.

Previty also testified that "it was very obvious to me that your strained relationship with all the senior managers assigned to the project was really a factor in your effectiveness in helping them." Tr. at 214. Previty further stated "there were too many senior managers that [Collier] couldn't work with." Tr. at 215. However, there was no solid testimony from those managers to support these assertions. This assessment by Previty is one that the contractor should have supported with testimony from the individuals that he was referring to. Yet, supporting testimony on this key point is thin. One person who did testify was not helpful. CRC Vice President Randy Morgan responded as follows to a question about what he had heard from FFI management about Collier's performance: "I think they thought your technical expertise was excellent and again that was pretty consistent in terms of commentary we had heard throughout the site. Comments were made I think more about--I don't want to say, I don't know if it's communication skills or a more combative nature in terms of interpersonal skills and interaction, that's about the extent I can remember." Tr. at 287. This hesitating and rather unspecific hearsay evidence does not provide clear, solid support for the position of CRC and FFI regarding Collier's allegedly deficient communication skills.

Other testimony from FFI and CRC witnesses who worked directly with Collier also does not support the Previty assessment regarding Collier's communication skills. For example, FFI employee Michele Miller testified about attending a meeting with Collier. She recounted that Collier wanted to state a difference of opinion and that he had a valid point. Miller did not suggest that Collier delivered his divergent opinion in an inappropriate manner, that his demeanor was unprofessional, or that his style of communication was poor. Tr. at 97-99. FFI Quality Assurance Manager Brinley Varchol testified about a meeting during which Collier made protected disclosures to him. Even though the meeting could have been heated and unpleasant, Varchol never offered any recollection at the hearing that Collier's communication style was poor or in any way inappropriate. Tr. at 153-172. 7/

7/ While it is true that Varchol was never specifically asked about Collier's communication, one might expect that

(continued...)

Joel Bradburne, an FFI project manager who worked directly with Collier on the Silos project, was a witness who testified directly about Collier's work. When asked about Collier's performance, Bradburne never mentioned communication problems. He saw work quality problems in Collier's performance. On the subject of Collier's performance, Bradburne testified as follows:

(1) "My surmise of your performance was mediocre." Tr. at 430.

(2) "For example, when we were doing a lot of graphics work basically, and again that's, you're not, you know a huge challenge I know, but you seemed to enjoy it and you did a good job and I appreciated the work, and once that kind of died down we got into the, you know, preparation review of things relative to operations within the projects safety basis stuff and it just seems like--To me it appeared that you knew we'd go through and --You know some of the assignments that I asked you to do, at least I thought I asked you to do just, you know, it wasn't timely on completion and from my estimation, you know it just didn't seem like something that you were that interested in doing, but and hence mediocre performance I guess from what I had seen in the past." Tr. at 432.

(3) "Well, basically in regards to the Silo 3 stuff, I mean you had pretty good knowledge of the Silo 3 proposed design and operation." Tr. at 435.

Thus, while Previty believed that Collier's failings related to communication, teamwork and customer satisfaction, Bradburne's view was that Collier's work was mediocre and untimely. In contrast, for the years 1995 through 2001, Collier's performance evaluations consistently show strength in the areas of job knowledge, quality and quantity of work and planning and communications. 8/

7/ (...continued)
Varchol would have mentioned inappropriate demeanor if it had been demonstrated, and that FFI would have asked questions about it had there been some negative actions that Varchol could report. Collier should have probed this issue on cross examination. I attribute Collier's failure to press this point to a reluctance to ask the witness questions about himself (Collier), or perhaps to his own inexperience in examination and cross examination of witnesses.

8/ Collier's quality of work was rated as a 4 out of 5 on his RIF form. This is hardly "mediocre." This was defined on

(continued...)

Further, as discussed above, there was at least one other witness, CRC Vice president Randy Morgan, who stated that he had heard from FFI managers that Collier's substantive skills were excellent and that he had a fine reputation throughout the site. Thus, Bradburne's negative testimony about Collier's performance is rather puzzling. It is self-contradictory in that while Bradburne claims that Collier's work was "mediocre," he also states that Collier did "a good job," had "good knowledge," and that Bradburne "appreciated the work." Moreover, the negative Bradburne testimony was contravened by other testimony and documentary evidence.

As indicated above, it has been the position of CRC and FFI that Collier was RIFed because he was difficult to work with, his communication skills were lacking and he was poor in teamwork and customer satisfaction. I am not persuaded on these points. Because, for the reasons explained above, it was difficult to focus the hearing on these critical issues, there was little direct evidence on these points. The testimony of Previty, Morgan and Bradburne, while of some weight, does not sufficiently support the FFI and CRC position.

I find that FFI and CRC did not provide testimony from their managers that specifically describes their dissatisfaction with Collier's performance in these areas. Further, they failed to provide testimony from Collier's co-workers who were in a position to support the managers' views of why they were dissatisfied with him. I therefore cannot find the evidence regarding Collier's performance in the areas of communication, teamwork and customer satisfaction meets the rigorous standard of proof required in this case.

In sum, it was the burden of FFI and CRC to provide clear and convincing evidence to support their position that they would have terminated Collier absent the protected disclosures. They attempted to show, mainly through the testimony of Previty, that Collier was the least able performer in the areas of communication, teamwork and customer satisfaction. I recognize that the Hearing Officer found Previty a dependable and convincing witness. Nevertheless, in a Part 708 proceeding there is an inherent risk in relying extensively on one or two key witnesses who have a significant stake in the outcome of a proceeding, and therefore an

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8/ (...continued)
the RIF sheet as "occasionally exceeds standards and expectations." CRC Ex at 11.

interest in not being completely candid and forthcoming in their testimony.

In this case, Collier complains of a retaliation for protected disclosures made to the very same person who has rated his performance. Collier also contends that Previty was motivated by his lack of objectivity and personal animus towards Collier for making those disclosures because they resulted in the dissatisfaction of FFI. Under these circumstances and given the fact that the contractors' burden of proof is a rigorous one in Part 708 proceedings, the contractors should have provided supporting evidence from objective witnesses who had specific knowledge of the purported Collier performance deficiencies. The contractors should have supported their positions with evidence from witnesses that had direct contact with the complainant and who could testify from their own experience about these very matters. *Janet Westbrook*, 28 DOE ¶ 87,021 (2002). 9/

The companies were certainly in a position to call as witnesses employees who worked with Collier. They also could have presented witnesses to provide their own observations about Collier's ability to work with others. FFI and CRC have simply not provided clear and convincing evidence for their position. In order to meet the clear and convincing standard, a contractor in a Part 708 proceeding must do more than merely articulate a plausible reason for a termination. It must support that position. One method would be by providing testimony from co-workers and supervisors who are directly familiar with the issues. *Westbrook*, slip op. at 15.

In order to provide clear and convincing evidence, CRC and FFI should have established that the allegedly poor communications that they saw as the crux of Collier's work-related deficiencies were not the very same communications that are protected under Part 708. 10/ The contractors should have pinpointed through

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9/ There is also some evidence in the record that the three CRC employees who were retained had some unique skills, and that it would be unacceptable to FFI if CRC would terminate any of those three individuals and retain either of the two terminated employees. CRC Ex. at 8.

10/ However, the contractors could have shown that the manner in which Collier delivered the disclosures was in some way inappropriate or unprofessional, and that this was the basis for the lowered ratings. This testimony should have been given by witnesses who have direct knowledge of the specific incidents involved.

direct testimony what the specific communications, teamwork and customer satisfaction incidents were that brought on the low ratings.

IV. CONCLUSION

As indicated by the above discussion, it is no longer disputed that Collier made health and safety-related protected disclosures. These disclosures were followed sufficiently quickly by CRC's termination of Collier to demonstrate that they were a contributing factor to that termination. I believe that the record sufficiently establishes these points. It was therefore the burden of CRC and FFI to show by clear and convincing evidence that Collier would have been terminated absent the protected disclosures. CRC and FFI offered a plausible explanation for the termination, i.e., that due to the site-wide RIF, CRC was forced to terminate two of its five employees. However, the Company failed to bring forth adequate substantiation to support its position that Collier merited his score as the lowest of the employees in the RIF process. Mere plausibility and reasonability are simply inadequate to meet the rigorous "clear and convincing evidence" standard applicable here.

Based on my review of the record, I found little evidence has been presented to support the companies' position that Collier had problems in communication, teamwork and customer satisfaction. Further, there is even some evidence that does not support the position that Collier had deficiencies in those areas.

Accordingly, I find that the result reached in the IAD is not sufficiently supported. However, I am reluctant to summarily reverse the IAD, due to the unusual history of this case. Accordingly, the above determination is only a tentative one. FFI and CRC may file comments regarding this decision within 30 days of the date of issuance. Collier may file a response within 10 days after receiving the contractors' comments.

Further, I am willing to consider whether it would be useful to take some additional testimonial evidence, especially from CRC and FFI, on the issue of Collier's performance. As a rule, I am not in favor of reconvening a hearing to receive additional evidence. I believe that parties in Part 708 proceedings should be well aware of the burdens of proof and are responsible for determining in

advance what information is necessary to present at the hearing to meet their burdens. In particular, contractors are on notice in the contracts that they sign of the applicability of Part 708 to protected activities. They should by now be familiar with what types of information they need to provide to support their positions. In this regard, parties are certainly able to discuss with the hearing officer at a prehearing conference what testimony might be important. They are also easily able to access our case law in order to determine what types of information hearing officers have considered in prior cases.

However, as I stated above, this case came for hearing with no investigation. In my view, selection of that option had a negative effect on the overall complaint process, because there was not an appropriate opportunity for factual and issue development regarding Collier's performance. Consequently, given that it was the complainant who opted to proceed immediately to a hearing, I believe that it is not unreasonable or unfair to consider providing the contractors with an opportunity for some additional development of their position here.

Accordingly, FFI and CRC may request that a new hearing be convened for the purpose of taking additional evidence of the type discussed above. However, I will direct that a new hearing be convened only if I am persuaded that it would serve an important purpose. Consequently, the firms will have to establish that they have some significant new testimony to provide about Collier in connection with his performance appraisal. They will have to state who the witnesses are and what <u>specific</u> incidents they will testify about that will support the deficient RIF ratings in the areas of customer satisfaction, teamwork and communications.

The contractors should be prepared to call Collier's co-workers as well as his supervisors to testify on these issues. Furthermore, each primary potential witness will be required to submit a signed statement describing what he will testify about, including the dates and places of contact with Collier. Each witness shall include in his written statement a detailed description of what he heard Collier say and what he saw Collier do that relates to the issues of deficient communication, teamwork and customer satisfaction. The contractor hearing submissions and witness statements should be filed at the same time as the contractor comments discussed above.

I recognize that it is very uncommon in a Part 708 proceeding to require potential witnesses to provide an advance written statement of the testimony they expect to provide. However, I believe this

unusual approach is warranted here to insure that if a new hearing is convened, there is new relevant evidence to be heard. The statements of primary witnesses should be sufficiently detailed to permit me to gauge whether a new hearing is warranted. Further, if a new hearing is convened, these witness statements will provide Collier with an opportunity to prepare appropriate questions on cross examination for the witnesses, as well as enable him to offer appropriate response witnesses. All in all, I believe that this approach will lead to a much more productive hearing, if one should be convened.

It Is Therefore Ordered That:

(1) The June 11, 2003 Appeal filed by Steven Collier of the Initial Agency Decision issued on May 20, 2003, is hereby granted as follows.

(2) Within 30 days of the date of this Decision, Coleman Research Corporation (CRC) and Fluor Fernald, Inc. (FFI) may file comments with respect to the above preliminary determination, as well as witness statements, as described in this determination. Collier may file a response within 10 days after receiving the CRC and FFI comments and witness statements.

(3) This is an interlocutory order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 24, 2003