Case No. VWA-0018

May 21, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner:Thomas T. Tiller

Date of Filing:November 17, 1997

Case Number: VWA-0018

This Decision concerns two whistleblower complaints filed by Thomas T. Tiller (Tiller) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. At all times relevant to this proceeding, Tiller was employed by Wackenhut Services, Incorporated (Wackenhut), a DOE contractor that provides paramilitary security support services at the DOE's Savannah River Site in Aiken, South Carolina. Tiller contends in his first complaint that Wackenhut demoted him after he alleged that a senior level manager at Wackenhut had engaged in unethical and possible criminal conduct. In his second complaint, Tiller charges that Wackenhut retaliated against him after learning he had filed a Part 708 complaint.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary 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.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to independent fact-finding by the DOE's Assistant Inspector General for Assessments (Assistant IG), a hearing before a Hearing Officer from the DOE's Office of Hearings and Appeals (OHA), and an opportunity for review of the Hearing Officer's Decision by the Secretary of Energy or his designee. See David Ramirez, 23 DOE ¶ 87,505, aff'd, 24 DOE ¶ 87,510 (1994).

B. Procedural History

On August 31, 1994, Tiller filed his first complaint pursuant to 10 C.F.R. Part 708. Tiller submitted a second Part 708 complaint to the DOE on April 18, 1996. The Assistant IG conducted an investigation into the allegations contained in Tiller's two complaints and issued a Report of Inquiry (ROI) and Proposed

Disposition on September 30, 1997. In the ROI, the Assistant IG concluded that Tiller had proven by a preponderance of evidence that he had made a protected disclosure and had participated in a protected activity. She found, however, that Tiller had failed to meet his regulatory burden of demonstrating that either the protected disclosure or participation in the Part 708 process was a contributing factor to any alleged adverse action taken against him by Wackenhut. As a consequence, the Assistant IG determined that Tiller was not entitled to any relief under the Part 708 regulations.

On October 28, 1997, Tiller submitted to the Assistant IG a request for a hearing under 10 C.F.R. § 708.9. The Assistant IG, in turn, transmitted the hearing request to OHA on November 17, 1997. The OHA Director appointed me as the hearing officer in this case on December 3, 1997.

Tiller filed a pre-hearing brief in this case on January 6, 1998, and amended that document twice, on January 20, 1998 and January 27, 1998. On February 6, 1998, Wackenhut tendered its pre- hearing submission in the case. On February 24 and 25, 1998, I convened a 22-hour hearing on the complaint in Aiken, South Carolina. At the conclusion of the hearing, I granted the parties' requests to file their closing arguments in written form and to submit post-hearing materials. With the filing of the last post-hearing submission on April 21, 1998, I closed the record in this case.

C. Factual Background

The record in this case is substantial and contains a plethora of material not relevant to the ultimate issues before me. The following summary focuses, therefore, only on those facts necessary for me to reach findings with respect to the issues defined by 10 C.F.R. Part 708. The relevant facts set forth below are extracted from the entire record developed in this case, including the investigative file generated by the Assistant IG, the submissions of the parties, and the transcript of the February 24 and 25, 1998 hearing (hereinafter Tr.).

In April 1991, Thomas Tiller accepted the position of Labor Relations Officer with Wackenhut at the DOE's Savannah River Site. Tiller quickly rose through the ranks in the labor relations field, assuming the position of Labor Relations Manager at the Site by 1992. As Wackenhut's Labor Relations Manager, Tiller served as a member of the management team that negotiated contracts with Wackenhut's guard union, the United Plant Guard Workers of America (UPGWA).

In April 1992 and February 1993, Tiller executed a Conflict of Interest Statement for Wackenhut, certifying, among other things that (1) neither he, nor any immediate family member had engaged, directly or indirectly, in any activity which created a conflict of interest, (2) he had read Wackenhut's Conflict of Interest Policy, and (3) he would immediately disclose any situation in the future that may possibly be interpreted as involving a Conflict of Interest. Exs. 39, 40. Wackenhut's Conflict of Interest Policy defines a conflict of interest, in relevant part, as follows:

any activity in which an employee . . . may participate that may conflict or may reasonably be interpreted to conflict with proper performance of their duty and responsibility to the Company, or with respect to transactions between the employee, the Company and other business interests . . .

Ex. 118 at 2. Among the examples cited in Wackenhut's Conflict of Interest Policy as activities that constitute a conflict of interest is a loan to or from any person or organization having any dealings with the Company.

In August 1993, Mr. Tiller encountered financial difficulties, leaving him unable to pay his bills. Ex. 9 at 26. Knowing that the local UPGWA union representative had assisted another employee during a time of financial need, Tiller asked the union representative for a $900 loan. Id. The union representative's wife advanced the $900 interest-free loan to Tiller; Tiller's wife repaid the loan two weeks thereafter. Id. Unknown to Tiller at the time, the local union representative photocopied the $900 check before giving it to Tiller and then showed a copy of the check to at least one UPGWA member. Tr. at 321-22. According

to a national UPGWA official and a senior Wackenhut official, the local union representative who loaned Tiller the $900 bragged, “I have Tiller in my pocket now and can get any information from him I want.” Tr. at 333, 545.

Senior managers at Wackenhut expressed disbelief when they first learned of Tiller’s loan during contract negotiations between the company and the UPGWA in October 1993. On or about October 12, 1993, two of Tiller’s fellow members on the contract negotiating team confronted Tiller about the loan. Wackenhut Hearing Ex.8; Ex. 19. Tiller confirmed that he had solicited and accepted the loan. Exs. 9, 19. Shortly thereafter, Wackenhut management removed Tiller from the negotiating team, orally advising him that he had compromised his position and damaged his credibility with the negotiating team. Wackenhut Hearing Ex. 8, Exs. 19, 23. When Tiller reportedly questioned whether he could be terminated for accepting the loan in question, a senior Wackenhut management official

responded affirmatively. Wackenhut Hearing Ex. 8.

Perplexed, Tiller queried why Wackenhut would punish him so harshly for a loan that he had already repaid when a senior Wackenhut management official had done something worse without any apparent adverse repercussion. Tiller then made the allegation that is at the heart of this case. Specifically, he disclosed to a Wackenhut manager that a senior management official at Wackenhut had (1) accepted a substantial quantity of stolen telephone wire from the same person who had lent Tiller $900 and (2) permitted that same person to install the telephone wire free of charge in the management official’s house. Tr. at 191. Tiller claims he acquired knowledge of the senior management official’s alleged questionable conduct sometime during the period of May to July 1993. Ex. 9. According to Tiller, at the conclusion of a labor relations meeting one Friday during that time period, Tiller overheard the local union representative offer to supply telephone wire to a senior Wackenhut management official and to install that wire free of charge in that official’s home that weekend. Id. Tiller alleges he saw the two parties to the alleged transaction wink and shake hands. Id. Tiller further claims he heard the local union official declare that the amount of material and labor at issue was $3,500. Id. The next Monday, according to Tiller, the local union official arrived at work looking tired and left work early that day as well. Id.; Ex. 1; Ex. 9 at 5. These observations led Tiller to conclude that the local union official had actually installed the telephone wire during the weekend. Tiller also asserts that the local union representative told him privately that he had obtained the telephone wire from his wife, a Southern Bell Telephone Company employee. Id. Tiller further relates that the local union representative implied to him that he had assisted in the installation of the telephone wire. Id.

The Wackenhut manager to whom Tiller disclosed the allegations regarding the “telephone wire transaction” dismissed Tiller’s allegations as baseless, believing them instead to be a thinly veiled attempt to justify his own error in accepting the loan. Wackenhut Hearing Ex. 8; Tr. at 177. It was a common belief, however, among UPGWA members that the local union representative had provided some telephone wiring to the senior Wackenhut management official in question. See Tr. at 302; 337; 385-87; 440.

In the days following Tiller’s admission that he had accepted the loan, Wackenhut management discussed Tiller’s fate with the company. During this time, Tiller lobbied to keep his job. Tiller pleaded with at least two managers to be retained with the company in any job, citing his need to support his family. Wackenhut Hearing Exs. 7& 8; Tr. at 192. Some urged that Tiller be terminated, an action sanctioned by the company’s Conflict of Interest Policy. Wackenhut Hearing Exs. 7 & 8; Ex. 23. One senior Wackenhut manager, however, persuaded the others that while Tiller may have damaged his labor relations career beyond repair, he was an otherwise loyal employee who had made valuable contributions to the company. Tr. at 192-93. Wackenhut ultimately decided to give Tiller a second chance with another division of the company.

In a memorandum dated October 25, 1993 entitled, “Management Direct Placement Reassignment,” Wackenhut first informed Tiller that he was being removed from his position as Labor Relations Manager

because he had violated Wackenhut's Conflict of Interest Policy. Ex. 44. Wackenhut then advised Tiller in the memorandum that it would offer him placement in the position of Personnel Security Supervisor, a position with a salary almost $20,000 per year less than the one from which he was being removed. The memorandum recited that if Tiller accepted the new position, Wackenhut would maintain Tiller at his higher salary for a period of time, after which the company would adjust his pay downward. The memorandum concluded by advising Tiller that if he chose to decline Wackenhut's offer of reassignment, he would be terminated immediately. Id. Tiller accepted the offer in writing. Id.

Tiller's transition to his new job position in the personnel security field can be best described as difficult and fraught with frustration. He received no formal training in his new field. Tr. at 381-383; 413. Instead, he was asked to review materials and ask others if he had questions. In addition, Tiller's lack of computer proficiency and poor typing skills compounded his frustration in acclimating to his new work environment. Moreover, since Tiller lacked substantive expertise in the personnel security field, it was challenging for him to supervise the two employees who looked to him for guidance in this area. Ex. 10, Tr. at 450, 456-57. Tiller's supervisor, however, believed Tiller was not making an effort to learn the responsibilities of his new job. Ex. 28. He believed that a person with Tiller's educational background (B.A. and J.D. degrees) and professional experience could develop a fairly sophisticated degree of expertise in the Personnel Security area through self- study.

Eight months after agreeing to accept the reassignment to the personnel security division, on June 12, 1994, Tiller filed a complaint with DOE's Office of Employee Concerns at the Savannah River Site. Two months later, in August 1994,(1) Tiller filed a Part 708 Whistleblower Complaint (1994 Whistleblower Complaint). In this complaint, Tiller claims that Wackenhut demoted him from Labor Relations Manager to a position for which he was not trained in retaliation for disclosing that a senior Wackenhut management official had engaged in unethical and possible criminal conduct.

In the months following the filing of his 1994 Whistleblower Complaint, Tiller alleges that Wackenhut retaliated against him for filing the Part 708 action in the following ways:

Wackenhut issued him a disciplinary letter on April 13, 1995;

Wackenhut officials treated him differently than other employees;

Wackenhut reduced his pay in 1995 and denied him merit increases;

Wackenhut gave him a poor performance evaluation in January 1996;

Wackenhut selected his personnel security supervisor's position for elimination in January 1996;

Wackenhut warned him in February 1996 of a possible further salary reduction and the elimination of his "exempt" status;

Wackenhut excluded him from supervisory training in March 1996;

Wackenhut managers criticized him for using the site medical facilities;

Wackenhut decertified him from its Human Reliability Program for alleged aberrent behavior and humiliated him in front of others while decertifying him.

On April 18, 1996, Tiller filed a second Whistleblower Complaint under 10 C.F.R. Part 708 in which he chronicles in specific detail the alleged acts of reprisal set forth immediately above (1996 Whistleblower Complaint). In his second Complaint, Tiller contends that Wackenhut initiated adverse personnel actions in retaliation for his filing the 1994 Whistleblower Complaint.

II. Legal Standards Governing This Case

As noted above, the regulations set forth in 10 C.F.R. Part 708 provide an administrative mechanism for the resolution of whistleblower complaints filed by employees of DOE contractors. The regulations specifically describe the respective burdens imposed on the complainant and the contractor with regard to their allegations and defenses and prescribe the criteria for reviewing and analyzing the allegations and defenses advanced.

A. The Complainant's Burden

It is the burden of the complainant under Part 708 to establish "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." 10 C.F.R. § 708.9(d). See Ronald Sorri, 23 DOE ¶ 87,503 (1993) (citing McCormick on Evidence § 339 at 439 (4th ed. 1992)). The term "preponderance of the evidence" means 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 burden of persuasion is allocated roughly equally between both parties. See 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). In the present case, Tiller must make two showings in connection with his 1994 Whistleblower Complaint. He must demonstrate at the outset that he disclosed information to Wackenhut which he in good faith believed evidences a violation of a law, rule or regulation. If Tiller fails to meet this threshold burden, his claim must be denied. If Tiller meets this burden, he must next prove that his disclosure was a contributing factor to his demotion and reassignment and its ancillary consequences, i.e., reduction in pay, damaged reputation, and exclusion from semi-annual bonus program. 10 C.F.R. § 708.9(d); see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). With respect to Tiller's 1996 Whistleblower Complaint, he must show that he participated in a Part 708 proceeding and that his participation was a contributing factor in the actions Wackenhut allegedly took or intended to take against him.

B. The Contractor's Burden

If Tiller meets his regulatory burden as set forth above, the burden then shifts to Wackenhut. The regulations require Wackenhut to prove by "clear and convincing" evidence that the company would have demoted or reassigned Tiller and taken other personnel actions against him even if Tiller had (1) not disclosed information about alleged unethical and criminal conduct by a senior Wackenhut official and (2) not filed his 1994 Whistleblower Complaint. "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

III. Analysis

I have thoroughly reviewed the extensive record in this proceeding, including the submissions tendered by the parties, the investigative file developed by the Assistant IG, and the testimony of the 33 witnesses presented at the hearing. After due deliberation, I conclude that Tiller is not entitled to any relief under 10 C.F.R. Part 708 on either of the two Whistleblower Complaints he filed against Wackenhut. The specific findings I make in support of my determination are discussed below.

A. The August 1994 Whistleblower Complaint

1. Tiller's Disclosure Regarding A Senior Management Official's Conduct

The regulations codified at 10 C.F.R. Part 708 provide, in pertinent part, as follows:

A DOE contractor covered by this part may not discharge or in any manner demote, reduce in pay . . . or otherwise discriminate against any employee because the employee . . . has (1) **disclosed to . . . the contractor information that the employee in good faith believes evidences a violation of any law, rule or regulation . . .**

10 C.F.R. §708.5(a)(1)(i)(emphasis added). It is Tiller's contention that he made a protected disclosure as defined above when he told a Wackenhut manager that a senior Wackenhut management official had accepted stolen goods (telephone wire) and services valued at $3,500 from the local union representative. The record indicates that Tiller disclosed this allegation to a Wackenhut manager prior to his demotion and reassignment to the Personnel Security Department. Specifically, Tiller communicated the information about the senior Wackenhut official either immediately after he was removed from the negotiating team on October 12, 1993 or shortly thereafter. Tr. at 173. According to Tiller, the senior Wackenhut management official's conduct violated Wackenhut's Conflict of Interest Policy which prohibits the receipt of services, gratuities, or gifts of more than nominal value. Ex. 118. In addition, Tiller believed that the telephone wire given by the local union official to the senior Wackenhut management official was stolen from the telephone company where the local union representative's wife worked.

Whether Tiller's beliefs as set forth above were factually accurate is irrelevant for purposes of Part 708. The focus instead is whether Tiller had a good faith belief that the senior Wackenhut management official's conduct in question violated a law, rule, or regulation. After reviewing the record, I am convinced that Tiller had a "good faith belief" that the senior Wackenhut management official's conduct in question (1) violated Wackenhut's Conflict of Interest Policy and (2) possibly constituted criminal activity. First, Tiller formed his "good faith" belief when he overheard the local union representative offer to supply and install telephone wire in the senior Wackenhut management official's house that was under construction at the time. Second, Tiller heard the local union representative state that he could save the senior Wackenhut management official $3,500 if the official accepted his offer of goods and services. Third, Tiller observed the two parties shake hands and wink, from which he inferred a consummation of the "deal." Fourth, Tiller's observations of the local union official's abbreviated work schedule and seeming fatigue on the Monday following the Friday Tiller overheard the "wire transaction" discussion fueled his belief that the transaction had occurred. Fifth, several union members testified that they had heard at the time in question that the local union official had supplied and/or installed telephone wire in the senior Wackenhut management official's home. Id. at 286-88; 302; 337-38; 385-89.

With respect to Tiller's contention that the local union official had implied to him that he had installed the wire into the senior management official's home, I noted with interest the testimony of a Wackenhut manager who characterized the local union representative as "a person who knew how to manipulate situations." Wackenhut Hearing Ex. 8; Tr. at 168. While that same manager questioned the factual accuracy of Tiller's charge, the manager admitted that it was possible that the local union representative did tell Tiller that he had done some work on the senior management official's home. Id. The manager also opined that Tiller accepted things at face value without double- checking the accuracy of the information conveyed to him. Id. The suggestion of Tiller's gullibility only serves to reinforce my view that Tiller earnestly believed the information he conveyed regarding what he perceived to be improprieties on the part of a senior Wackenhut management official. (2)

In sum, the substance of what Tiller overheard in discussions between the local union representative and the senior Wackenhut management official, the general observations Tiller made of the two parties to the alleged "telephone wire" transaction, and other persons' corroborating testimony about the transaction at issue establish Tiller's good faith belief that the information he communicated to a Wackenhut manager evidenced a violation of a law, rule or regulation. Accordingly, I find that Tiller made a protected disclosure as defined by 10 C.F.R. Part 708.

2. Contributing Factor

A protected disclosure may be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personal action." Ronald A. Sorri, 23 DOE ¶ 87,503 (1993) citing McDaid v. Dept't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990); see also County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (County). In addition, "temporal proximity" between a protected disclosure and an alleged reprisal is "sufficient as a matter of law to establish the final required element in a prima facie case for retaliatory discharge." County, 886 F. 2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that there is clearly temporal proximity between Tiller's protected disclosure on or about October 12, 1993 and Tiller's subsequent demotion and reassignment on October 25, 1993. While there is conflicting testimony in the record as to how many Wackenhut senior officials knew of Tiller's protected disclosure, it is clear that at least one Wackenhut manager had actual knowledge of Tiller's disclosure. That manager is the one to whom Tiller made the disclosure around October 12, 1993, and is the same manager who persuaded others at Wackenhut to reassign Tiller instead of firing him.

Based on the foregoing, I find Tiller has established a prima facie case that his protected disclosure was a contributing factor to his demotion and reassignment. The burden now shifts to Wackenhut to prove by clear and convincing evidence that it would have demoted and reassigned Tiller absent his protected disclosure. 10 C.F.R. § 708.9(d).

3. Justification for Tiller's Demotion and Reassignment

Wackenhut asserts that it removed Tiller from his Labor Relations position and reassigned him to the Personnel Security Department solely because he had violated Wackenhut's Conflict of Interest Policy. Wackenhut explained that Tiller's acceptance of a loan from the local union representative's wife clearly constituted a conflict of interest as defined in Exhibit 118, and potentially subjected him to blackmail. Wackenhut Ex. 8; Hearing Tr. at 124 and 154. Wackenhut elicited testimony at the hearing from a national UPGWA official and a senior Wackenhut official who recounted the local union official's expression of glee, "I have Tiller in my pocket and can get any information from him that I want." Tr. at 333, 545. (3) Other evidence shows that the local union official photocopied the $900 check and showed the copy to at least one UPGWA member. These facts support Wackenhut's position that Tiller's acceptance of the $900 loan destroyed not only the arms-length labor management relationship required by the National Labor Relations Act but also Wackenhut's trust in Tiller's judgment as a Labor Relations Manager. Wackenhut Closing Statement at 3.

The record is clear, and Tiller now admits,(4) that Wackenhut would have been justified in terminating him for violating the company's Conflict-of-Interest policy. In fact, even before Tiller made his protected disclosure, a Wackenhut manager told Tiller that he could be terminated for having solicited and accepted the loan from the local union official. Wackenhut Hearing Ex. 8. But instead of firing him, Wackenhut responded to Tiller's plea to keep him employed in any job. The record shows that after Wackenhut decided to retain Tiller, it looked for vacant management positions with an eye toward minimizing any salary decrease resulting from the reassignment. Tr. at 179. The only position available at the time was the one to which Tiller was ultimately reassigned. Wackenhut supplied evidence that there had been five or six other cases where managers had encountered some "difficulties," and the company retained them in non-management positions. There is absolutely nothing in the record to suggest that Wackenhut reassigned Tiller in retaliation for making a protected disclosure.

In conclusion, the totality of the evidence convinces me that Wackenhut had clear and independent grounds for reassigning Tiller to the Personnel Security Supervisor position. It appears that Wackenhut was seeking a just solution to an unfortunate situation when it demoted and reassigned him. I therefore find that Wackenhut has met its burden of showing by clear and convincing evidence that it would have

demoted and reassigned Tiller even absent his protected disclosure. In addition, I find that the other acts of reprisal about which Tiller complains, i.e., reduction in pay, damaged reputation, exclusion from management semi-annual bonus, are simply natural consequences of the reassignment. I conclude, therefore, that Wackenhut has met its evidentiary burden on these allegations as well.

B. Tiller's 1996 Whistleblower Complaint

1. Protected Activity

The regulations set forth at 10 C.F.R. § 708.5(a)(2) state, in relevant part, that an employee's participation ". . . in a proceeding conducted pursuant to this part" is considered a protected activity. It is uncontested that Tiller filed a Part 708 Complaint on August 31, 1994 and that officials in Tiller's management chain knew he had filed that complaint. Exs. 1, 12, 24, 27, 63. The preponderance of evidence demonstrates, therefore, that Tiller engaged in an activity protected under 10 C.F.R. Part 708.

2. Contributing Factor

According to Tiller, after he filed his 1994 Whistleblower Complaint, Wackenhut began a "systematic, military" campaign to "undermine, harass, intimidate" and otherwise discriminate against him in violation of 10 C.F.R. § 708.5(a). Ex. 2; Tiller's Closing Brief at 1; Tiller's Post- Hearing Brief at 1. Specifically, Tiller charges that Wackenhut engaged in a pattern of discriminatory acts which were motivated by a retaliatory animus stemming from his filing of the 1994 Whistleblower Complaint. To support his position in this regard, he highlights a number of incidents in his 1996 Whistleblower Complaint which he characterizes as retaliatory.

The record demonstrates unequivocally that Wackenhut management had actual knowledge of Tiller's complaint filing, and that Tiller alluded to his 1994 Whistleblower Complaint in the workplace. When viewing each alleged discriminatory incident in isolation, it is not readily apparent that there is "temporal proximity" between those alleged incidents and the filing of his 1994 Whistleblower Complaint. However, the record shows that beginning in the fall of 1994, Tiller's supervisor met with him to discuss concerns about his performance in the personnel security department. Tr. at 424. This fall meeting occurred close in time to Tiller's complaint filing on August 31, 1994. If I view all the alleged discriminatory acts that are the subject of his 1996 Whistleblower Complaint in their totality, and in conjunction with entire record in this case, I find that a reasonable person could conclude that Tiller's filing of his 1994 Whistleblower Complaint contributed to the overall pattern of alleged discriminatory acts of which he complains. See Ronald Sorri, 23 DOE ¶ 87,503 at 89,010 (1993).

3. Wackenhut's Justification for its Various Actions

As noted in Section II. B. above, once Tiller has met his burden under 10 C.F.R. § 708.9(d), the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the personnel actions against Tiller absent Tiller's protected activity. While it is arguable that some of the alleged incidents of which Tiller complains may not technically be considered "personnel actions," I have elected to analyze all of the alleged discriminatory acts set forth in Tiller's 1996 Whistleblower Complaint.

a. Disciplinary Letter

Tiller complains that Wackenhut issued him a disciplinary letter on April 13, 1995, citing his absence from work on April 6, 1995 as its justification. Ex. 2. On April 6, 1995, the Personnel Security Department was scheduled to undergo an audit. Tiller was told that his presence was required at the audit, as he was the supervisor of the department subject to the inspection. Ex. 73. Tiller failed to report to work on the day of the audit and neglected to inform Wackenhut of his absence. Tiller testified that he was ill on the day in

question and failed to notify Wackenhut of his absence because he had over-medicated himself. Tr. at 84; Ex. 9.

Testimony in the record establishes that Tiller's supervisors were extremely dismayed at his dereliction of duty in not advising them of his illness on the day of the audit. Several persons testified that Tiller's absence placed an unwarranted burden on others to ensure the audit went smoothly. Tiller's immediate supervisor testified that he had advocated a harsher form of punishment than the disciplinary letter, but that more senior Wackenhut officials decided on the less severe disciplinary action. Tr. at 497.

The weight of the evidence demonstrates, to my satisfaction, that the reasons Wackenhut issued Tiller a disciplinary letter on April 13, 1995 were that Tiller had failed to report to work for the audit and had neglected to call in sick on that day. I find, therefore, that Wackenhut has proven by clear and convincing evidence that it would have issued Tiller the subject disciplinary letter absent Tiller's filing of his 1994 Whistleblower Complaint.

b. Differential Treatment by Management

Tiller asserts that he was treated differently than other employees after he filed his 1994 Whistleblower Complaint. Specifically, he alleges that his supervisors required him to report to senior management officials' offices for discussions, and that they escorted him there. Ex. 9.

On March 21, 1995, Tiller claims he was escorted by his supervisor to a senior manager's office where he was told that his position of Personnel Security Supervisor would be eliminated as the result of a restructuring proposal. Tr. at 44. Tiller viewed the manner in which he was escorted to this meeting as well as the fact that two managers were present throughout the meeting as intimidating and retaliatory. Id., Tr. at 45. The evidence in the record reflects, however, that the senior manager who requested the March 21, 1995 meeting, did so as a matter of Wackenhut policy, which provides that a director "advise affected employees in person of the potential effects of the restructuring." Wackenhut Ex. 24. According to the senior manager who called the meeting, Tiller's supervisor and the manager of Tiller's department were present because the senior manager wanted them to "witness the meeting and know the status of the restructuring proposals." Id. The record contains no further evidence that would give merit to Tiller's claim that this meeting was an act of retaliation.

Tiller further relates that he was summoned to meet with a senior manager on February 29, 1996 at which time a senior manager reprimanded him for discussing labor relations issues with the Union president. Tiller also viewed this meeting as intimidating and another act of retaliation. The evidence in the record reflects that the senior manager requested the meeting only after information surfaced during a Wackenhut law enforcement investigation that Tiller had engaged in labor relation discussions with a union official. Wackenhut Hearing Ex. 8. The record reveals nothing sinister about this meeting. It was appropriate for Tiller's line managers to advise him of the prohibition on his participation in labor relation matters. I conclude, therefore, that there was nothing even remotely retaliatory about the February 29 meeting.

Finally, Tiller complains that when he received the April 13, 1995 disciplinary letter referenced in Section III.B.3.a. above, several managers in his supervisory chain were present. Ex. 9. As mentioned above, Wackenhut had a valid reason for issuing a disciplinary letter to Tiller on April 13, 1995 in light of his failure to call in sick on the day of a scheduled audit. While Tiller may have felt uncomfortable with the presence of the managers during the meeting, I find that Wackenhut was justified in having several managers present to discuss this serious personnel action.

In all of the meetings discussed above, I find that Wackenhut managers had valid reasons to meet with Tiller and that these meetings would have occurred even if Tiller had not filed his 1994 Whistleblower Complaint.

c. Reduction in Pay in 1995 and Denial of Merit Increases

Tiller asserts that in April 1995, Wackenhut reduced his pay by approximately $18,000. Ex. 9. He further maintains that Wackenhut denied him at least two merit increases. Ex. 2 and 9. There is simply no evidence in the record to support Tiller's claim that his reduction in pay was a retaliatory act. As discussed above in Section III.A.3 above, Tiller's salary was reduced as a consequence of his demotion and reassignment to the position of Personnel Security Supervisor on October 23, 1993. Therefore, I will not analyze this claim further.

In addition, a review of the record does not support Tiller's claim that his filing of his complaint contributed, in any way, to his being denied two merit increases in 1994 and 1995. According to the evidence in the record, Tiller did not receive an annual performance review for 1994. Wackenhut considered this year as a "learning period" for Tiller to adjust and familiarize himself to his new position. Tr. at 491. Moreover, the record reflects that Tiller's salary had not yet been reduced during 1994, so his salary exceeded the top salary level of his new position as Personnel Security Supervisor. Tr. at 157. Thus, Tiller would not have been eligible to receive a merit pay increase for 1994. As for 1995, the evidence in the record indicates that Tiller received a poor performance review for that year, a rating that I determine below to be supported by the evidence in the record. Ex. 36. Thus, Wackenhut has met its burden by showing that there were independent, non-retaliatory reasons why Tiller would not have been eligible to receive a merit pay increase for 1994 and 1995.

d. Poor Performance Evaluation for the year 1995

Tiller relates that he received a poor performance evaluation in January 1996 for the period covering the year 1995. Ex. 9 at 22. According to Tiller, he lodged his disagreement with the evaluation at the time he received it, complaining that he was unfairly judged on only three projects during the 12- month period and that he had received no constructive criticism of his work prior to his receipt of the performance evaluation. See Ex. 37. It is Tiller's contention that the performance appraisal was given in retaliation for the filing his 1994 Whistleblower Complaint.

There is not a scintilla of evidence to support Tiller's contention that the performance evaluation in question was linked to Tiller's 1994 Whistleblower Complaint. To the contrary, the record contains overwhelming evidence that Tiller's performance in the Personnel Security Program was deficient in many respects. The following comment appears on the evaluation in question: "Mr. Tiller has been with the department two years and is still not thoroughly fimiliar [sic] with the elements of the Personnel Security Program. He needs to improve his job knowledge, commence tasks in a timely manner, [a]nd utlilize [sic] better judgement in prioritizing his task[s]." Ex. 36. Additional comments appended to the evaluation detail deficiencies in Tiller's work product on three projects. At the hearing, Tiller's supervisor related that he approached Tiller several times during 1995 to address concerns about Tiller's work. Tr. at 501. On each occasion, according to the supervisor, Tiller responded, "you're harassing me, you'll hear from my lawyer." Id. The supervisor also pointed to Exhibit 77, a memorandum he had written to Tiller in May 1995, as evidence that he had tried to address his concerns in writing. The memorandum outlined the specific responsibilities of the Personnel Security Supervisor's Position. The supervisor testified that he had written the memorandum after he uncovered a number of problems with Tiller's performance including, among other things, Tiller's failure to notify individuals about restrictions placed on them regarding their use of weapons, and his failure to notify the DOE promptly in cases where persons were decertified from Wackenhut's Human Reliability Program. Tr. at 502-506. The supervisor also cited Tiller's failure to report to work on April 6, 1995, knowing that a scheduled audit of his department was to occur, as evidence of marginal job performance. Id. at 494-498. Finally, there is evidence that Tiller was absent from work with some frequency during 1995. Id. at 452,455; Ex. 27.

Based on the foregoing, I find that the weight of the evidence conclusively demonstrates that Wackenhut has met its burden with respect to the performance evaluation at issue.

e. Elimination of Tiller's Supervisory Responsibilities

Tiller charges that Wackenhut eliminated the supervisory component of his Personnel Security position in January 1996 in retaliation for his filing the 1994 Whistleblower Complaint. Ex. 9 at 21- 22. The record shows, however, that the DOE criticized Wackenhut for its supervisor-to-subordinate ratio during the period in question and that the company tried to be responsive to that criticism. Tr. at 158. The record further reflects that there were several divisions in the company, including the Personnel Security Division, where supervisors supervised only one or two people. Id. As a consequence, beginning in 1996, Wackenhut began to flatten its organizational structure. Wackenhut Hearing Ex. 11. Many departments at Wackenhut were affected by the restructuring. Id. In the Personnel Security Department, Wackenhut eliminated four of five supervisory positions, including the one occupied by Tiller. There is simply no evidence to suggest that Wackenhut targeted Tiller's supervisory position during the restructuring process in retaliation for the filing of his 1994 Whistleblower Complaint. Like others affected by the restructuring, Tiller maintained his job and pay level after his supervisory responsibilities disappeared. After reviewing the record, I find that Wackenhut has proven by clear and convincing evidence that it would have eliminated Tiller's supervisory responsibilities absent the filing of his 1994 Whistleblower Complaint.

f. Warning of Potential Salary Reduction and Elimination of "Exempt" Status

Tiller alleges that in February 1996 Wackenhut warned him of a possible further salary reduction and the potential elimination of his "exempt" status pending the results of a "HAY job study" of his newly reorganized position. Ex. 2. This charge is inextricably intertwined with the allegation discussed in Section III.B.3.e. above which I found to be without merit. I will, therefore, not analyze this issue further.

g. Exclusion from Supervisory Training

Tiller complains further that he was excluded from attending supervisory training in March 1996. He maintains that this action constituted retaliation for his filing his 1994 Whistleblower Complaint. As discussed in Section III.B.3.e. above, I found that Wackenhut had independent, non-retaliatory justifications for the reorganization that led to Tiller's loss of supervisory responsibilities. It is only reasonable that Tiller would not participate in supervisory training once he lost his supervisory status. My finding in Section III.B.2.e. above dictates my finding here that Wackenhut has met its burden.

h. Criticism of Tiller's Use of Medical Facilities

Tiller states that his personal physician provided documentation to Wackenhut requesting that Tiller have his blood pressure taken three times each day. Ex. 9 at 20. According to Tiller, beginning in December 1995 or January 1996, his immediate supervisor questioned the length of time he was absent from the office to have his pressure readings taken at the medical facility on site. Id. Eventually, Tiller's second-line supervisor suggested that Tiller consider having his blood pressure monitored at the fitness facility instead of the medical facility on site as the fitness facility was closer to Tiller's office than the on-site medical facility. Id. at 21. Tiller alleged that Wackenhut's attempts to prevent his use of the on-site medical facility stemmed from the filing of his 1994 Whistleblower Complaint.

The record is clear that no manager at Wackenhut ever denied Tiller access to any medical facilities. Tr. at 585-86; 589. While two managers testified that they suggested Tiller use a site closer to his work to have his blood pressure checked, Wackenhut did not mandate that course of action.(5) Further, Wackenhut suggested that Tiller use the closer facility only to minimize the amount of time he was absent from the workplace. Id. at 589-590. I find that Wackenhut was justified in making the suggestion that Tiller use a closer facility and therefore met its burden on this issue.

i. Tiller's Temporary Decertification from the Human Reliability Program and the Humiliation He Suffered as a Consequence of that Action.

Tiller claims that his decertification from the Human Reliability Program (HRP)(6)on March 14, 1996 and the consequential humiliation he suffered during the decertification process was intimately connected with his filing of the 1994 Whistleblower Complaint. He points to the fact that the DOE and Wackenhut approved the reinstatement of his HRP certification within a short period after the decertification process as evidence that Wackenhut decertified him in retaliation for his filing of the 1994 Whistleblower Complaint.

The DOE is extremely sensitive to charges of irregularities in any process involving special reliability certification or access authorization imposed by DOE or its contractors as a condition of employment. Prior to the hearing in this case, I was concerned that the Wackenhut's decertification of Tiller was suspect. Therefore, I advised both parties that I would carefully examine the circumstances surrounding Tiller's temporary decertification from the HRP and suggested that both parties focus on this issue at the hearing.

Tiller's decertification from the HRP stemmed from a letter he authored on March 8, 1996 and sent to a senior Wackenhut manager. Relevant excerpts of the letter are set forth below:

. . . As a professing Christian, how can you allow yourself to be entangled with the unrighteous management cover-up. . . you know that upper management has used me as a "scapegoat" and [three senior Wackenhut managers] are guilty as sin. As a man of God, you are going to witness the move of Almighty God on my behalf like you have never seen. If any of these management personnel involved in this conspiracy are to be released, they are going to have to step forward and confess their mis-management cover-up actions. . .

Ex. 95. On the same day, Tiller wrote a second letter to the addressee of the letter described above. Ex. 96. In the second letter, Tiller complained about his hostile work environment and expressed his belief that he was being singled out for "blowing the whistle" on the senior Wackenhut management official's unethical conduct.

The Wackenhut manager who received Tiller's March 8, 1996 letters claimed he felt threatened by the language contained in the letters and, as a result, contacted an official in the company's Personnel Security Department. Wackenhut Hearing Ex. 8; Tr. at 160, 221. The Personnel Security Department official, in turn, took the letters to the Site Medical Director and a staff psychologist. Id. Both professionals agreed that the language contained in one of the letters could be considered a veiled threat and that Tiller should be evaluated by a competent medical professional to determine his mental state. Id. at 201-02, 210, 212. Based on the concerns expressed by the two professionals, Wackenhut decided to decertify Tiller from its HRP, citing his "aberrant behavior" as justification. Ex. 102.

Wackenhut informed Tiller of the company's decision to suspend him with pay and decertify him from the HRP on March 14, 1996 when they summoned him back from a luncheon engagement. Ex. 9 at 25. After completing the decertification paperwork in a conference room, two Wackenhut officials and an armed security protection officer escorted Tiller to his office. Wackenhut then searched Tiller's office before escorting Tiller to his car. Tiller maintains his co-workers were observing all this activity which was very embarrassing for him. Next, Tiller's car was searched for weapons. As Tiller was driving to leave the site, a security officer followed Tiller's car to the exit barricade where the car was stopped and searched again. The second search was for sensitive documents or Wackenhut materials. Wackenhut confiscated several documents.

As required, Tiller subsequently underwent an evaluation by a clinical psychologist who opined that while Tiller was under stress, he was neither a danger to anyone nor required any psychological treatment. Ex. 107. Wackenhut, with permission from the DOE, recertified Tiller based on the findings of the clinical psychologist.

Testimony from most of those involved in the decertification process has convinced me that Wackenhut's

decision to decertify Tiller and the manner in which it executed that decertification was

not in retaliation for Tiller's filing of the 1994 Whistleblower Complaint. At the hearing, officials from Wackenhut's Personnel Security Department emphasized that they are not medical experts, and that they always defer to medical experts in cases where there is potential employee violence, such as this one. Tr. at 221. There is ample testimonial and documentary evidence that Wackenhut consulted with medical and psychological authorities for opinions before they initiated the decertification and suspension actions. See Exs. 13, 99, 100; Tr. at 149-195; 208-213. While it is unfortunate that the medical experts neither spoke to Tiller before they rendered their opinions, nor realized that he was the same person with whom they dealt on a routine basis on HRP matters, it is uncontested that the medical experts expressed concern about the content of the letters after reviewing them. The experts' concern was sufficient under Wackenhut policy to allow the appropriate officials in Wackenhut's Personnel Security Department to label Tiller's conduct "aberrant behavior" and to commence the decertification process. See Ex. 136. Moreover, the armed security escorts and the searches conducted of Tiller's office and car appear to comply with Wackenhut's established company procedure in cases where there is a concern about employee violence. Id. While Tiller is adamant that a second search of his car at the exit barricade was unreasonable and designed to further humiliate him, I do not agree. Testimonial evidence indicates someone observed Tiller carrying documents to his car and that the first search of his car was for weapons only. It was certainly reasonable, therefore, for Wackenhut to re-search the car for proprietary documents. Moreover, since Tiller occupied a position in the Personnel Security Department where he had access to confidential, sensitive documents, Wackenhut had an interest in ensuring no such documents were in Tiller's possession during the time of his suspension. It is also significant, in my opinion, that Wackenhut did, in fact, confiscate some materials from Tiller at the exit barricade.

In sum, I find that Wackenhut had a legitimate business-related reason for decertifying Tiller from Wackenhut's HRP, and complied fully with its established company procedures in the decertification process. Accordingly, I conclude that Wackenhut has proven by clear and convincing evidence that it would have decertified Tiller from the HRP even if he had not filed his 1994 Whistleblower Complaint.

IV. Conclusion

As set forth above, I have determined that Tiller made one protected disclosure and has proven by a preponderance of evidence that the protected disclosure was a contributing factor to his demotion and reassignment. I determined, however, that Wackenhut has provided clear and convincing evidence to demonstrate that it would have demoted and reassigned Tiller even if he had not made his protected disclosure.

I also determined that Tiller participated in a protected activity when he filed his Part 708 Complaint in August 1994. I further determined that Tiller's 1994 complaint filing contributed to the pattern of alleged discriminatory acts set forth in his 1996 Whistleblower Complaint. I determined, however, that Wackenhut has proven by clear and convincing evidence that it would have taken the actions enumerated in Tiller's 1996 Whistleblower Complaint even if Tiller had not filed his 1994 Whistleblower Complaint.

In summary, I find that Tiller has failed to establish the existence of any violations of the DOE's Contractor Employee Protection Program for which relief is warranted under § 708.10. While it is apparent to me that Tiller has experienced much personal and professional frustration since his demotion and reassignment and that he genuinely views Wackenhut's actions in a conspiratorial, retaliatory light, there is simply no recourse for him within the confines of a Part 708 proceeding.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Thomas T. Tiller under 10 C.F.R. Part 708 is hereby denied.

(2) This is an Initial Agency Decision, which shall become the Final Decision of the Department of

Energy denying the complaint unless, within five days of its receipt, a written request for review of this Decision by the Secretary of Energy or his designee is filed with the Assistant Inspector General for Assessments, Office of the Inspector General, Department of Energy.

Ann S. Augustyn

Hearing Officer

Office of Hearings and Appeals

Date: May 21, 1998

(1)The record is unclear whether Tiller attempted to resolve his dispute through an internal company grievance procedure, thereby tolling the 60-day deadline for filing complaints pursuant to 10 C.F.R. § 708.6(d). I note that in his Complaint, Tiller attests that "he made numerous attempts to resolve this complaint since December 1993 by mutual means without success." Ex. 2. Since the Assistant IG accepted the Complaint for processing pursuant to 10 C.F.R. § 708.8, I will presume the action was timely filed.

(2)Wackenhut argues that no reasonable person could believe that the alleged "telephone wire" transaction occurred. See Wackenhut Pre-Hearing Brief at 2. As an initial matter, the Part 708 regulations as currently written apply a "good faith belief" standard, not a reasonable belief standard. I note that the Part 708 regulations are currently being revised; however, any proposed revisions do not apply here. See generally 62 Fed. Reg. 245 (1997) (to be codified at 10 C.F.R. pt. 708) (proposed Dec. 22, 1997) (proposed rule would further define the nature of the "disclosure" under Section 708.5(a)(1), requiring that the employee's disclosure involves information he or she "reasonably and in good faith believes" is true.). Interestingly, the senior management official admitted at the hearing that he had indeed accepted a small quantity of telephone wire allegedly of nominal value from the local union official, but returned that wire almost one year later. Tr. at 116-117; 593. This admission reinforces my finding that Tiller had a "good faith belief" that the wire transaction had occurred and would even lend support to a finding that Tiller had a reasonable belief that the wire transaction had occurred.

(3)The local union official denied he made the statement in question. Tr. at 355. I have reservations about the local union official's credibility, however. Some of his responses at the hearing appeared to be evasive (Tr. at 351, 354), others directly contradicted testimony I find to be compelling (compare Tr. at 326 with Tr. at 351). Finally, I am mindful of the testimony of a Wackenhut manager who characterized the local union official as someone who knew how to manipulate situations. At the hearing, I also asked a union member for his opinion as to whether the local union official was an honest and credible individual in his dealings with the union membership. Id. at 399. The response was "sometimes." Id. All these factors lead me to disbelieve the local union official's denial of his statement that he had Tiller "in his pocket."

(4)At one point in the proceeding, Tiller tried to justify his actions by stating he thought he was borrowing money from a friend. My review of Wackenhut's policy reveals no exception based on friendship. Even if such an exception were in Wackenhut's policy, I am skeptical that a friendship of any substance existed between Tiller and the local union representative. I think it is highly unusual that a true friend would brag that he had his friend in his pocket and could get any information from him that he wanted. I note, also, that the local union official made no mention in his hearing testimony that the loan was motivated by friendship.

(5)I noted with interest that while Tiller complains about being asked to use a facility closer to his work site to monitor his blood pressure, he apparently did not appreciate that Wackenhut accommodated his medical condition by permitting him to work half days for a period of time because of his hypertension. Id. at 590. During the period he worked half days, he easily could have monitored his blood pressure on his own time before and after work.

(6)"The Wackenhut Human Reliability Program was developed to impose safeguards against employee

complicity in nuclear theft, sabotage, or compromises in security." Ex. 136. The program, along with others, "is designed for early recognition of potential problems associated with employee mental or physical behavior that could threaten DOE security interests." Id. "The program monitors each individual's behavior, judgement, trustworthiness, attitude, and overall reliability, while performing nuclear and transportational-related duties on a day-to-day basis." Id.