Case No. VWA-0005

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DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners:Daniel L. Holsinger

K-Ray Security, Inc.

Date of Filing:December 6, 1995

Case Numbers: VWA-0005

VWA-0009

I. Introduction

This Decision involves a complaint filed by Daniel L. Holsinger (Holsinger) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In his complaint, Holsinger contends that certain reprisals were taken against him after he raised concerns relating to the possible theft of government property from the DOE's Morgantown Energy Technology Center (METC). These reprisals allegedly were taken by Watkins Security Agency, Inc. (WSA), a DOE contractor that employed Holsinger as a security guard at the METC. The reprisals alleged by Holsinger included a one-day suspension on September 2, 1994, announcement of his prospective rescheduling to the midnight guard shift (12-8 a.m.) on September 18, 1994, a three-day suspension on September 19, 1994, and a three-day suspension on September 29, 1994. Because this last suspension was his third suspension within a period of six months, Holsinger's employment was terminated pursuant to WSA policy effective October 2, 1994. The DOE's Office of Contractor Employee Protection (OCEP) investigated the complaint and issued a Report of Investigation & Proposed Disposition (the Report) on November 9, 1995. In the Report, OCEP found that Holsinger had made a protected disclosure and that this disclosure contributed to Holsinger's September 19, 1994 suspension and his resulting termination of employment by WSA. Accordingly, OCEP proposed that WSA pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses). OCEP also included the current METC security operations contractor, K-Ray Security, Inc. (K-Ray) as a party to the proceeding, and proposed that K-Ray should reinstate Holsinger to his former position as a security guard or to a comparable position.

In response to OCEP's Report, Holsinger, WSA and K-Ray all requested a hearing before the Office of Hearings and Appeals (OHA) under 10 C.F.R. § 708.9(a). The

hearing in this case was held on February 28, 1996 at the METC facility in Morgantown, West Virginia. After consideration of OCEP's Report of Investigation, the briefs of the parties and the testimony given at the hearing, I find that WSA committed an act of reprisal against Holsinger prohibited under 10 C.F.R. § 708.5, and that Holsinger is entitled to reinstatement by K-Ray.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established for the purpose of "safeguarding public and employee health and safety; ensuring compliance with applicable laws, rules, and regulations; and preventing 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 and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, the DOE will direct contractors to provide relief to complainants who are found to have been discriminated against for making such disclosures. The DOE Contractor Employee Protection Program regulations, which are codified as Part 708 of Title 10 of the Code of Federal Regulations and became effective on April 2, 1992, establish administrative procedures for processing complaints of this nature.

Before Part 708 was promulgated, contractor employee protection at DOE's government-owned, contractor-operated (GOCO) facilities was governed by DOE Order 5483.1A (6-22-83) ("Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities"). As with Part 708, the Order prohibited contractors from taking reprisals against whistleblowers. However, no formal procedures existed under Order 5483.1A. The Part 708 regulations were adopted to improve the process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

1. The Findings of the OCEP Report

On October 7, 1994, Holsinger filed a complaint pursuant to Part 708 with the OCEP. In the following months, OCEP personnel investigated Holsinger's complaint by conducting interviews with Holsinger, WSA officials, other security officers, and certain DOE employees at METC. They also collected relevant documentary evidence. This information and OCEP's analysis of this information is presented in its November 9, 1995 Report and the Report's accompanying exhibits. The Report finds that Holsinger was hired as a part-time security officer for the security contractor at the METC on January 10, 1990. When WSA began performance of the METC security contract in March 1990, Holsinger was retained in that status. In his May 1995 statement to the OCEP interviewer, Holsinger asserts that he had not received any performance appraisals or any disciplinary actions prior to September 1994. OCEP Report Exhibit 1 at 1. However, OCEP finds that Holsinger was suspended for three days in December 1990 for "[f]ailure to properly respond to an emergency situation" and two days in March 1991 for "[u]nauthorized use of government property." OCEP Report Exhibit 21. In its Report, OCEP summarized Holsinger's assertions of protected disclosures and his allegations of retaliation by WSA in 1994 as follows:

Mr. Holsinger alleges that in March 1994, Fred Munz, the security force Captain, held a meeting during which he advised the security staff that personal calls were to be kept to a minimum and no long distance calls were allowed from the site. Because Mr. Holsinger was not present at this staff meeting, Captain Munz explained the policy to Mr. Holsinger the day after the staff meeting. [Exhibit 1].

In July or August 1994, Mr. Holsinger allegedly advised Captain Munz that a security XXXXX [hereafter referred to as "the Accused Individual"], was wrongfully removing unspecified items from the site. [The Accused Individual] was reportedly removing the items in five gallon buckets covered with rags. Mr. Holsinger reportedly believed that [the Accused Individual] may have been "stealing" DOE property. Id. He also contacted Deborah Purkey, DOE-METC, Contracting Officer's Representative, to report the alleged possible thefts. Exhibit 12.

On August 18, 1994, James H. Watkins, President, WSA, issued a memorandum advising the security force that only Captain Munz could speak with DOE-METC security representatives regarding "company

matters." Exhibit 10.

On August 31, 1994, Mr. Holsinger sent an anonymous letter to DOE reporting the alleged thefts by [the Accused Individual] and alleging that WSA management had chosen to do nothing about the alleged thefts. Exhibit 12.

On September 2, 1994, Mr. Holsinger was notified that he would receive a one-day suspension for a 44 minute telephone call that he made on July 29, 1994. Exhibit 21.

On September 18, 1994, Captain Munz rescheduled Mr. Holsinger from the evening shift (3-11 p.m.) to the midnight shift (12-8 a.m.). This change in shift allegedly interfered with Mr. Holsinger's part-time position with the local Kingwood Police. Exhibit 1.

Mr. Holsinger received a three-day suspension on September 19, 1994 for failure to follow instructions. Mr. Holsinger reportedly took a cup of coffee on patrol after being informed by [the Accused Individual] that it was a violation of "post orders" to have food or beverages on patrol. Exhibit 21.

On September 29, 1994, Mr. Holsinger received a three-day suspension for excessive personal use of the telephone on August 18, 19, 25, 28 and September 1, 1994. Because this was his third suspension within a period of six months, Mr. Holsinger's employment was terminated pursuant to WSA policy effective October 2, 1994. Exhibit 21.

OCEP Report at 2-3. In the Report, OCEP finds insufficient evidentiary support to confirm that Holsinger made an oral disclosure to Captain Munz in July or August 1994. It does find that Holsinger's August 31 anonymous letter constituted a protected disclosure under Part 708 and that this disclosure contributed to Holsinger's September 19, 1994 suspension for failure to follow instructions. It therefore found that his termination of employment by WSA for receiving three suspensions in a six month period also was a retaliatory action. The Report finds insufficient evidence that WSA's disciplinary actions against Holsinger for excessive personal use of the telephone were retaliatory acts.

The Report's proposed disposition requires WSA to pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses. The Report also requires the current METC security operations contractor, K-Ray, to reinstate Holsinger to his former position as a security guard or to a comparable position. Report at 27.

2. The Contentions of the Complainant and the Contractors

In letters to the OCEP dated December 4, November 28 and November 29, 1995, respectively, Holsinger, WSA and K-Ray all requested a hearing concerning the Report's findings and preliminary disposition. The OCEP forwarded these requests to the OHA, and I was appointed the Hearing Officer in this matter on December 18, 1995. I received a complete copy of the OCEP Complaint File on January 3, 1996, and by letter of that date established a filing schedule for the parties' pre-hearing briefs and a hearing date of February 28, 1996. See 10 C.F.R. § 708.9(b).

In his February 9, 1996 brief, Holsinger maintained that his transfer to the midnight shift on September 18, his suspensions by WSA on September 2, September 19 and September 29, and his termination of employment by WSA are all acts of retaliation for his efforts to disclose possible wrongdoing by certain members of the METC security force.

In its February 9, 1996 brief, WSA argued that the disciplinary actions taken against Holsinger were the normal and customary disciplinary measures which would be taken by WSA with respect to any employee who presented the types of employee disciplinary problems presented by Holsinger. It maintained that Holsinger's termination of employment was the result of his violation of WSA policies and the fact that he received three suspensions for these violations within a six-month period. It therefore concluded that this case shows no discriminatory treatment by WSA or any retaliatory action taken by WSA, and that

Holsinger's complaint should be dismissed.

In its February 5, 1996 brief, K-Ray contended that it is not in a position to either agree with or disagree with the analysis set forth in the Report, because it had no involvement nor knowledge of any such activities or actions. It notes that the Report contains no allegation or factual findings that K-Ray violated any federal regulations or discriminated against any employees. It argues that the Report's proposal that K-Ray reinstate Holsinger to his former position as a security guard or to a comparable position creates a hardship upon K-Ray and is totally unwarranted by the facts. It contends that if it is required to hire Holsinger, it must terminate one of its own employees. K-Ray therefore requests that the Report's proposed disposition be modified so as not to require K-Ray to hire Holsinger or to impose any other penalty or requirement upon K-Ray.

3. Holsinger's Settlement with WSA

On February 27, 1996, this Hearing Officer received telephone calls from the counsels for Holsinger and WSA. They announced that Holsinger and WSA were attempting to reach a monetary settlement concerning the claims by Holsinger against WSA for the actions covered in his complaint against WSA. This settlement would cover the Report's proposed requirement that WSA pay Holsinger back pay and benefits (minus any earned income and benefits), as well as certain other fees and expenses. The contemplated settlement contained no admissions by either party concerning Holsinger's alleged disclosures and the other events discussed in the Report. As a result of this settlement, counsel for WSA announced that WSA would drop its challenge to the Report and request to be dismissed as a party to the proceeding. Counsel for Holsinger stated that Holsinger would continue to assert his position that the Report was correct in finding that he was wrongfully terminated from his position as a security guard by WSA and that he should be reinstated as a security guard by K-Ray.

4. Issues and Participants at the Hearing

Accordingly, on February 28, 1996, I convened a hearing in this matter at the DOE's METC facility in Morgantown, West Virginia. At the outset of the hearing, counsel for Holsinger announced that Holsinger and WSA had reached a settlement. He stated that the settlement constituted a full release by Holsinger of all liability by WSA for all of the alleged retaliatory actions against Holsinger discussed in the OCEP Report. He stated that neither party had made factual admissions concerning any of the events discussed in the Report. Transcript of February 28, 1996 Hearing (hereinafter "Tr.") at 11. Counsel for Holsinger asserted that his client continued to support the Report's proposed requirement that K-Ray reinstate Holsinger to his former position.

I think the equities in this situation mandate that Mr. Holsinger be returned to his position that he held previous to his unlawful termination, and request that the Office of Hearings [and] Appeal[s] and you, particularly, order that K-Ray Security take Mr. Holsinger back.

Tr. at 10. No representative of WSA was present at the hearing.

In response to this information, counsel for K-Ray requested that I not proceed any further regarding the consideration of any matters involving the Report's proposal that K-Ray reinstate Holsinger. I responded by noting that the OCEP Report and its proposed requirement that K-Ray reinstate Holsinger remained in effect and that the hearing was K-Ray's opportunity to present its factual and legal challenges to that proposal. Counsel for K-Ray then restated the position taken in its February 5, 1996 brief that it was inappropriate for the Report to propose that K-Ray reinstate Holsinger because K-Ray was not a party to any actions that took place between Holsinger and WSA, and was not influenced by WSA when K-Ray hired security guards pursuant to its contract with METC. K-Ray then requested that the proceeding be dismissed on these grounds. I stated that I would respond fully to K-Ray's objections to the OCEP Report in the Initial Agency Decision issued in this matter, but that it would be inappropriate to dismiss the matter at this time.

The hearing proceeded with the presentation of witnesses by K-Ray and Holsinger, and focused on the appropriateness of the Report's proposal that Holsinger be reinstated by K-Ray. Counsel for K-Ray presented the testimony of Diane Lewis and Kenneth Jackson, officials of K-Ray involved in obtaining the DOE contract for guard services at METC and in hiring guards pursuant to that contract. He also presented the testimony of Ms. Purkey, the DOE's Contracting Officer and Technical Representative with respect to K-Ray's hiring practices and staffing constraints under its contract at METC. Counsel for Holsinger presented the testimony of Holsinger and of John Kisner, a security guard at METC currently employed by K-Ray.

5. Post-hearing Briefs and the Dismissal of WSA

At the close of the hearing, this Hearing Officer permitted post-hearing briefs from Holsinger and K-Ray concerning the legal and factual issues raised at the hearing. Post-hearing briefs were submitted by K-Ray and Holsinger on April 12 and April 17, 1996. In his post-hearing brief, Holsinger asserts that he was improperly discharged for making a protected disclosure, and that the equities of the situation favor an order for his reinstatement by K-Ray pursuant to Part 708's support for full protection of contractor employees who have been wrongfully discharged as a result of protected disclosures. In its post-hearing brief, K-Ray asserts that OHA holdings in Part 708 proceedings support its position that it would be inequitable to require K-Ray to perform any action, including reinstatement, to provide relief to Holsinger for actions taken against him by WSA.

At the hearing, Holsinger and K-Ray received notice that WSA had entered into a settlement with Holsinger and had ended its participation in this proceeding. This information constituted constructive notice to show cause why WSA should not be dismissed as a party to this proceeding. See 10 C.F.R. § 708.9(j). The post-hearing briefs of both Holsinger and K-Ray acknowledge Holsinger's settlement with WSA and the fact that the validity and appropriateness of the OCEP Report's proposed restitutionary actions for WSA are no longer at issue in this proceeding. Neither brief contended that WSA should remain a party to this proceeding, and I did not believe it necessary to maintain WSA as a party. See K-Ray Post-Hearing Brief at 2-3, Holsinger Post-Hearing Brief at 2. Accordingly, in a letter to the parties dated April 18, 1996, I ordered that WSA be dismissed as a party to this proceeding.

III. Analysis

Proceedings under 10 C.F.R. Part 708 are intended to offer employees of DOE contractors a mechanism for resolution of whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee. See David Ramirez, 23 DOE ¶ 87,505 (1994).

The settlement between Holsinger and WSA has significantly narrowed the factual matters at issue in this proceeding. In his pre-hearing brief submitted prior to the settlement, Holsinger objected to the OCEP Report's findings that certain of his allegations were not supported by sufficient evidence. However, Holsinger's monetary settlement with WSA rendered his objections irrelevant to the issue of compensation, and, at the hearing, counsel for Holsinger offered no argument or testimony concerning Holsinger's objections to any of the Report's findings. Instead, he indicated that his client intended to rely completely on the factual record and findings of the OCEP Report as support for the Report's proposed requirement that K-Ray reinstate Holsinger as a security guard. Tr. at 8-10. In his post-hearing brief, counsel for Holsinger reiterates this position:

We respectively pray that the Court adopt the findings and recommendations of the Report of Investigation and Proposed Disposition.

Holsinger Brief at 7. WSA and K-Ray never have objected to the Report's findings that certain allegations of Holsinger are not sufficiently supported by factual evidence. Accordingly, I will not review the Report's findings in those instances where OCEP found insufficient evidence to support Holsinger's allegations that he made protected disclosures or that specific actions of WSA were retaliatory acts for his disclosures.

Rather, I will confine my review to the Report's findings relevant to its proposed requirement that K-Ray reinstate Holsinger, and to the evidence and argument presented by the parties with regard to those findings and the reinstatement proposal. As discussed in more detail below, in order for me to uphold the OCEP Report's proposed reinstatement order, the evidence in the record must be sufficient to support its findings that (1) Holsinger made a protected disclosure, (2) this disclosure was a contributing factor to Holsinger's dismissal by WSA, and (3) reinstatement of Holsinger by K-Ray is an appropriate remedy in this instance.

As previously noted, WSA did not present any argument or witness testimony at the hearing, and K-Ray confined its argument and testimony to the equities of reinstatement as an appropriate remedy in this matter. Therefore, with regard to the first two OCEP findings listed above, the entire evidentiary record consists of the OCEP Report and complaint file, and the general objections contained in WSA's February 9 brief.

A. Legal Standards Governing Findings of Protected Disclosures and Adverse Actions in this Case

The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action, such as discharge, demotion, coercion or threat, against any employee because that employee has " . . . *[d]isclosed* to an official of DOE, to a member of Congress, or to the contractor (including any higher tier contractor), *information that the employee in good faith believes evidences . . . a violation of any law, rule, or regulation* . . . [or] *[f]raud, mismanagement, gross waste of funds, or abuse of authority*." 10 C.F.R. § 708.5 (emphasis added).

1. The Complainant's Burden

The regulations describe the burdens of proof in a whistleblower proceeding as follows:

The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant 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 personnel action absent the complainant's disclosure, participation, or refusal.

10 C.F.R. § 708.9(d).

It is the task of the finder of fact to weigh the sufficiency of the evidence presented by both parties at trial. "Preponderance of the evidence" is proof sufficient to persuade the finder of fact that a proposition is more likely true than not true when weighed against the evidence opposed to it. See Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990) (Hopkins); 2 McCormick on Evidence § 339 at 439 (4th Ed. 1992). Under this standard, the risk of error is allocated roughly equally between both parties. Grogan v. Garner, 111 S. Ct. 654, 659 (1991) (holding that the preponderance standard is presumed applicable in disputes between private parties unless particularly important individual interests or rights are at stake). Holsinger has the burden of proving by evidence sufficient to "tilt the scales" in his favor that when he communicated the concerns discussed above, he *disclosed information which evidenced* his belief in good faith that there was *a violation of law, rule, or regulation* or an instance of *mismanagement or abuse of authority*. 10 C.F.R. § 708.5(a)(1)(i) and (iii). If this threshold burden is not met, Holsinger has failed to make a *prima facie* case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in a personnel action taken against the complainant. 10 C.F.R. § 708.9(d); see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994).

2. The Contractor's Burden

If the complainant has met his burden, the burden shifts to the contractor. The contractor must prove by "clear and convincing" evidence that it would have taken the same personnel action against the complainant absent the protected disclosure. "Clear and convincing" evidence is a much more stringent

standard; it requires a degree of persuasion higher than mere preponderance of the evidence, but less than "beyond a reasonable doubt". See Hopkins, 737 F. Supp. at 1204 n.3. Thus if Holsinger has established that it is more likely than not that he made protected disclosures that were a contributing factor to WSA's decision to discipline and eventually dismiss him, WSA or K-Ray must convince us that WSA would have taken these actions even if Holsinger had never made any communications concerning possible thefts of DOE property by an employee of WSA.

B. The Complainant's Allegation Was a Protected Disclosure

In its Report, OCEP conducted an extensive analysis of whether Holsinger's suspensions, shift rescheduling, and employment termination are to be considered acts of reprisal for a protected disclosure under Part 708. As an initial matter, OCEP found that Holsinger had failed to establish by a preponderance of the evidence that he had made a verbal disclosure to Captain Munz, sometime in July or August 1994, that the Accused Individual was apparently "stealing" government property, or that he had telephoned Ms. Purkey at her home and reported the alleged thefts. OCEP Report at 6-8. However, OCEP found that a preponderance of the evidence indicates that Holsinger wrote and sent the August 31, 1994 anonymous letter to Tom Bechtel, Director, DOE-METC. The letter indicated the WSA management had been informed that the Accused Individual was committing "thievery" and that WSA management had done nothing about the alleged thefts. OCEP makes the following findings regarding this letter:

Available information indicates that Mr. Holsinger is the only individual taking responsibility for writing the letter. The record also indicates that one or more members of the guard force were aware that Mr. Holsinger intended to write an anonymous letter to DOE-METC regarding the alleged thefts. The record further indicates that a number of security officers believed that [the Accused Individual] may have been committing theft and that WSA management was not taking appropriate action. Therefore, the record indicates that the letter was written under a good faith belief that the Accused Individual possibly had committed thefts and that WSA management had not properly addressed the issue of the alleged thefts. Under the circumstances, a preponderance of the evidence indicates that Mr. Holsinger wrote and sent the anonymous letter to DOE-METC and that the letter made "good faith" disclosures regarding possible thefts.

Report at 9. The OCEP Report concludes that sometime after September 7, 1994, when he had a conversation with Ms. Purkey concerning the August 31, 1994 anonymous letter, Captain Munz was probably convinced that Mr. Holsinger authored that letter. Report at 13, citing Exhibits 6 and 13.

After reviewing the Report and its supporting material concerning this issue, I conclude that the record in this proceeding supports OCEP's finding that Holsinger wrote and sent the anonymous letter to DOE-METC. The reports of OCEP's investigative interviews with two of Holsinger's co-workers indicate that they and others were aware that Holsinger wrote the anonymous letter. See Report Exhibits 5 and 10. I also conclude that Holsinger had a good faith belief that the allegations of misappropriation of government property contained in this letter were true. In this regard, I believe that the reports of OCEP's investigative interviews with three of Holsinger's co-workers (Report Exhibit 8, 9, and 10) provide independent support for Holsinger's allegation that the Accused Individual may have improperly removed certain items of DOE property to her home and that WSA management had not properly addressed the issue. I therefore hold that Holsinger's disclosure was protected by 10 C.F.R. § 708.5(a)(1)(i) and (iii).

C. Certain WSA Actions Constituted Retaliation

Based on its finding that Holsinger made a single, protected disclosure to the DOE on August 31, 1994, the OCEP Report proceeds to evaluate Holsinger's allegations of retaliatory actions by WSA. In this regard, it finds that Holsinger failed to meet his burden of establishing by a preponderance of the evidence that the anonymous letter contributed to his one-day suspension on September 2 and his three day suspension on September 29 for excessive personal use of the telephone. OCEP finds that in both instances the evidence is "clear and convincing" that, absent any knowledge of the anonymous letter, WSA still

would have suspended Mr. Holsinger for excessive personal telephone use. Report at 13 and 24. With respect to the September 18, 1994 announcement by Captain Munz that Holsinger would soon be placed on the midnight shift, OCEP concluded that "a preponderance of available evidence may indicate that the anonymous letter contributed to the shift change." However, OCEP finds that "the issue lost real significance" when Mr. Holsinger's employment was terminated on October 2, prior to the implementation of the shift change. Report at 25.

OCEP finds that Holsinger's three day suspension on September 20, 1994 was probably a retaliatory act by WSA. Holsinger was suspended because on September 11, 1994, he ignored an advisement by the Accused Individual that it was a violation of Post Orders to carry his cup of coffee while on his tour of the site. OCEP presented the following explanation for its finding that this suspension was probably related to discontent with Holsinger's disclosure to the DOE:

Mr. Holsinger was subjected to a suspension within fairly close proximity to when Captain Munz had reason to believe that he made a protected disclosure. [The Accused Individual], the individual who made the report that resulted in Mr. Holsinger's three-day suspension, was the subject of Mr. Holsinger's disclosure. [The Accused Individual] was given only a "counseling," for a similar breach of site rules. Given that [the Accused Individual] had reported Mr. Holsinger for the same breach, [the Accused Individual] clearly had knowledge of the applicable site rule. Additionally, there is also evidence . . . that WSA upper management and Captain Munz had concerns that the security force was reporting problems directly to DOE and that Captain Munz cited the anonymous letter as a communication with DOE that could lead to disciplinary action against anyone who made such a report in the future. Under the circumstances of this case, a preponderance of the evidence in the record supports the finding that the anonymous letter contributed, at least partially, to the three day-suspension [of Holsinger] for "failure to follow instructions." Accordingly, WSA must establish by clear and convincing evidence that it would have taken the action absent the protected disclosure.

Report at 15-16, quoting from WSA disciplinary action reports at Exhibits 20 and 21. The Report further concludes that WSA has not shown that its suspension of Holsinger would have occurred absent the disclosure. In this regard, the Report notes that interviews with the Accused Individual and others indicate that Holsinger was singled out for discipline in the enforcement of the rule against taking a beverage on a site tour. Report at 17. The Report notes that WSA procedures prescribe a policy of "progressive discipline" for repeated infractions of WSA rules of employee conduct. However, OCEP could find no support for Holsinger's treatment when it examined the record of disciplinary actions taken with regard to other WSA security guards.

The record indicates that some individuals were given more than one verbal warning when the second offense was different from the offense cited for the first warning. The record also indicates that no one else received more than a one-day suspension for any offense cited. [Exhibit 20] No one, except Mr. Holsinger, was cited for either a "failure to follow instructions" or insubordination.

Report at 19. OCEP also found that other employees received less severe disciplinary actions from WSA for what appeared to be more serious conduct infractions, i.e., a one-day suspension for taking milk without permission from the child day-care center, and a documented verbal warning for "falsifying information on an incident report". Report at 19-20. The OCEP concluded that the available evidence is not clear and convincing that WSA normally would have issued a three-day suspension or, indeed, any type of suspension, for the type of violation committed by Holsinger. Report at 21.

I agree with OCEP that the available evidence supports its finding that Holsinger's anonymous letter contributed to the WSA's decision to suspend him as a result of the "coffee carrying" incident. Although WSA was warranted in taking some form of corrective action for Holsinger's failure to respond to the Accused Individual's reminder concerning Post Orders, a three-day suspension is far more severe than any other employee disciplinary actions taken by WSA with respect to similar or even more serious offenses. Given the disparity between this suspension and other disciplinary actions of WSA security guards, I

reject WSA's argument that the actions against Holsinger were the normal and customary disciplinary measures which would be taken by WSA with respect to any employee who presented the types of employee disciplinary problems presented by Holsinger. WSA brief at 1. Furthermore, this severe act of discipline coincided closely in time with the identification of Holsinger by Captain Munz as the probable author of the anonymous letter to the DOE.<1> There also is strong evidence in the record that Captain Munz and WSA management considered the anonymous letter a serious breach of WSA policy. In their statements to the OCEP investigator, two of Holsinger's co-workers indicated that during the September 1994 staff meeting, Captain Munz informed the security force concerning the anonymous letter and advised that, in future, all issues were to be brought to Captain Munz and taken through the chain of command, or the offending employee would be disciplined. Report Exhibits 8 and 10. I therefore agree with OCEP that the record indicates that Captain Munz was concerned that the anonymous letter had been sent to DOE and advised his security force to interpret previous directives concerning WSA's chain of command in a restrictive manner. That advice restricted protected activity by the security forces. Report at 20.

Under these circumstances, I conclude that the record in this proceeding indicates that Holsinger's disclosures in his anonymous letter to the DOE were a contributing factor to his three-day suspension by WSA on September 20, 1994 and his subsequent dismissal by WSA (for incurring three suspensions in a six month period) on October 2, 1994. WSA has failed to show by clear and convincing evidence that it would have disciplined Holsinger in the same, severe manner if the disclosures had not occurred.

D. Reinstatement Is a Proper Remedy

Having concluded that a violation of Part 708 has occurred, I now turn to the remedy. As discussed above, Holsinger and WSA have entered into a settlement regarding the OCEP Report's proposals for remedial action by WSA. These provisions therefore are no longer at issue in this proceeding. However, the OCEP Report also finds that it is an appropriate remedial action to require K-Ray to reinstate Holsinger in his former position as a security guard. In this regard, the Report finds:

Information provided to OCEP by K-Ray indicates that all of the employees working for WSA at the time that K-Ray became security contractor at METC were retained as employees of K-Ray. Under the circumstances, OCEP finds that Mr. Holsinger would have been retained by K-Ray had his employment not been terminated in violation of Part 708 by WSA. Accordingly, OCEP proposes that Mr. Holsinger be reinstated to his former position as an employee of K-Ray and that his shift scheduling be done in an equitable manner. The payment of back pay, lost benefits, costs and fees will remain the responsibility of WSA.

Report at 26. K-Ray vigorously opposes the Report's proposed requirement that it reinstate Holsinger to his former position as a security guard at METC. Its objections to this requirement fall into the following general categories: (1) K-Ray had no role in any of the retaliatory actions taken by WSA against Holsinger, and the DOE cannot require it to redress those actions; (2) it is inequitable and inappropriate to require K-Ray to reinstate Holsinger when K-Ray was not a participant in the adverse actions taken against him by WSA; (3) reinstating Holsinger will place an undue hardship on K-Ray's other employees at the METC site. For the reasons discussed below, I conclude that it is appropriate to require K-Ray to reinstate Holsinger to a security guard position at METC.

1.The DOE Possesses Authority to Order Reinstatement by a Successor Contractor

In its Post-Hearing Brief, K-Ray asserts that there is absolutely no connection whatsoever between K-Ray and WSA.

[T]hey are two entirely distinct and separate entities and K-Ray did not purchase any of the assets of Watkins and no corporate nexus exists between the two companies.

It therefore concludes that K-Ray cannot be held liable for WSA's discriminatory acts on the grounds that

it essentially constitutes a continuation of WSA. See Kolosky v. Anchor Hocking Corp., 585 F. Supp. 746 (W.D. Pa. 1983).

The existence of a corporate nexus between K-Ray and WSA is not required to support the reinstatement order proposed by OCEP. The remedial provisions of Part 708 are applicable to all DOE contractors where they are necessary to effect equitable relief. Part 708's general policy provision indicates that the DOE may provide an "appropriate administrative remedy" to contractor employees who establish they have been subjected to discriminatory acts. 10 C.F.R. § 708.3. Section 708.10(c)(3) provides that the Initial Agency Decision may contain an order for interim relief, "including but not limited to reinstatement, pending the outcome of any request for review." Finally, Part 708 indicates that relief ordered by the Secretary in a final decision and order

... may include reinstatement, transfer preference, back pay, and reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses ... reasonably incurred by the complainant in bringing the complaint upon which the decision was issued or such other relief as is necessary to abate the violation and provide the complainant with relief.

10 C.F.R. §708.11(c). For those cases in which discrimination against an employee in reprisal for a protected disclosure is found to have occurred, the preamble to Part 708 states that the goal of the DOE regulations is to restore the employee to the position to which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. 57 Fed. Reg. at 7539; see, e.g., Energy Reorganization Act of 1974, 42 U.S.C. § 5851; Whistleblower Protection Act of 1989, 5 U.S.C. § 1214(b)(4)(B).

Where reinstatement of an employee is necessary to restore the employee to the position that he or she would have occupied absent the acts of reprisal, the DOE clearly possesses authority under Part 708 to order such reinstatement by a succeeding contractor, even where the succeeding contractor did not participate in any way in the acts of reprisal. The DOE procurement contracts executed after the effective date of Part 708 generally incorporate a provision requiring full compliance with all pertinent health and safety regulations, including Part 708. In fact, K-Ray signed a contract of this type when it agreed to provide security services for the DOE-METC. K-Ray furnishes these services as a subcontractor to the U.S. Small Business Administration (SBA), the prime contractor to the DOE in this matter. See copy of Contract DE-AC21-95MC-32163 (SBA Subcontract No.0390-95-2-00018), hereafter referred to as the "K-Ray Contract", in the OCEP complaint file. With regard to Part 708, the K-Ray Contract specifically provides as follows at Part II, Section I.118:

(a) The Contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 C.F.R. Part 708.

(b) The Contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts, at all tiers, with respect to work performed on-site at a DOE-owned or -leased facility, as provided for at 10 C.F.R. Part 708.

Clearly, then, K-Ray is on notice that pursuant to the terms of its agreement with the DOE, it is subject to all of the requirements of Part 708, and these requirements include actions necessary to restore an employee's position that has been negatively impacted by acts of reprisal. One type of action necessary to restore an employee's rights is reinstatement by a subsequent contractor if such reinstatement actually is necessary to restore the employee to the position to which he or she otherwise would have occupied absent the acts of reprisal by the former contractor. Boeing Petroleum Services, Inc.; Dyn McDermot Petroleum Operations Company, 24 DOE ¶ 87,501 (1994)(Boeing).

2.Reinstatement of Holsinger by K-Ray is a Necessary Remedial Action in this Instance

In its Post-Hearing brief, K-Ray contends that reinstatement in a situation involving a subsequent contractor should not be viewed as a necessary or desirable remedy by the DOE. K-Ray cites two court

decisions, Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988)(Holley) and Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992)(Blackburn), where the remedy of reinstatement was deemed inappropriate. In Holley, the court noted that "not every employee recommended [by the former contractor] was hired by the new company," and that there was insufficient factual data to overturn the district judge's ruling that reinstatement was an inappropriate remedy. 835 F.2d at 1377. In Blackburn, the court held that the evidence in the record supported the Secretary of Labor's finding that in this instance the liability of the contractor ended when the contract under which the wrongfully discharged employee worked was terminated. It noted that in this instance all of the other employees working under the contract received reduction in force notices when the contract project ended. It also found that there was no evidence in the record to support the complainant's assertions that (I) the contractor routinely rehired its former employees for other projects or that (ii) the contractor had interfered with his ability to obtain other employment by blacklisting him. 982 F.2d at 129-130.

Holley and Blackburn clearly do not stand for the proposition that reinstatement by a successor contractor is never an appropriate remedy. In both of these cases, the available evidence clearly indicated that reinstatement was not necessary to restore the complainant to the position he would have occupied absent the acts of reprisal by his former employer. Blackburn specifically refers with approval to the Supreme Court's holding in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)(Albemarle), that the goal of remedial actions in the employment discrimination context is to make the victim of discrimination whole and restore him to the position that he would have occupied were it not for the unlawful discrimination. 982 F.2d at 129, citing 422 U.S. at 421. In Albemarle, the Supreme Court finds where a legal injury is of an economic character,

The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

Albemarle, 422 U.S. at 418-19, quoting Wicker v. Hoppock, 6 Wall. 94, 99, 18 L.Ed. 752 (1867). It further states that back pay, reinstatement and other remedies are discretionary powers vested in the courts "to make possible the fashioning of the most complete relief possible." 422 U.S. at 421. Accordingly, if I find in this proceeding that it is likely that Holsinger would have been hired by K-Ray had he remained an employee of WSA, reinstatement would constitute an appropriate remedy.

In its Report, OCEP found that K-Ray hired all thirteen of the WSA security personnel employed at DOE-METC when it began to furnish security services at the METC site in June, 1995. K-Ray admits that this was in fact the case. K-Ray Post-Hearing Brief at 2. At the hearing, however, K-Ray asserted that it was not required by its agreement with the DOE to hire any of the WSA security personnel, and that it conducted an independent application and screening process prior to hiring these individuals. K-Ray contends that it is inappropriate for the DOE to require it to reinstate Holsinger under these circumstances. K-Ray contends that its position is supported by the following language from the OHA Hearing Officer's interlocutory order in Boeing:

Thus, as a general matter, we do not believe that reinstatement is an appropriate remedy under Part 708 where, as here, there is a new M&O contractor that has no connection with the firm actually employing the complainant or the circumstances surrounding the discharge of the complainant, and the retention of employees by the new contractor is not directly influenced by the former contractor but merely a condition of assuming the M&O contract.

K-Ray Post-Hearing Brief at 6-7, citing Boeing 24 DOE at 89,007.

I believe that K-Ray's reliance on Boeing is misplaced. The language immediately following this quotation clearly indicates that, as discussed above, the remedy of reinstatement by a successor contractor is equitable in nature and may be necessary to fully protect a whistleblower.

Nonetheless, we remain keenly aware of the strong policy dictates underlying Part 708, favoring full protection of contractor of contractor employees that have been wrongfully discharged as a result of a

protected disclosure. Therefore, we might exercise our equitable authority under Part 708 to order the reinstatement of a wrongfully discharged party under particular circumstances.

Boeing at 89,007. Nor is the holding in Boeing applicable to the facts of this case. The Hearing Officer in Boeing evaluated reinstatement in relation to an alternative remedy proposed by the Complainant, i.e., reimbursement for future lost wages and benefits. The Hearing Officer decided that the alternative remedy proposed by the Complainant would be more appropriate and ordered the dismissal of the successor contractor from the proceeding. Boeing at 89,007-8. In this instance, Holsinger has not argued that an alternative to reinstatement is an appropriate remedy. Moreover, as discussed below, the facts in this proceeding indicate that reinstatement is necessary and appropriate because it is reasonable to conclude that Holsinger would have been hired by K-Ray along with all of the other WSA security personnel at METC if he had been an employee of WSA at the time that K-Ray hired its security personnel.

The testimony at the hearing strongly indicates the willingness of K-Ray's executives to rehire all of the WSA security personnel. During his testimony, Kenneth Jackson, the President of K-Ray, related that Captain Munz of WSA provided K-Ray with information concerning the entire pool of WSA employees at METC prior to their interviews with K-Ray personnel.

Mr. Jackson: Mr. Munz did not make recommendations as far as who to hire. Mr. Munz supplied us with the -- more or less the records that he had as far as his employees and any information that we requested. So Mr. Munz was very helpful in that regard, and we conducted interviews, ...

Tr. at 76. Mr. Jackson stated that Diane Lewis, the contract administrator at K-Ray, interviewed each of the thirteen WSA employees at METC and brought back her recommendations to Mr. Jackson, who made the final hiring decisions. Tr. at 77. In describing his decision to hire all thirteen WSA employees and no one else, Mr. Jackson stated that on-the-job experience and continuity of operation were major considerations.

Mr. Jackson: The thing that influenced us with it is, you know, these are experienced people that, you know, have good track records that even someone that may have better credentials such as a degree in criminal justice, you know, didn't look as good as an experienced person, you know, to me. These people are experienced, they're on the job, and they were hard to replace.

Hearing Officer: Was continuity of operation a factor in this as well?

Mr. Jackson: It definitely played a part, you know; everything was working. And I have solid procedure that if the system's not broke, I'm not going to try to fix it, if the system was not broke.

Tr. at 76.

Based on this testimony in the record and on the fact that K-Ray filled every one of its positions at METC with a current WSA employee, I find that it is likely that, had Holsinger remained an employee of WSA, he would have been hired by K-Ray in June 1995. I therefore conclude that reinstatement of Holsinger by K-Ray is necessary to restore him to the position he would have occupied absent the acts of reprisal by WSA.

3.Reinstatement Will Not Cause Undue Hardship to K-Ray

Because reinstatement is an equitable remedy, it is appropriate to consider not only whether reinstatement is necessary to provide relief to the complainant, but also whether it would impose an undue hardship on others. At the Hearing and in its Post-Hearing Brief, K-Ray asserts that reinstatement is inappropriate in this instance because it will place an undue hardship on the other K-Ray employees working at METC. In this regard, K-Ray contends that if it is required to hire Holsinger, it will have to fire one of its current employees in order to comply with DOE hiring limitations. K-Ray also argues that the special requirements of Holsinger regarding the scheduling of his work shifts will place a hardship on K-Ray and

its employees. As discussed below, I find that these contentions do not raise concerns sufficient to outweigh the DOE's policy favoring full protection of whistleblowers.

According to K-Ray, one of the original thirteen WSA employees hired by K-Ray resigned in January, 1996. The individual who resigned was a part-time employee. K-Ray states that it has not replaced that employee because the DOE has informed K-Ray that it cannot hire any additional employees due to the personnel cutbacks being implemented at the METC site. K-Ray states that it has been forced to operate with eight full-time employees and four part-time employees. These twelve employees have had to assume the duties and hours of the thirteenth position. The four part-time employees now work an average of approximately 32 hours per week. Testimony of Ms. Lewis, Tr. at 32-34. K-Ray concludes that since it was not allowed to replace the part-time employee who resigned, the DOE would not permit it to reinstate Mr. Holsinger without firing someone else.

If K-Ray were forced to hire Holsinger by this Board that would require the termination of an innocent employee, independently selected by K-Ray.

K-Ray Post-Hearing Brief at 3.

As an initial matter, I am not convinced that the available evidence fully supports K-Ray's conclusion that the DOE will require it to terminate an employee if it is required to reinstate Holsinger. Testimony at the Hearing indicates that METC currently is using a hiring freeze coupled with attrition to reduce its work force. At the Hearing, Ms. Purkey of DOE-METC testified that K-Ray could not hire a new security guard because the METC has had "a hiring freeze for well over a year now." Tr. at 67. She also stated that METC had not taken steps to dismiss any of its employees as a result of budget concerns.

We are -- at this point right now, we are letting it trickle down with attrition without actually having to lay people off. We do not want to lay people off at this point, but it could come to that.

Tr. at 66. Nevertheless, Ms. Purkey concludes that the DOE will require K-Ray to dismiss one of its employees if Holsinger is reinstated. Her conclusion is based on her belief that METC management will not allow K-Ray to have more than twelve employees.

Well, as far as my management's position is, the twelve - - that's the limit they [K-Ray] are now. They'll either go below that; they will not go above that - - that twelve number of people.

Tr. at 66.

Certainly the remedy of reinstatement does not fully comport with the goals of an organization attempting to downsize its work force through employee attrition and a freeze on hiring. In this instance, however, the issue of whether K-Ray has twelve or thirteen employees at the METC site is of marginal significance to the DOE's cost-cutting efforts. K-Ray is paid a fixed sum for providing security services to the DOE. An additional part-time security guard on its payroll does not represent an additional cost to the DOE, and the number of hours of security services provided by K-Ray to the DOE is not increased. In this situation, it would be anomalous for METC to abandon its policy of attrition and require K-Ray to fire one of its employees.

However, even if the DOE requires K-Ray to terminate an "innocent employee" to maintain a security force no larger than twelve, this potential harm does not provide a basis for denying reinstatement to Holsinger. Holsinger too, is an "innocent employee" who but for the improper actions of WSA currently would be an employee of K-Ray. To deny him reinstatement on the basis of DOE hiring ceiling requirements would effectively single him out for discriminatory treatment in comparison to the other security personnel working at METC. Holsinger should be reinstated by K-Ray and thereafter be subjected to the same risks of downsizing as his fellow employees.

K-Ray also contends that Holsinger's demands regarding his reinstatement as a part-time employee are

unreasonable and would impose an unfair hardship on K-Ray and its current employees.

Holsinger is not only requesting that he be reinstated and hired by K-Ray in a part-time capacity, but that he also be able to dictate the days, hours and shift he would be able to work because he is currently employed on a full-time basis as a Deputy Sheriff by the Monongalia County Sheriff's Department. Holsinger works Thursday through Monday 3:00 p.m. to 11:00 p.m., and also works part-time as a police officer for the City of Kingwood. If K-Ray were forced to hire Holsinger it would result in a total restructuring of the hours and shifts worked by [K-Ray's] part-time employees and possibly its full-time employees just to accommodate the demands of Holsinger which would affect the performance, morale and harmony of the remaining 11 employees and be detrimental to the overall security services provided to DOE.

Post-Hearing Brief at 4. I reject K-Ray's assertion that Holsinger is attempting to dictate the days, hours and shift he will be able to work. At the Hearing, Holsinger testified that he had a full-time job (40 hours a week) at the Monongalia County Sheriff's Department. He also stated that he was working part-time as a police officer for the City of Kingwood, but that he was willing to terminate this part-time job if he were reinstated with K-Ray. Tr. at 86. While he stated that he preferred to work "a day or two a week" for K-Ray, he testified that he was able and willing to work up to four days a week (32 hours) to meet K-Ray's requirements. Tr. at 94. In his Post-Hearing Brief, Counsel for Holsinger reiterates his client's willingness to meet K-Ray's requirements.

[Holsinger] has expressed that although he would be unavailable for one shift from 3:00 to 11:00 p.m., he would be available for all remaining shifts, as well as all three shifts on Tuesday and Wednesday, his days off. Holsinger further testified that in the event that a real emergency occurred he would be able to take vacation days from his employment at the Sheriff's Department to fulfill any responsibilities which may be expected by him as a part-time employee at K-Ray.

Holsinger Post-Hearing Brief at 4. These assertions demonstrate that Holsinger is aware that he cannot dictate the days and hours of his work as a security guard at METC. If Holsinger is reinstated at METC, he will be required to meet the scheduling requirements of K-Ray in exactly the same manner as other security personnel. Similarly, K-Ray will be required to accommodate his scheduling conflicts only to the extent that it would accommodate its other employees.

The chief potential problem cited by K-Ray for scheduling Holsinger's part-time guard duty is working around his full-time position at the Monongalia County Sheriff's Department. However, testimony has established that another part-time employee of K-Ray, Mr. John Kisner, has been a full-time employee of the Monongalia County Sheriff's Department for several years, and that K-Ray has successfully accommodated the time requirements of his full-time position when scheduling his part-time guard duty at METC. Tr. at 106-11. Accordingly, if Holsinger is reinstated, K-Ray is not being required to accommodate potential scheduling problems that are more serious than those raised by another of its part-time employees. Nor is Holsinger requesting more in the way of schedule accommodation than K-Ray is already providing to another of its part-time employees.

Finally, K-Ray argues that it can accommodate Mr. Kisner because its three other part-time security guards have more flexible schedules. It contends that if it is required to replace one of these flexible, part-time guards with Holsinger, the resulting scheduling problems will be highly disruptive to its employees. Tr. at 112-113. This assertion is speculative and unsupported by the available evidence. In this regard, it should be noted that Mr. Kisner and Mr. Holsinger work different hours at the Monongalia Sheriff's Department and have different days off from that employment. Tr. at 107. Accordingly, there is reason to believe that it will be possible to reach an equitable resolution of Holsinger's shift scheduling that will not unduly inconvenience his fellow employees.

Based on these considerations, I find that reinstatement is a necessary and appropriate remedy in this instance.

IV. Conclusion

For the reasons set forth above, I have concluded that Holsinger has proven by a preponderance of the evidence that he engaged in protected activity under 10 C.F.R. Part 708 and that this activity was a contributing factor to his September 20, 1994 suspension and his October 2, 1994 dismissal by WSA. WSA and K-Ray have failed to prove by clear and convincing evidence that WSA would have taken these adverse personnel actions absent Holsinger's protected activity. I therefore find that a violation of 10 C.F.R. § 708.5 has occurred. I also find that reinstatement of Holsinger by K-Ray is a necessary and appropriate action to effect full relief for Holsinger. In light of WSA's settlement with Holsinger and its February 27, 1996 Stipulation of Dismissal with Holsinger, I find that no further remedial action by WSA is required in this matter.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 of Daniel L. Holsinger (OHA Case Number VWA-0005) is hereby granted as set forth in this Decision and denied in all other aspects.

(2) The request for relief under 10 C.F.R. Part 708 of K-Ray Security, Inc. (K-Ray) (OHA Case Number VWA-0009) is hereby denied.

(3) K-Ray shall reinstate Daniel Holsinger to his former position as a part-time security guard at the Department of Energy Morgantown Energy Technology Center or to a comparable position at that facility. K-Ray shall perform his shift scheduling in an equitable manner.

(4) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or her designee is filed with the Director of the Office of Contractor Employee Protection.

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date:

<1>/ Ms. Purkey reported to the OCEP interviewer that sometime after she concluded her investigation of the allegations in the anonymous letter, she had a conversation with Captain Munz and that they agreed that the author was probably Holsinger. Report, Exhibit 6. Ms. Purkey concluded her investigation on September 7, 1994. Captain Munz issued the three-day suspension to Holsinger on September 20, 1994.