Case No. VWA-0031

August 6, 1999

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Petitioner: Barbara Nabb

Date of Filing: February 25, 1999

Case Number: VWA-0031

I. Introduction

This Decision involves a complaint filed by Mrs. Barbara Nabb under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. In her complaint, Mrs. Nabb contends that reprisals were taken against her after she made certain disclosures concerning possible health and safety violations and mismanagement at the Rocky Flats Environmental Technology Site (Rocky Flats). These reprisals allegedly were taken by EG&G Rocky Flats, Inc. (EG&G) and by Kaiser-Hill Company, LLC (Kaiser Hill). EG&G was the managing and operating contractor of Rocky Flats beginning in December 1989. On April 4, 1995, Kaiser-Hill was awarded a contract to succeed EG&G as managing and integration contractor at Rocky Flats. Kaiser-Hill assumed EG&G's management responsibilities at Rocky Flats on July 1, 1995.

From January 1990 until October 1993, Mrs. Nabb held the position of Machinist. In October 1993, her job title was changed to Production Specialist. In November 1994, as a result of a Reduction in Force, she chose to "bump" into the position of Radiological Control Technician or RCT. On September 30, 1994, Mrs. Nabb provided information regarding her Part 708 complaint pursuant to the DOE Rocky Flats Field Office's Employee Concerns Manager. She completed the filing of her Part 708 complaint with a signed affirmation on January 12, 1995.

Acting on Mrs. Nabb's complaint, the DOE's Office of the Inspector General investigated this matter and on January 20, 1999, the Inspector General's Office of Inspections issued its findings in a Report of Inquiry and Recommendations (the RIR). The RIR found that Mrs. Nabb made several disclosures that constitute protected disclosures pursuant to Part 708. However, with respect to the alleged reprisals, the RIR found that Mrs. Nabb has failed to prove by a preponderance of the evidence that the alleged reprisals

involving temporary reassignments were the result of her protected activity. The RIR also found with respect to management's decision to terminate Mrs. Nabb's training for the position of Radiological Control Technician (RCT), that there is clear and convincing evidence that management's decision was not retaliatory pursuant to Part 708. As a result of these findings, the RIR recommends that Mrs. Nabb's request for relief be denied.

In response to the Office of Inspections' RIR, Mrs. Nabb requested a hearing before the Office of Hearings

and Appeals (OHA) under 10 C.F.R. § 708.9(a) concerning the findings of the RIR and additional allegations of reprisals. Both EG&G and Kaiser Hill also participated fully as parties in the OHA proceeding. The hearing in this case was held on April 28 and 29, 1999 at Rocky Flats. After consideration of the RIR, the briefs of the parties, the testimony given at the hearing, and the parties' post-hearing submissions, I find that EG&G and Kaiser Hill took acts of reprisal against Mrs. Nabb prohibited under 10 C.F.R. § 708.5, and that Mrs. Nabb is entitled to remedial action from these contractors.

II. Background

A. The DOE Contractor Employee Protection Program

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[] fraud, mismanagement, waste and abuse" at DOE's Government-owned or -leased facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices by protecting those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure will be directed by the DOE to provide relief to the complainant. 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.

B. Factual Background

1. The Findings of the RIR

The Office of Inspections investigated Mrs. Nabb's Part 708 complaint by conducting interviews with Mrs. Nabb, EG&G officials, and certain of Mrs. Nabb's co-workers at Rocky Flats. It also collected relevant documentary evidence. This information and the Office of Inspections' analysis of this information is presented in the RIR and its accompanying exhibits. The RIR finds that Mrs. Nabb made several disclosures that constitute protected disclosures pursuant to Part 708. In this regard, the RIR finds that:

(1) Mrs. Nabb's refusal to sign allegedly fraudulent travel documentation ("travelers") for hazardous waste drums during the period June to September 1993 constituted engaging in protected activity;

(2) Mrs. Nabb made allegations of waste drum "traveler" fraud to her supervisors and managers from September 1993 through December 1994 and these allegations constituted protected disclosures;

(3) Mrs. Nabb made allegations in May 1994 to EG&G managers concerning time card fraud that constituted protected disclosures; and

(4) Mrs. Nabb's statements to DOE official Marcy Nicks in December 1994 and to a management official in November 1995 concerning the contractors' alleged misuse of "3161 money" (funds specifically allocated for the retraining of certain employees) constituted protected disclosures.

RIR at pp. 4-9. In her original Part 708 Complaint, Mrs. Nabb alleged that several reprisals were taken against her by management officials of EG&G and Kaiser-Hill as a consequence of her making these disclosures. In this regard, the RIR finds that Mrs. Nabb's claims of reprisals included the following:

(1) In May 1994, EG&G refused to credit the time off that she took to attend the funeral of her brother-in-law as special "funeral leave" and instead required her to use her regular vacation leave for this purpose;

(2) During the summer of 1994, she was assigned, along with two or three other employees, to Warehouse

031 to clean equipment, an assignment that she considered to be undesirable;

(3) From August 1994, for a period of two or three months, she asserts that she was assigned to Property Utilization and Disposal (PU&D), which she regarded as an undesirable assignment;

(4) During the winter months of 1995, while undergoing RCT training, she was assigned by Mr. Kevin Konzen, Radiological Operations Compliance Section Manager, to what she considered to be an undesirable outside work assignment at "Ponds/Pads" (she was shortly moved to Building 776); and

(5) In 1995, shortly after Kaiser-Hill succeeded EG&G as managing contractor, she was informed by management that she would not be provided with the opportunity to complete her RCT training and thereby qualify for an RCT II job classification at a pay level of 16.

RIR at pp. 9-18. With respect to these alleged reprisals, the RIR found that Mrs. Nabb had failed to prove by a preponderance of the evidence that the denial of "funeral leave", her temporary reassignment to Warehouse 031, her reassignment from Building 460 to the PU&D, and her assignment to "Ponds/Pads" were the result of her protected activity. The RIR also found that there is clear and convincing evidence that management's decision to terminate Mrs. Nabb's RCT training was not retaliatory pursuant to Part 708. As a result of these findings, the RIR recommended that Mrs. Nabb's request for relief be denied.

2. The Contentions of the Complainant and the Contractors

In letter to the Office of Inspections dated February 10, 1999, Mrs. Nabb requested a hearing concerning the RIR's findings and preliminary disposition. The Office of Inspections forwarded this request to the OHA, and I was appointed the Hearing Officer in this matter on March 1, 1999. By a letter of March 3, 1999, I established a filing schedule for the parties' pre-hearing briefs and hearing dates of April 28 and April 29, 1999.

In submissions that she made to the parties in March 1999, Mrs. Nabb stated that she would not pursue her allegation that her employer's alleged decision to deny her "funeral leave" constituted a Part 708 reprisal. However, she contested the RIR's findings and conclusions concerning the other alleged acts of retaliation by EG&G and Kaiser-Hill. In addition, she made allegations of reprisal that were not discussed in the RIR. Specifically, she claimed that in about October 1994, certain contractor employees deliberately placed an acid in the liquid coolant of a lathe that she operated, causing her severe burns. She also claimed that Kaiser-Hill took certain actions in 1995 with the intention of getting her access authorization revoked. In a letter dated April 20, 1999, I dismissed Mrs. Nabb's claims for relief regarding these alleged retaliations, finding that Part 708 did not authorize the requested relief for these alleged retaliations. However, I permitted testimony at the hearing concerning the issue of the burns for the sole purpose of allowing Mrs. Nabb to attempt to establish a pattern of hostile activity toward her by EG&G personnel.(1) April 20, 1999 letter from Kent S. Woods, Hearing Officer, OHA, to Mrs. Nabb.

In its pre-hearing submission dated April 22, 1999, EG&G did not raise specific factual or legal objections to the RIR's findings concerning Mrs. Nabb's alleged protected disclosures and the alleged reprisals taken against her. With respect to the protected disclosures, EG&G stated that "[t]o the extent the Hearing Officer has already drawn conclusions regarding the legal sufficiency of these disclosures, Respondent EG&G must object, and reserves the right to examine Mrs. Nabb and other witnesses regarding these alleged disclosures, as well as introduce documentary evidence as necessary to address these issues." Similarly, with respect to the alleged reprisals, EG&G reserved the right to examine Mrs. Nabb and to present witness testimony and documentary evidence on these issues. In its pre-hearing submission dated April 29, 1999, Kaiser-Hill did not address the RIR's findings concerning the allegations of protected disclosures made by Mrs. Nabb. With respect to Mrs. Nabb's allegations of reprisals, Kaiser-Hill stated the following:

It is Kaiser-Hill's position that Mrs. Nabb suffered no retaliation of any sort from Kaiser-Hill as a

consequence of any allegation she may have raised while an employee of EG&G. The actions which were taken regarding Mrs. Nabb and her RCT training were the result of legitimate business reasons in the management of the RCT program.

April 29, 1999 Kaiser-Hill submission at 2.

3. Issues and Participants at the Hearing

Accordingly, on April 28 and 29, 1999, I convened a hearing in this matter at Rocky Flats. The hearing proceeded with the presentation of testimony by Mrs. Nabb and eleven other witnesses. At the outset of the hearing, Mrs. Nabb presented the parties with a letter that specified her claim for relief, including a claim for waste management "crew leader pay" that she had not raised previously. In addition to her own testimony, Mrs. Nabb presented the testimony of a co-worker and union representative, her supervisor at the time she was attending RCT training, a union steward, and two co-workers. Kaiser-Hill presented the testimony of the radiological control manager for Rocky Flats at the time of Mrs. Nabb's RCT training, as well as the testimony of the radiological operations manager who worked under him. EG&G presented the testimony of Mrs. Nabb's supervisor prior to the beginning of her RCT training, and of two EG&G operations officials who directed his activities.

4. Post-hearing Submissions

At the close of the hearing, I permitted post-hearing briefs from the parties concerning the factual and legal issues raised at the hearing. On May 25, 1999, Kaiser-Hill supplemented the record with additional correspondence and documents concerning the budget situation with respect to Mrs. Nabb's RCT training and concerning the July 24, 1995 directive to end the RCT training program. Post- hearing briefs were filed by Mrs. Nabb on May 27, 1999, by Kaiser- Hill on June 4, 1999, and by EG&G on June 8, 1999. In her post- hearing brief, Mrs. Nabb asserts that she was improperly denied the opportunity to complete her RCT training, and that the equities of the situation favor an order granting her relief under Part 708 that includes back pay and overtime pay that she would have received if she had completed that training. In its post-hearing brief, Kaiser-Hill asserts that its determination to terminate the RCT training program was made for reasons unrelated to the disclosures made by Mrs. Nabb, and that it would be both inequitable and contrary to Kaiser-Hill's contractual agreement with EG&G, for the DOE to require Kaiser-Hill to provide any remedial payments or actions for any retaliatory actions that EG&G personnel may have taken against Mrs. Nabb. In its post-hearing brief, EG&G maintains that, "although the fact that Mrs. Nabb made certain Part 708-protected disclosures has not been disputed," she has "failed to establish that her disclosures were a ?contributing factor' in the acts of retaliation alleged." EG&G post-hearing brief at 3.

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 leading to an initial agency decision, followed by an opportunity for an appeal of that decision to the OHA Director. If circumstances warrant, the employee or the DOE contractor may seek review of the OHA Director's decision by the Secretary of Energy or his designee. 10 C.F.R. §§708.32 and 35.

A. Legal Standards Governing Findings of Protected Disclosure and Adverse Action in this Case

The regulations provide, in pertinent part, that a DOE contractor may not take any adverse action against any employee for "[d]isclosing to a DOE official, . . . or [the individual's] employer, or any higher tier contractor, information that [the individual] reasonably and in good faith believe[s] reveals-

(1) A substantial violation of a law, rule, or regulation; [or]

(2) A substantial and specific danger to employees or to public health or safety; . . .

10 C.F.R. § 708.5(a).

1. The Complainant's Burden

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

The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29.

It is my task, as the finder of fact in this Part 708 proceeding, to weigh the sufficiency of the evidence that has been presented by both Mrs. Nabb and the contractors. "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). Mrs. Nabb has the burden of proving by evidence sufficient to "tilt the scales" in her favor that when she communicated one or more of the specific concerns described above, she disclosed information which evidenced her reasonable and good faith belief that there was (I) a substantial violation of a law, rule, or regulation; or (ii) a substantial and specific danger to employees or to public health or safety. 10 C.F.R. § 708.5(a). If this threshold burden is not met, Mrs. Nabb has failed to make a *prima facie* case and her claim must therefore be denied. If the complainant meets her burden, she must then prove that the disclosure was a *contributing factor* in a personnel action taken against her. 10 C.F.R. § 708.29; see Helen Gaidine Oglesbee, 24 DOE ¶ 87,507 (1994). A protected disclosure is likely to be a contributing factor in a personnel action where "the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." Ronald A Sorri, 23 DOE ¶ 87,503 at 89,010 (1993) citing McDaid v. Dep't of Hous. and Urban Dev., 90 FMSR ¶ 5551 (1990). See also Russell P. Marler, Sr., 27 DOE ¶ 87,506 at 89,056 (1998).

2. The Contractor's Burden

If I find that Mrs. Nabb has met her threshold burden, the burden of proof shifts to the contractors. The contractors must prove by "clear and convincing" evidence that they 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 Mrs. Nabb has established that it is more likely than not that she made a protected disclosure that was a contributing factor to an adverse personnel action taken by the contractors, the contractors must convince me that they clearly would have taken this adverse action had Mrs. Nabb never made any communications concerning possible statutory or health and safety violations by EG&G.

B. The Complainant Made a Protected Disclosure

In the RIR, the Office of Inspections conducted an extensive analysis of whether certain statements and actions made by Mrs. Nabb constituted protected disclosures under Part 708. As noted above, Kaiser-Hill did not present any argument or witness testimony in this proceeding concerning Mrs. Nabb's alleged protected disclosures, and EG&G has acknowledged that "the fact that Mrs. Nabb made certain Part 708-protected disclosures has not been disputed . . . ." EG&G Post-Hearing Brief at 3. If I find that Mrs. Nabb's disclosures were protected under Part 708 and were proximate in time to the alleged reprisals, those findings are sufficient to establish her protected position under the regulations and to place the burden of proof on her employers to show that the alleged reprisals did not occur. As discussed below, I find that Mrs. Nabb did make protected disclosures that occurred proximate in time to the reprisals alleged in this proceeding.

As noted above, the RIR found that Mrs. Nabb made allegations of waste drum "traveler" fraud to her supervisors and managers from September 1993 through December 1994 and these allegations constituted protected disclosures. Specifically, the RIR found that at some time in the summer of 1993, she was told by Mr. Ernie Bentson, an EG&G waste management compliance specialist, to alter the travel documentation ("travelers") on 29 waste drums by marking them as containing "dry" waste rather than liquid or "wet" waste. RIR at 4. Mrs. Nabb explained to the Office of Inspections investigator that she was told that the barrels contained "sucker pigs" (sacks filled with material like cat litter and used to soak up oil, transmission fluid, machine lubrication, and cutting fluids) or "floor dry" or "kemwipes", and that these materials contained sufficient waste liquid to create "liquid depth" in some of the barrels. Mrs. Nabb refused to make the requested changes because she believed they would falsify the "travelers." RIR Exhibit 10 at 2.

The RIR indicates that beginning in September 1993, Mrs. Nabb shared her concerns regarding the mislabeling of hazardous waste drums with a number of individuals in addition to her immediate supervisor, Mr. Bentson. These individuals included Wilma Padron, Shift Manager, Safe Sites of Colorado; Dale H. Nichols, Shift Manager, Safe Sites of Colorado; Mr. D. Foster, Environmental Coordination; Lawrence Kwei, General Engineer, DOE Safeguards and Security Group; and Paul Golan, Team Leader of Mission Advocacy, DOE Rocky Flats. RIR at 4-5, citing Exhibits 12, 32, 29, and 24.

While most of these contacts appear to have occurred in late 1993, the RIR finds that in May and June of 1994, Paul Golan, Team Leader of Mission Advocacy, DOE Rocky Flats, met with Mrs. Nabb at the request of Anson Burlingame, former President, EG&G, Rocky Flats, to discuss several of the concerns that she had raised. RIR at 5, citing Exhibit 50. However, in a submission in this proceeding received on April 19, 1999, Mrs. Nabb asserted that "I only talked to him on the steps about silicone hardener being improperly disposed of which I did not turn in [as an alleged disclosure]." Mrs. Nabb's April 19 submission at 4. Mrs. Nabb repeated this assertion at the Hearing, but later recalled a brief meeting with Mr. Golan where at least one of her alleged disclosures was discussed. Hearing Tr., Vol. 2 at 599-608. It appears from a post meeting memorandum written by Mr. Golan that the issue of the waste drum travelers was at least briefly raised at this meeting. Exhibit 50.

Finally, in December 1994, Mrs. Nabb met with several EG&G management officials and Marcy Nicks, Employee Concerns Coordinator, DOE Rocky Flats. According to Ms. Nicks, the meeting was organized to allow EG&G management and Nicks to come to an understanding regarding the issues that Mrs. Nabb was raising in her Part 708 complaint. See Memorandum of Interview with Marcy Nicks, Exhibit 30. Ms. Nicks' notes of that meeting indicate that Mrs. Nabb raised the issue of the improper disposal of liquid waste at that meeting. A section of her notes is headed "sucker pig ground water loss" and one of the complaint disclosures she lists is described as "[i]llegal dumping of oil - wanted her to sign paperwork." Exhibit 113. Mark Spears, at that time the Radiological Control Manager for EG&G, attended this meeting and also recalls that Mrs. Nabb made allegations of illegal dumping and improper disposition of fluid from cleaning machines.(2)

After reviewing the record, I concur with the RIR's conclusion that Mrs. Nabb engaged in protected

activity pursuant to Part 708 when she disclosed the alleged mislabeling of hazardous waste drum "travelers". It is clear that Mrs. Nabb came forward with allegations concerning the "travelers" beginning in September 1993, and that she continued to report this information to her supervisors and management officials up to December 6, 1994. As discussed below, I find that Mrs. Nabb's disclosures in this regard are also proximate in time to Part 708 "retaliations" taken by the contractors. Accordingly, under these circumstances there is no reason for me to evaluate any of the other alleged disclosures made by Mrs. Nabb that were identified in the RIR.

C. Mrs. Nabb's Allegations of Contractor Reprisal

1. Mrs. Nabb Has Met the Contributing Factor Showing

As noted above, a protected disclosure has been found to be a contributing factor in a personnel action where the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. As discussed above, the factual record established by the RIR and its supporting exhibits indicates that Mrs. Nabb disclosed her concerns regarding the labeling and disposal of liquid wastes to her supervisors and to other contractor and DOE officials on a number of occasions during the period from September 1993 through December 6, 1994. All of the alleged reprisals contained in the RIR occurred within eight months of one of these instances of disclosure.

In its post-hearing brief, EG&G contends that at the hearing, Mrs. Nabb failed to establish a credible "time line" of significant incidents. It cites several instances at the hearing where Mrs. Nabb was unable to say when a particular incident or conversation occurred, or suggested contradictory dates. EG&G Post-Hearing Brief at 3-4. It is true that Mrs. Nabb was consistently vague in her testimony concerning the precise timing of some of the events at issue. However, I find that there is ample support in the RIR and its supporting documents to establish accurate dates for the series of disclosures that I have discussed above. Mrs. Nabb's lack of specificity at the hearing is most likely owing to the

passage of time from these events, and does not negate this other evidence. With respect to the specific instances of alleged retaliation that are discussed below, the RIR and the information submitted by the hearing by Kaiser-Hill accurately identify the timing of these events. Accordingly, I reject EG&G's contention in this regard.

EG&G also argues that no legitimate inference of "contributing causation" may be drawn in this case, because Mrs. Nabb has testified that she has been the victim of adverse treatment at Rocky Flats for over a decade for reasons (gender discrimination, age discrimination, anti-union bias, etc.) that are completely unrelated to her Part 708 disclosures.

Taking her own testimony and that of her witnesses at face value, contractor "adverse actions" did not *begin* at some point in time after her disclosures; rather they appear to have *continued* after them. Under these circumstances, the Sorri and Ramirez rationale may not properly be applied to infer that Mrs. Nabb's complained- of "adverse" job circumstances were at all the result of contractor retaliation for her Part 708 disclosures.

EG&G Post-Hearing Brief at 4-5. I reject this argument. A protected disclosure made proximate in time to an adverse personnel action should be viewed as a contributing factor to that action, regardless of whether the employer possessed other discriminatory motivations for its action. While Mrs. Nabb and her witnesses have indicated that some of her supervisors were inclined to discriminate against her for reasons unrelated to her protected disclosures, the protected disclosures still "contributed" to the alleged discriminatory acts that she has identified in her Part 708 complaint. In order to show under this argument that the protected disclosures were not contributory, EG&G would have to present evidence to establish that its supervisory and management officials were so prejudiced against Mrs. Nabb for one of these other reasons, that they would have discriminated against her regardless of whether or not she made the

protected disclosures. EG&G has not attempted to make such a showing. Accordingly, I find no merit in EG&G's assertions in this regard.

In its post-hearing brief, Kaiser-Hill argues that all of the alleged protected disclosures at issue in this proceeding were made while Mrs. Nabb was an employee of EG&G, and that therefore Kaiser- Hill cannot be considered accountable under Part 708 for any adverse personnel actions that Mrs. Nabb may have experienced after it succeeded EG&G as the managing contractor at Rocky Flats. Kaiser-Hill Post-Hearing Brief at 2. I reject this position. Many of the same supervisors and officials who managed Rocky Flats for EG&G continued to perform the same operations under Kaiser-Hill. The Part 708 regulations do not exempt a contractor from accountability for acts of reprisal taken by its managers because the underlying protected disclosure was made to those managers while they were employed under a previous contract. Such a result would completely undermine the purposes for which the Part 708 regulations were enacted. Where an adverse personnel action against an employee in reprisal for a protected disclosure is found to have occurred, the goal of DOE's Part 708 regulations is to restore the employee to the position in which he or she would otherwise have been absent the acts of reprisal, in a manner similar to other whistleblower protection schemes. 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).

I therefore find that officials of EG&G and Kaiser-Hill had actual or constructive knowledge of these disclosures and that the disclosures were proximate in time to the alleged acts of reprisal. Accordingly, I conclude that Mrs. Nabb has met her burden of showing that her disclosures concerning the alleged mislabeling of liquid wastes constituted a contributing factor in the negative personnel actions identified as alleged reprisals in the RIR. The burden is therefore with the contractors, EG&G and Kaiser-Hill, to prove by clear and convincing evidence that they would have taken the same actions without Mrs. Nabb's disclosures.

2. Evaluating Alleged Reprisals in the Context of Part 708 Relief

In a Part 708 proceeding, a complainant may allege numerous acts of reprisal by a DOE contractor. Where multiple allegations of reprisal are made, it may not be necessary to conduct a detailed factual analysis and make legal conclusions concerning the merits of each allegation. This is particularly true in instances where the Hearing Officer has already found that the complainant has suffered a reprisal prohibited by Part 708 and the finding of additional reprisals would have little or no impact on the relief that will be awarded to the complainant. Accordingly, in analyzing the reprisals that Mrs. Nabb has alleged were taken against her, I will focus on allegations of reprisal for which relief is authorized and available under the Part 708 regulations. In the preamble to the recent amendments to Part 708, the DOE discussed the extent of the relief that it can provide in a Part 708 proceeding. In these comments, the DOE clearly indicated that Part 708 remedies are limited in scope, and *do not* provide "compensatory damages, including damages for mental anguish, pain and suffering, and emotional distress resulting from a contractor's wrongful actions." The DOE described Part 708 remedies as follows:

The restitutionary remedies authorized under [Part 708] are intended to correct unwarranted employment actions. The goal of this regulation is simply to restore employees to the position they would have occupied but for the retaliation. Part 708 exists to provide an alternative to filing a lawsuit in which a broad range of compensatory relief may be available, but it is not intended to suspend that option or duplicate the remedies that may be available in litigation. Before choosing a forum for seeking redress of an unwarranted employment action, contractor employees should compare Part 708 with other available remedies.

64 Fed. Reg. 12867-68 (March 15, 1999). In other words, if I find that Mrs. Nabb suffered retaliation as a result of making protected disclosures, I can provide her with relief aimed at restoring her position in the workplace to what it would have been if these retaliations had not taken place. These remedies could include the opportunity to complete job training, her placement in a job position that she would have

occupied but for the retaliatory acts, and an award of any pay differential between that position and her current position (back pay).(3)

Viewed in this context, Mrs. Nabb's allegation of reprisal concerning her inability to complete her RCT training is the most significant. If it occurred, the reprisal resulted in the loss of job training, job placement, and salary benefits, for which Part 708 relief is available. Accordingly, I will focus my analysis on this allegation of reprisal.

3. Actions Taken Regarding Mrs. Nabb's RCT Training Were Reprisals

In the Fall of 1994, Mrs. Nabb was permitted to "bump" into the RCT I job classification along with more than one hundred other individuals as a consequence of the shut down of machining operations in Rocky Flats Building 460, where she previously worked. Kaiser-Hill Hearing Exhibits F and Q. The RCT I position was a training position, and Mrs. Nabb was required to complete an extensive training and testing program in order to meet the requirements of the RCT II level job classification. Kaiser-Hill took over the administration of this program from EG&G on July 1, 1995. Along with many other displaced employees, Mrs. Nabb was provided with special academic training to assist her in passing the required course of training and tests to meet the requirements of an RCT Level II. She successfully completed this academic training. Beginning in late November 1994, she took an extensive series of mini-courses and tests as part of her RCT II training. While most of the other RCT I trainees completed their testing in June and early July, 1995 (see Kaiser-Hill Hearing Exhibit R) and qualified as RCT II's, Mrs. Nabb and several others had not completed the testing as of July 24, 1995. Citing the exhaustion of funding for the RCT training program, Kaiser-Hill officials decided to curtail the training program as of that date. Mrs. Nabb was therefore unable to complete her training to qualify as an RCT II (salary level 16). As a result, when all RCT I employees were laid off on September 29, 1995, she "bumped" into the position of Process Specialist (salary level 15). Kaiser-Hill Hearing Exhibits F and G.

The RIR makes the following findings based on the evidence that it assembled concerning this issue:

The Complainant has shown that one manager, Mr. Spears, who had supervisory responsibility over the RCT program, learned of the Complainant's protected activities in December 1994. . . . Mr. Spear's knowledge of the Complainant's disclosure, and the proximity between gaining that knowledge and the training termination decision may constitute a preponderance of the evidence that the decision was retaliatory; the record, however, contains no other information that supports Complainant's assertion that her protected disclosures were a motivating factor behind that decision. Moreover, the contractor has, by clear and convincing evidence, shown that it had a good business reason (a projected over- expenditure of more than $1 million (Exhibit 62, p. 1)) to terminate training of the Complainant and other employees. Accordingly, we find that the termination of the Complainant's RCT training was not a retaliatory act within the meaning of Part 708.

RIR at 18. In her March 7, 1999 submission in this proceeding, Mrs. Nabb contested this aspect of the RIR's findings. She asserted that the RCT trainers deliberately delayed her testing so that they could provide testing and training to other employees:

Dennis Scherock (one of the instructors) told me point blank that "there are other people we want to get through" when I told him he had made me sit for 9 days, refusing to allow me to test out on the daily walk downs and I wanted [to be] tested or told why. When given the chance to test with Mr. Fox I finished 8 tests in one day.

March 7, 1999 submission at 1-2. She also questioned Kaiser-Hill's position that budget over-runs forced it to cancel her training. "About running out of money - there was quite a large class [of RCT trainees] after me." Submission dated April 15, 1999, handwritten attachment at 3.

The burden of the contractors in this case is to show by clear and convincing evidence that Mrs. Nabb was

offered the same opportunities for training and testing as the other employees in the RCT II training program. This could permit them to establish that other causes of a non-retaliatory nature accounted for Mrs. Nabb's failure to complete her training. In this way they could show that in the absence of any protected disclosures, this adverse result still would have occurred. Such non-retaliatory causes could include a prolonged absence from the workplace by Mrs. Nabb, or a demonstrated inability on her part to achieve a passing grade on the testing portion of the training program.

The contractors have failed to meet this evidentiary burden. Based on my review of the record, rather than making such a clear and convincing showing, convincing evidence indicates that Mrs. Nabb's failure to complete her RCT training prior to the termination of the training program was due in part to undue delays in the scheduling of her training and testing. Mrs. Nabb claims that the contractors were responsible for these delays and the evidentiary record discussed below convinces me that the contractors have failed to show that these delays were not deliberate.

Mrs. Nabb's assertions that she waited an undue amount of time for training and testing are supported by the testimony of Maurice Brown, her supervisor for most of the period when she was training for the RCT II position. Tr. at 190. Mr. Brown currently works for Kaiser-Hill as a manager in Building 779 at Rocky Flats. Tr. at 180. Mr. Brown initially testified that as her supervisor, he remembers being concerned that Mrs. Nabb was not being scheduled for RCT training in a consistent and timely manner.

I questioned why you [Mrs. Nabb] weren't sent to Rad. Con. [training], and I never did get -- I think you heard me on the phone a couple times. I never did get a straight answer, as to why you were not sent to Rad. Con. Nobody ever did tell me that you were untrainable. No. And my personal belief is I don't think you were [untrainable]. You always did everything that I ever asked.

Tr. at 180. Mrs. Nabb also questioned Mr. Brown concerning a conversation that she remembered that they had with Ms. Sherrie L. Olguin. Ms. Olguin worked as the RCT Training Coordinator for EG&G and, subsequently, for Kaiser-Hill. The following exchange took place:

Q And one day we were sitting in the office, about five or ten minutes before time to go, and she came running in with the training schedules, and you looked through [them]. You turned around and asked her when the training for me was going to be. What was her first answer?

A I don't even remember, Barb. I --

Q She ignored you. When you asked her the second time, what was the answer?

A The only thing I -- I don't remember exactly what answers were given. I can't -- you know, I'm sorry that I can't remember that, but I know that I really never did get a straight answer that stuck in my mind, as to why you weren't on the schedule for training.

Tr. at 182. During cross examination by counsel for Kaiser-Hill, Mr. Brown reviewed the detailed RCT training record for Mrs. Nabb (Kaiser-Hill Hearing Exhibit H). Under questioning, he indicated that he generally was aware of when one of the employees that he supervised was in RCT training.

Q Would you necessarily have known that she was in the classroom on 1/19/95, taking that test?

A Yes. They usually hand out training slips that we would give to the RCTs and send them to class.

Tr. at 198. Mr. Brown then acknowledged that it was possible that he was unaware of some of the RCT training that Mrs. Nabb received because in 1995, there was a period when he was not working in the same location as Mrs. Nabb. However, at the same time, he reiterated his perception that she had received less scheduled RCT training than his other employees.

I'm going to tell you what I know, and I've stated that before. I know that when I called to ask about

Barb's training -- okay, when she was under my direct supervision -- I never did get a straight answer as to why she didn't go back. Okay? I see all this training in writing. Okay. I'm not saying that she didn't go.

Tr. at 200. Accordingly, I find that Mr. Brown's testimony strongly supports Mrs. Nabb's allegation that she did not receive scheduled training in a timely manner.

Although the RCT Training Coordinator, Ms. Olguin, did not testify at the hearing, she appears to have tacitly acknowledged that there were delays in scheduling Mrs. Nabb's training during a 1996 interview with an Office of Inspections investigator.

Olguin said that the Complainant seemed to be out sick a lot and she missed a lot of training. According to Olguin, the foreman did not know where the Complainant was a lot of the time.

April 23, 1996 Memorandum of Interview, RIR Exhibit 31. The reasons that Ms. Olguin provided for the scheduling delays, absences and lax supervision, are not substantiated elsewhere in the record. Other than one period of sick leave lasting about two and one half weeks(4), Mrs. Nabb does not acknowledge taking an unusual amount of sick leave during the approximately eight month period of her RCT training, and the contractors have submitted no evidence indicating such a pattern of absences. Ms. Olguin's assertion that she was unable to contact Mrs. Nabb through Mrs. Nabb's foremen is similarly unsupported, and appears to conflict with the testimony of Mr. Brown, who states that he actively contacted Ms. Olguin in order to obtain scheduled training for Mrs. Nabb.

The documentary evidence provided by Kaiser-Hill concerning Mrs. Nabb's RCT training does not refute her allegations of delay. The schedule of RCT training for Mrs. Nabb provided by Kaiser-Hill indicates that Mrs. Nabb received an extensive amount of RCT testing and training from November 28, 1994 through July 13, 1995. However, this record does not indicate that the testing and training occurred on a daily basis. In the months of December, 1994 and in January, February and early March, 1995, there are numerous periods of six to twelve days in length when no testing or training appears to has taken place. Most significantly, in the period from June 22 through the "cut-off date(5) for RCT training of July 24, 1995, the record indicates that Mrs. Nabb received RCT training only on July 13, 1995, when she passed a "Remediation/Tutorial" for the "RCT Core Comprehensive test." Kaiser-Hill Hearing Exhibit H at 5. During this same June 22 to July 24 period, the training records indicate that seventeen of her fellow trainees were able to complete the "oral board" portion of their RCT testing. Kaiser-Hill Hearing Exhibit R. Accordingly, it appears that Mrs. Nabb's training record supports her allegations of delays in the scheduling of training and testing.

Nor does the training record presented by EG&G and Kaiser-Hill indicate that Mrs. Nabb lacked the ability to complete her RCT training. Her training record indicates that, like many other trainees in the RCT program, she had to repeat some segments of her RCT training and be retested on those segments. However, she successfully completed the tests in all of the training "mods" in which she was scheduled for training and testing by her employer. Kaiser-Hill Hearing Exhibit I. This record therefore agrees with the previously quoted testimony of her supervisor, Mr. Brown, indicating that he believed that she could be trained as an RCT II. Under these circumstances, I conclude that Mrs. Nabb has presented evidence indicating that her failure to complete her RCT training and thereby qualify for the RCT II job classification was due, at least in part, to unusual delays in the scheduling of her RCT training and testing. I further conclude that EG&G and Kaiser-Hill have not refuted her evidence, or shown, by clear and convincing evidence, that the failure to provide training to Mrs. Nabb resulted from reasons unrelated to her December 1994 protected disclosure, which occurred proximate in time to this activity. Accordingly, quite apart from a determination on the issue of what evidence Kaiser-Hill has presented that it would have terminated training on July 24, 1995, I find that adverse actions taken by both EG&G and Kaiser-Hill in not permitting Mrs. Nabb to attend RCT training in 1994 and 1995 constitute retaliatory actions under Part 708.

As noted above, the RIR acknowledged the proximity in time between Mrs. Nabb's December 6, 1994

protected disclosure (observed by Mr. Spears, the Manager with responsibility for the RCT training program) and Kaiser-Hill's decision to halt Mrs. Nabb's RCT training on July 24, 1995. However, this proximity was outweighed by the RIR's finding that there was clear and convincing evidence that Kaiser-Hill "had a good business reason (a projected over- expenditure of more than $1 million) . . . to terminate training for the Complainant and other employees." Based on these findings, the RIR concluded that the termination of Mrs. Nabb's RCT training "was not a retaliatory act within the meaning of Part 708." RIR at 18. I do not believe that this determination subjects Kaiser- Hill's decision to the full level of scrutiny required by Part 708. The provisions of Part 708 clearly indicate that in this situation, the burden is on the contractor not just to show that it had a good business reason for its action, but to show, by clear and convincing evidence, "that it would have *taken the same action* without the employee's disclosure . . ." 10 C.F.R. § 708.29 [emphasis added].

Through the extensive testimony of Kaiser-Hill officials at the hearing, and through the submission of documentary evidence, Kaiser-Hill has sought to establish that it had good business reasons to terminate its RCT training program in July 1995. It has also made an effort to show that it would have structured the termination of RCT training in a manner that prohibited Mrs. Nabb and a few other employees from completing their training. Kaiser- Hill's contentions in this regard are presented in its post-hearing brief.

The evidence is clear and undisputed that the § 3161 workforce restructuring funding used to train Mrs. Nabb had become exhausted. Mr. Dondelinger, who was in the Human Resource group, was charged by EG&G [and its successor, Kaiser-Hill] to manage that program and ordered a halt to training. Consequently, it is Kaiser- Hill's position that Mr. Dondelinger was the person who made the ultimate personnel decision in this case. There was no evidence that Mr. Dondelinger was ever aware of Mrs. Nabb's status as a whistleblower or was aware of her protected activities. After receiving a Stop Work directive from Mr. Dondelinger, Mark Spears and James Wood made the collateral decision to halt training at the point where only the RCT oral boards were left to be taken. Persons who had progressed to that point were allowed to take the oral boards. Mrs. Nabb had yet to complete the final RCT Site Comprehensive written examination and therefore was not qualified to take the final RCT oral board at the time funding was canceled. As a consequence, Mrs. Nabb and six or seven others who were similarly situated to Mrs. Nabb could not complete the RCT training. The only person in the chain of decisions made regarding this training who was aware of Mrs. Nabb's allegations was Mark Spears . . . . Mr. Spears testified that Mrs. Nabb's allegations had nothing to do with Mr. Spear's management responsibilities, and it was simply by virtue of the fact that Mr. Spears was in charge of the radiological program that he was even involved in the meeting. These facts make it clear that no "reasonable person" could conclude that the personnel actions taken were the result of Mrs. Nabb's earlier whistleblower activities.

Kaiser-Hill Post-Hearing Brief at 3-4. I do not agree. The cancellation of the training program was not neutral with respect to Mrs. Nabb. Kaiser-Hill admits that following Mr. Dondelinger's decision to halt the training, Mr. Spears and Mr. Wood made the "collateral decision" to divide the remaining RCT trainees into two groups consisting of those who would be allowed to complete their RCT training and those who would not. This indicates that, in spite of cost over-runs, Kaiser-Hill managers retained the ability to spend additional resources to continue the training of RCTs. Their decision to structure the termination of the training program in a particular way was a discretionary decision that impacted adversely on Mrs. Nabb and "six or seven others" out of an original pool of over 100 RCT trainees. Management decisions that impact negatively on a small group of employees that includes a whistleblower must be viewed as inherently suspect in a Part 708 analysis. Although there may well have been sound economic reasons for Kaiser-Hill to continue training only for those employees who had completed everything except their RCT oral boards, the contractors have not shown clearly and convincingly that this precise management decision was made *solely* for economic reasons when the decision clearly had an adverse impact on Mrs. Nabb and a few others. Under Part 708, Mrs. Nabb's standing as a known whistleblower is presumed to have influenced Mr. Spears and Mr. Wood in developing procedures for the termination of RCT training that would not operate to her benefit. The contractor has the burden of showing that it was not related. In this regard, there is evidence in the record that when the training termination procedures were developed, the managers were aware of the training status of each affected employee, including Mrs. Nabb.

The Hearing Officer (to Mr. Dondelinger): So people below you in the organization, people who were teaching Ms. Nabb, didn't really have an input in just how you were going to structure the cut-off.

Mr. Dondelinger: Well, Mr. Wood certainly would have been involved in discussions, because he was the subordinate manager to me, who ran the training and operations group, so he certainly -- in fact he was involved in the discussions.

And I also believe that the workforce restructuring folks were involved in the discussion. Again, it was a business decision, and I'm sure we probably discussed the status of each and every student who remained in the course, although I have no specific recollections of the conversations.

To come to a rational answer, we would have had to have gone through each and every case, and say, Okay, where do we draw the line; what makes sense for the company from an expenditure of funds, or do we stop everything right now.

Tr. at 447. This testimony strongly indicates that the "structuring of the cut-off" of the RCT training was a discretionary decision by Kaiser-Hill managers and was made with an awareness of the potential impact on each affected employee. Under these circumstances, I find that Kaiser-Hill has not established, by clear and convincing evidence, that it would have structured its cut-off of the RCT training in this particular manner if Mrs. Nabb had not made a protected disclosure.(6) Accordingly, I find that Kaiser-Hill's structuring of its cut-off of RCT training in a manner that prevented Mrs. Nabb from completing that training constituted a retaliatory act for purposes of Part 708.

4. Mrs. Nabb's Alleged Denial of "Crew Leader Pay"

As discussed above, the other alleged reprisals reported by Mrs. Nabb include being temporarily assigned to undesirable work locations, working on a machine that resulted in acid burns, and having her security clearance revoked. The Part 708 regulations do not provide independent, potential remedies for these allegations, since they do not relate to Mrs. Nabb's current work situation or to salary issues. Since I have already determined that Kaiser-Hill and EG&G retaliated against Mrs. Nabb with respect to her RCT training, it is not necessary for me to evaluate these other allegations, which have no impact on Mrs. Nabb's Part 708 remedies. However, Mrs. Nabb has made one claim for back pay based on treatment that she received in the summer of 1993 when she was working as a Waste Coordinator for EG&G. In a letter submitted to the parties at the hearing, Mrs. Nabb states that she is entitled to the following:

The crew leader pay at 2 labor grades [that] I was promised and Karl E. Scott pushed me out of for 1 and a half months (when I told Mr. Hoover I would do no more trash when the attempt to force me to falsify documents and break the ground water laws happened).

April 27, 1999 Letter from Mrs. Nabb.

The factual record concerning this matter does not support this claim. In her interview with the Office of Inspections investigator, Mrs. Nabb indicated that when she volunteered to train as a waste coordinator, she expected to receive "crew leader pay while I worked with the waste." RIR Exhibit 10 at 2. However, the record indicates that following the incident in which she refused to label waste barrels containing "sucker pigs" as dry waste, she voluntarily quit her training and her work assignment as a waste coordinator. In her interview, she stated that a few days after this incident she spoke to Mr. Hoover, the manager of the waste program.

At that time, I also informed Mr. Hoover that "I would not do any trash" (packing or disposal of toxic waste). . . . I knew the consequences that could result from incorrectly annotating the "travelers," and I decided I would not work "the waste." I would forego the crew leader's pay and possible salary position because I will not break the law or knowingly disregard the rules as trained.

RIR Exhibit 10 at 3-4. This statement clearly indicates that Mrs. Nabb made the decision to stop working as a waste coordinator. There is no evidence that this personal decision to stop working as a waste coordinator resulted from Part 708 retaliatory activity by EG&G. 10 C.F.R. § 708.2 defines a "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor . . . as the result of the employee's disclosure of information . . . ." Mrs. Nabb's apprehension that she might be asked to do something improper in the future cannot be attributed to any "retaliatory" action by EG&G. Accordingly, Part 708 remedies do not apply to her decision to "forego the crew leaders pay," and her request for relief in this regard must be denied.(7)

5. Conclusion

Based on the analysis presented above, I find that Mrs. Nabb made disclosures protected under Part 708, and that both Kaiser-Hill and EG&G took adverse personnel actions with respect to Mrs. Nabb's RCT training that constituted retaliatory acts under Part 708. Accordingly, I find that these contractors should be held jointly and severally liable for the remedial actions ordered below.

D. Remedy

10 C.F.R. § 708.36 provides that if the initial agency decision determines that an act of retaliation has occurred, it may order: (1) Reinstatement; (2) Transfer preference; (3) Back pay; (4) Reimbursement of reasonable costs and expenses; and (5) Such other remedies as are deemed necessary to abate the violation and provide relief to the complainant. In her post-hearing brief, Mrs. Nabb asks that we refer to her April 27, 1999 letter wherein she presents her request for relief aimed at "replacing me to the position that I was in." Mrs. Nabb's Post-Hearing Brief at 4. In this April 27, 1999 letter, Mrs. Nabb requests that she be given back pay for the differential in salary between her current Process Specialist position (grade level 15) and the RCT II position (grade level 16) that she would have been paid if she had completed her RCT Training in 1995. She estimates that this pay differential amounts to $3.60 per week. She also requests back pay for lost overtime that she claims she would have been permitted to earn if she had been working as an RCT II in 1996, 1997 and 1998. She estimates that the average overtime for an RCT worker is 450 hours per year, and asks to receive time and a half pay for a total of 1,350 hours.

I believe that it is appropriate to award Mrs. Nabb a back pay differential and back pay for overtime, based on the average amount of overtime performed by RCT II employees. I have no basis for disputing the salary and labor hour figures that she has submitted, and EG&G and Kaiser-Hill have not submitted information on these issues. However, I believe that it is inappropriate to provide these back pay awards to Mrs. Nabb for the time periods that she has requested.

Mrs. Nabb requests that both back pay requests be calculated from a starting date of January 1, 1996. She may have selected this date in order to simplify her back pay and lost overtime calculations. However, in light of my finding that there are indications that her RCT training was delayed, I believe that an earlier starting date for these awards is appropriate. I will assume, for purposes of calculating relief, that, had she received scheduled training and testing in a timely manner, she would have completed her RCT training no later than August 31, 1995, and qualified for the RCT II salary level as of September 1, 1995. I believe that it is also appropriate to calculate lost overtime pay from that date. In addition, the record indicates that in a letter dated November 6, 1997, Mrs. Nabb was offered the opportunity to be recalled as an RCT I and receive the training necessary to qualify as an RCT II. The letter indicates that this training period is not to exceed 264 hours in duration. Kaiser-Hill Hearing Exhibit C. On February 24, 1998, Mrs. Nabb stated on a form that "I do not accept the recall." Kaiser-Hill Hearing Exhibit D. Mrs. Nabb's acceptance of this recall would have enabled her to complete her RCT training and allowed Kaiser-Hill to reduce the damages that she suffered as a result of the Part 708 retaliations by Kaiser-Hill and EG&G.(8) Her failure to accept this recall means that Kaiser- Hill is no longer responsible for any damages subsequent to the time that she would have completed this training. Given the 264 hour time limit, I believe it is reasonable to estimate this training period at no more than two months. Accordingly, I find that after April 30, 1998, the

contractors should no longer be held responsible for the accrual of damages arising from their Part 708 retaliations. I will therefore base the back pay relief for Mrs. Nabb on the time period from September 1, 1995 to April 30, 1998, a period of thirty-two months.

Based on the salary figures provided by Mrs. Nabb, I find that she is entitled to a salary differential back pay award of $498.24 ($3.60 per week for 138.4 weeks) and overtime back pay award of $36,897.53 ($13,871.25 per year for 2.66 years). The award of back pay therefore totals $37,395.77. As part of her back pay, Mrs. Nabb is entitled to receive interest to compensate her for the time value of money lost. Interest shall be calculated from January 1, 1997, the midpoint of the injury period, through the date of payment. Interest shall accrue at eight percent per year, compounded yearly. If either contractor seeks a technical correction concerning the back pay awards (i.e., based upon different information concerning hourly wage rates or average overtime worked by RCT II employees), they may petition me for such an adjustment.

In addition, Mrs. Nabb states that her "out of pocket expenses" in this proceeding "have totaled approx. $1,200 (rounded low)." Mrs. Nabb has not itemized these costs, but the figure appears on its face to be reasonable. Since Mrs. Nabb began to accrue these costs prior to the filing of her complaint with the Office of Inspections in January 1995, I believe it is appropriate to calculate interest on this sum in the manner I have described for the back pay award. If the contractors wish for an itemization of these costs so that they can examine and verify particular expenses, they may file such a request with me. Otherwise, they may simply accept her estimate.

In her April 29, 1999 letter, Mrs. Nabb requested that she be left in the position that she now holds (Process Specialist) "with the labor grade raise to 16 rather than the 15 that I had dropped to." In her post-hearing brief she adds the following request:

For the job protection that I was promised and the replacement of my status on the RCT seniority I would request that the companies make arrangements for me to be [taught] the RCT program . . . .

Mrs. Nabb's Post-Hearing Brief at 4. To the extent that these somewhat conflicting statements can be viewed as a request to remain in her current position at the salary that she would have received as an RCT II, I believe that such a request is inappropriate. As noted above, the goal of Part 708 relief is "simply to restore employees to the position they would have occupied but for the retaliation." 64 Fed. Reg. 12868-69 (March 15, 1999). The relief I provide must be aimed at restoring her position in the workplace to what it would have been if the Part 708 retaliations had not taken place. Accordingly, if Mrs. Nabb wants the salary benefits that she would have received if she had been permitted to complete her RCT Training, she must accept the training requirements and job duties of the RCT II classification. She cannot be awarded those benefits while remaining in her current position, which is classified at a lower grade. I will therefore direct Kaiser-Hill to offer Mrs. Nabb the opportunity for RCT training that would qualify her for the RCT II position. If she elects to remain in her current position, she will have to accept the salary level and other levels of benefit attached to that position. However, her decision in this regard does not affect the awards for back pay and reasonable costs that are discussed above.

Finally, Mrs. Nabb states in her April 27, 1999 letter that she would like to receive letters of apology from certain Kaiser-Hill managers. I cannot grant this request, as it does not fall within the relief available under Part 708.

Accordingly, I have concluded that Mrs. Nabb should receive a total monetary award of $38,595.77, plus accrued interest, and the opportunity to retrain for the RCT II position at Rocky Flats.

Although I find Kaiser-Hill and EG&G jointly and severally liable for the remedies discussed above, I believe that it is appropriate to direct Kaiser-Hill to provide this Part 708 relief to Mrs. Nabb. Kaiser-Hill was the managing contractor at Rocky Flats at the time that a substantial portion of the retaliation took place with respect to curtailing Mrs. Nabb's RCT training. Moreover, it is the party that can provide her with the opportunity to retrain for an RCT II position. In its Post-Hearing Brief, Kaiser-Hill argues that on

June 30, 1995, Kaiser-Hill, EG&G and the DOE signed a three-party transition agreement providing that "EG&G shall maintain responsibility for the defense, management and resolution of all actions filed against it pursuant to DOE's ?whistleblower' regulations." Clearly, this agreement does not require the DOE to seek relief exclusively from EG&G for retaliatory actions committed by individuals at a time when they were employed by Kaiser-Hill. Nor can such an agreement limit the relief available to Mrs. Nabb under Part 708, some of which (the opportunity to retrain for the RCT II position) only Kaiser-Hill can provide. Accordingly, Kaiser-Hill's contentions in this regard must be rejected.

IT IS THEREFORE ORDERED THAT:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Barbara Nabb (Mrs. Nabb), OHA Case No. VWA-0031, is hereby granted as set forth in Paragraph (3) below and is denied in all other respects.

(2) The objections to Mrs. Nabb's requests for relief specified in Paragraph (3) below that were submitted by EG&G Rocky Flats, Inc. (EG&G) and Kaiser-Hill Company, LLC (Kaiser-Hill) in the above-captioned proceeding are hereby denied for the reasons set forth in the foregoing Decision. EG&G and Kaiser-Hill shall be jointly and severally liable for the relief specified in Paragraph (3) below.

(3) Kaiser-Hill Company, LLC (Kaiser-Hill) shall pay to Mrs. Nabb the following amounts in compensation for actions taken against her in violation of 10 C.F.R. Part 708:

(i) $498.24 for lost salary for the period September 1, 1995 through April 30, 1998;

(ii) $36,897.53 for lost overtime pay for the period September 1, 1995 through April 30, 1998;

(iii) $1,200 for reasonable costs and expenses incurred by Mrs. Nabb since the filing of her Part 708 Complaint on January 12, 1995; and

(iv) interest on these amounts, calculated from January 1, 1997 through the date of payment. Interest shall accrue at eight percent per year, compounded yearly.

(4) Kaiser-Hill shall offer Mrs. Nabb the opportunity to receive the training necessary to qualify her for the RCT II job classification, and shall offer Mrs. Nabb a position as an RCT II at the time that she completes the required training.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy granting in part the complaint unless, within 15 days of its receipt, a Notice of Appeal is filed with the OHA Director, requesting review of the initial agency decision.

Kent S. Woods

Hearing Officer

Office of Hearings and Appeals

Date: August 6, 1999

(1) I did not permit any testimony at the hearing concerning the extent of Mrs. Nabb's injuries from the burns, as such testimony and evidence would go to the issue of damages and relief not covered by Part 708 and therefore not relevant to this inquiry.

(2)Mr. Spears also identifies the date of this meeting as December 6, 1994. Exhibit 35. The RIR mistakenly identifies the meeting as taking place on December 12, 1994. RIR at 5.

(3)If I find that there was a retaliation against her, I can also award her attorney fees and other expenses

that she incurred in bringing this administrative action.

(4)At the hearing, Mrs. Nabb acknowledged that she was on sick leave for about two and one half weeks, from the end of April to about May 15, 1995, for extensive oral surgery. Tr. at 202-03.

(5)”As discussed below, not all RCT training was stopped on that date.

(6)Kaiser-Hill argues that there is no indication that Mr. Spears or other Kaiser-Hill managers had any animus toward Mrs. Nabb for her protected disclosures, since “her allegations had nothing to do with Mr. Spears management responsibilities.” However, it is not necessary in a Part 708 proceeding for the employee to establish that a protected disclosure was likely to produce an adverse reaction in a particular manager. As clearly indicated by the burden of proof rules at 10 C.F.R. § 708.29, that an adverse reaction may ensue is a basic presumption underlying the entire whistleblower protection program.

(7)Her request for crew leader pay also is factually deficient. She does not explain why one and one half months of this pay is appropriate as a remedy.

(8)The Part 708 regulations encourage contractors to take actions that reduce or eliminate the damages being suffered by complainants. Section 708.17(c)(6) provides for the dismissal of complaints where the contractor employer has made a formal offer to provide the remedy requested or a remedy that the DOE considers to be equivalent to what could be provided as a remedy under Part 708.