Case No. VWA-0036

November 8, 1999

DECISION AND ORDER OF

THE DEPARTMENT OF ENERGY

Initial Agency Decision

Name of Petitioner: Robert Gardner

Date of Filing: April 20, 1999

Case Number: VWA-0036

This Decision involves a complaint filed by Robert Gardner (Gardner or "Complainant") under the Department of Energy (DOE) Contractor Employee Protection Program, codified at 10 C.F.R. Part 708. Gardner is a former employee of a DOE contractor, Rust GeoTech (Rust). He alleges that certain reprisals were taken against him by Rust, including denial of a merit pay increase in 1996 and interference with his prospects for future employment in retaliation for his protected disclosures to DOE management and public officials. On the basis of the hearing that was conducted and the record before me, I have concluded that Gardner is not entitled to relief under 10 C.F.R. Part 708.

I. Background

A. The 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 and to protect those "whistleblowers" from consequential reprisals by their employers. Thus, contractors found to have discriminated against an employee for such a disclosure, or participating in a related proceeding, will be directed by the DOE to provide relief to the complainant.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at 10 C.F.R. Part 708. The DOE recently issued revised Part 708 regulations that apply to all cases which were pending as of April 14, 1999, the date the regulations became effective. 64 Fed. Reg. 12,862 (March 15, 1999). The regulations provide, in pertinent part, that a DOE contractor may not retaliate against any employee because that employee has disclosed to a DOE official or to a DOE

contractor, information that the employee reasonably believes to evidence, among other things, a substantial violation of a law, rule, or regulation. *See* 10 C.F.R. §§ 708.5 (a)(1). Employees of DOE contractors who believe they have been retaliated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE. The regulations entitle these employees to an independent fact-finding and a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer.

B. The Present Proceeding

1. Procedural History

Gardner alleges that his employer, DOE contractor Rust Geotech (Rust) took reprisals against him for several protected disclosures. The denial of his merit increase in 1996 was one of the alleged reprisals contained in his complaint. As a result of the reprisals, he filed a Part 708 claim on July 10, 1996. DOE's Office of the Inspector General (IG) investigated Gardner's complaint, and pursuant to that investigation, issued a final report concluding that the complainant had disclosed protected concerns. *See* IG Report of Investigation (March 31, 1999) (ROI). The IG also found that Rust was unable to establish by clear and convincing evidence that it would have denied Gardner's merit increase notwithstanding his protected disclosures. ROI at 13. The IG recommended that Rust pay the complainant back pay and the reasonable costs that he incurred in bringing this complaint. ROI at 14.

In April 1999, this case was transferred to the Office of Hearings and Appeals (OHA) under the revised Part 708 regulations, and I was appointed as hearing officer. 10 C.F.R. Part 708. I scheduled a hearing which was conducted on June 29 and 30, 1999. The official transcript of that hearing shall be cited as "Tr." and pertinent documents, received into evidence as hearing exhibits, cited as "Ex." Exhibits to the ROI are cited as "IG."

Prior to the hearing, the parties agreed that presentation of evidence would be limited to two issues: (1) whether evidence in the record establishes that in early 1996, Rust would have awarded a pay increase to Complainant were it not for his protected disclosures; and (2) whether Rust interfered with Complainant's future employment, and if so whether the action would have been taken anyway in the absence of alleged protected activity. Memorandum from John Shunk, Counsel for Rust and Alan Hassler, Counsel for Complainant to Hearing Officer, OHA (June 23, 1999). The parties also stipulated to several findings of the IG ROI. *Id*. Upon receipt of a post-hearing submission from Rust on September 9, 1999, I closed the record in this case.

2. Factual Overview

The facts in this case are uncontroverted. Rust provided environmental cleanup and other management services to DOE under a 10 year management and operating contract at DOE's Grand Junction, Colorado site beginning on October 1, 1986. IG 4 at 2. Rust hired Complainant in 1989 as a senior technical manager at the Grand Junction Project Office (GJPO). Ex. A, Att. B. In 1992, David Van Leuven (Van Leuven) became president of Rust. Van Leuven assigned Gardner, who had extensive political contacts in Colorado and at DOE headquarters, to report directly to him. Tr. at 87. Shortly after Van Leuven became president, he made Gardner responsible for strategic planning, including securing new work for Rust at the site and nationwide, and also working with Colorado politicians at the local, state, and national level, to further Rust's interests. Tr. at 88, 104, 172. In 1994, Gardner became Senior Planner Principal, at salary grade 22, responsible for directing strategic planning and program development activities in support of GJPO. Ex. A, Att. B. He also served as the company's inter-governmental liaison, due to his extensive political connections at all levels of Colorado government. IG 29.

In 1994, DOE notified Rust that the contract would be re-competed as two small business contracts, and Rust would not qualify to bid. Tr. at 88, 172. With no future business opportunities on the contract, Rust began to "wind down" its operations at GJPO, in preparation for a reduction-in-force (RIF) and the termination of its operations at the site. Tr. at 88, 105. Beginning in the spring of 1994, Gardner raised concerns to Rust management, DOE management and Colorado politicians, that the GJPO workforce restructuring was in violation of Section 3161 of the National Defense Authorization Act of 1993. Tr. at 174, 199. (1) Gardner expressed his concerns to the following DOE/GJPO managers: Jon Sink, Project Manager; Jim Lampley, Director; and Robert Ivey, Contract Officer. ROI at 3. He also contacted the office of the Governor of Colorado and Congressman Scott McInnis to get them involved in the matter and to support the application of Section 3161 to the GJPO. *Id.*

Gardner received an outstanding performance appraisal in December 1994. ROI at 7. Later that month, Rust submitted a request to DOE for reimbursement of employee salary actions over $80,000. IG 27. This annual approval was required by DOE procurement regulations. Tr. at 71. The request listed recommended merit increases for certain employees, including Gardner, based on their performance for the calendar year 1994. Tr. at 38-45; IG 27.

In February 1995, DOE denied Rust's request to be reimbursed for Complainant's salary. IG 27. DOE found that Gardner's job description, as written, was not reimbursable under the contract, and notified Rust that it would not pay Gardner's salary because his performance objectives and duties did not appear to benefit the contract. IG 34; Tr. at 74-75. DOE felt that Gardner's work benefitted Rust and not the DOE mission. Tr. at 74-75. Rust then submitted an amended job description, and the DOE approved reimbursement of Gardner's new salary in August 1995, retroactive to February 1995. IG 28; IG 47.

In mid-summer 1995, the complainant was appointed to a three-man Rust team that was formed to deal with the human resource aspects of the contract close-out, including examining the issues of severance, 401(k), pension, and benefits for displaced workers. IG 1 at 3; Tr. at 88, 104-105, 152. Van Leuven advised Gardner that because there was no opportunity for new business under the contract, Gardner should focus his activities on the close-out matters. Tr. at 87-88. According to Gardner, he spent the majority of his time on these activities. Tr. at 177. According to Rust, these activities took up only about 20% of Gardner's time. Tr. at 237.

Around this time, DOE management and employees at GJPO and the Albuquerque Operations Office began expressing their disapproval of Gardner to Rust management. DOE employees complained to Rust management about the aggressiveness of the three-man team in pursuing the interests of Rust employees. Tr. at 106, 154, 158. Gardner further antagonized DOE management by faxing a copy of a controversial petition about the GJPO workforce restructuring to the office of the governor of Colorado in March 1996. IG 48; ROI at 7. The petition had been placed in public areas in the Rust offices, and DOE management accused Gardner of trying to embarrass DOE by circulating the petition. Ex. C of IG 1; IG 3, 6. Gardner denied being the author of the petition. IG 3. As a result of the controversy, Van Leuven notified all Rust employees to remove any copies of the petition from the site. IG 37. The three-man committee tasked with looking into RIF benefits was disbanded, and replaced by one senior level Rust manager. IG 6.

On June 6, 1996, Gardner wrote to Van Leuven requesting a merit increase in view of his above average performance for calendar 1995. Claimant's Ex. 4. One week later, Van Leuven sent Gardner a memo denying Gardner's request for a merit increase. Claimant's Ex. 5. Shortly thereafter, on June 17, 1996, Van Leuven told Gardner that the strategic planning position was no longer required, due to the imminent termination of the contract. Tr. at 87. Van Leuven then removed Gardner from the strategic planning position and reassigned Gardner, effective that day, to a lower-level manager who was responsible for education programs. Tr. at 88; 200. Van Leuven distributed news of Gardner's reassignment to all Rust employees via electronic mail, a deviation from procedures in the Rust personnel manual. Tr. at 171, 187. Notice of employee reassignments was usually limited to those with a "need to know," and new jobs were posted prior to being filled. IG 1 at 4-5. On June 27, 1996, Gardner was removed from his position as management advisor to the Employees Association, and he filed this complaint on July 10, 1996. IG 3 at 2; ROI at 11. As of September 4, 1996, Rust had no employees at the Grand Junction site. IG 4 at 4. Complainant was among those permanently separated from the company on that date. Gardner applied for a job with the new contractors, but was not hired. ROI at 11, 18.

II. Legal Standards Governing This Case

A. The Complainant's Burden

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

The complainant shall have the burden of establishing by a preponderance of the evidence that there was a disclosure, participation, or refusal described under § 708.5, and that such act was a contributing factor in a personnel action taken or intended to be taken against the complainant. Once the complainant has met this burden, the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure, participation, or refusal.

10 C.F.R. § 708.9 (d); *see Ronald Sorri*, 23 DOE ¶ 87,503 (1993) (*Sorri*). "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). As a result, Gardner has the burden of proving by evidence sufficient to "tilt the scales" in his favor that he disclosed information, in this case concerns regarding the workforce restructuring at GJPO, which he believed evidenced a substantial violation of a law, rule, or regulation. 10 C.F.R. § 708.5(a)(1). If the complainant does not meet this threshold burden, he has failed to make a prima facie case and his claim must therefore be denied. If the complainant meets his burden, he must then prove that the disclosure was a *contributing factor* in the personnel actions taken against him, specifically the denial of his merit increase in 1996 and interference with his prospects for future employment. 10 C.F.R. § 708.29; s*ee Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993) (applying "contributing factor" test). Temporal proximity between a protected disclosure and an alleged reprisal shows that a protected disclosure was a contributing factor in a personnel action. *See Sorri*, 23 DOE ¶ 87,503 (1993); *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

B. The Contractor's Burden

In the event that Gardner makes a prima facie case, the regulations require Rust to prove by "clear and convincing" evidence that the company would have denied Complainant's merit increase even if he had not made protected disclosures. "Clear and convincing" evidence 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. In evaluating whether Rust has met its burden, I will consider the following factors: (1) the strength of Rust's evidence in support of its decision to deny Gardner's 1996 merit increase; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision to deny Gardner's merit increase; and (3) any evidence that Rust takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (quoting *Geyer v. Dep't of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997)).

III. Analysis

I have carefully reviewed the record in this proceeding, including the testimony of the witnesses at the hearing and the exhibits submitted into evidence by both parties. For the reasons set forth below, I find that although Gardner made a disclosure that is protected under 10 C.F.R. § 708.5(a)(1), and that disclosure was a contributing factor in an adverse personnel action taken against him, Rust Geotech has proven by clear and convincing evidence that it would have taken the same action absent the complainant's disclosure.

A. Gardner's Disclosures

In his complaint, Gardner alleges that he made protected disclosures to several DOE managers, to his employer, to the governor of Colorado, and to a Colorado congressman when he related his concerns that the restructuring of the GJPO workforce was not in compliance with Section 3161. IG 1 at 3. The IG found that these disclosures were protected. ROI at 4. During the hearing, counsel for Rust reiterated that Rust did not challenge the finding that Gardner's contact with Congressman McInnis and various DOE officials was a protected activity. Tr. at 203. I therefore find that Gardner has met his threshold showing under Part 708 that he engaged in an activity protected under Part 708.

B. Were Gardner's Disclosures a Contributing Factor in The Denial of His Merit Increase?

A finding of "temporal proximity," i.e., a finding that "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," is sufficient to show that a protected disclosure was a contributing factor in a personnel action. *See Ronald A. Sorri*, 23 DOE ¶ 87,503 (1993) *citing McDaid v. Dep't of Hous. And Urban Dev.*, 90 FMSR ¶ 5551 (1990); *see also County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

I find temporal proximity between Gardner's disclosures about DOE's alleged non-compliance with Section 3161 from the spring of 1994 through the summer of 1996, and the denial of his merit increase in 1996. Gardner's supervisor Van Leuven was aware of Gardner's concerns and communications with the DOE prior to his denial of Gardner's merit increase. IG 19; Tr. at 106. The disclosures occurred within six months of the denial of his merit increase. *See, e.g., Frank E. Isbill*, 27 DOE ¶87,513 (1999) (six months between disclosure and alleged retaliatory action); *Barbara Nabb*, 27 DOE ¶ 87,519 (1999) (eight months); *Russell Marler*, 27 DOE ¶ 87,506 (1998) (three months to four years).

Based on the above, I find that Gardner has established a prima facie case that his protected disclosures were a contributing factor to the alleged retaliatory action. The burden now shifts to Rust to prove by clear and convincing evidence that it would have denied Gardner's merit increase despite his protected disclosures.

C. Would Rust Have Taken The Same Action Against Gardner Absent His Protected Disclosures?

Rust argues that it would have denied Gardner his 1996 pay increase despite his disclosures to DOE employees, the governor, and a congressman. After reviewing the record, I find that Rust has shown by clear and convincing evidence that it would have denied Gardner's merit increase notwithstanding his disclosures.

(1) Evidence in Support of the Denial of Complainant's Merit Increase

Rust has presented credible evidence to support its argument that Gardner was denied a merit increase because he was at the maximum pay for his salary grade, and not because he made protected disclosures.

Rust employees are placed in salary grades for the purposes of compensation, and within each salary grade there is a salary range with upper and lower limits. IG 4 at 4. The Rust personnel manual states that "[m]aximum salary rate is the highest salary rate that may normally be paid to any individual within the salary range applicable to a given position. . . . The span between the minimum and maximum salary rates is available for granting individual salary increases, either merit or promotional." IG 4 at 4. The manual defines a merit increase as "a salary rate adjustment within the existing grade," and further states that "[m]erit increases will normally fall within the applicable salary range." Attachment A, Ex. 3. (2) According to Van Leuven and Roberto Archuleta (Archuleta), contractor human resources specialist at DOE's Albuquerque Operations Office, the purpose of these guidelines was to fairly compensate employees. Departures from the guidelines were rare and disfavored because they could result in problems for management if corporate compensation policy was perceived by employees as subjective. Tr. at 128. Archuleta testified that DOE's policy was not to compensate a contractor who paid an employee in excess of a predetermined salary range. Tr. at 25-26. The salary ranges were established after extensive surveys of other companies, and were viewed as the optimum way to compensate employees in a fair manner. Tr. at 24-25.

Archuleta had responsibility for the oversight of the Rust-DOE contract from 1992 until 1996. Tr. at 18-20. He testified that he knew of only three instances where a Rust employee was compensated at a salary higher than the upper limit of the range for his or her salary grade. Tr. at 27-28. One of those individuals was transferred from another Rust site with a salary at the first site that was already in excess of the range for the applicable salary grade at GJPO. Tr. at 26. The second individual was a well-know industry executive hired away from another DOE contractor to be a Rust vice president, and Rust made the decision to cover the difference in his salary because of his reputation, skills, and the complexity of the new position. Tr. at 106-107, 164. Both transactions occurred prior to Van Leuven becoming president, and both employees were at a very senior level. *Id*. The third individual was the complainant.

Gardner was a salary grade 22 manager earning an annual base salary of $86,520 ($7,210 monthly). Ex. A, Attachment B. The salary range for salary grade 22 was a minimum of $4,745 monthly and a maximum of $7,120. *Id.* Van Leuven and Archuleta testified that Gardner's salary of $7,210 per month was an error, probably in transposition, to the extent that it exceeded the maximum of $7,120. Tr. at 26, 107. Van Leuven testified that Rust did not correct the error because it was discovered some months after it occurred, and it would have been unfair to Gardner to change his salary at that late date. Tr. at 107-108.

Company policy was to require a promotion in order to move to the next salary grade, and promotions were only warranted if job responsibilities and duties changed. Tr. at 108. Rust's former personnel manager testified that he had suggested that Van Leuven promote Gardner to a salary grade 23 in order to increase Gardner's salary. Tr. at 151. However, even though Van Leuven appraised Gardner's performance as above average, Van Leuven did not think that Gardner deserved a promotion, because the "total breadth of [Gardner's] job was definitely on the decline." Tr. at 231. Van Leuven testified that Gardner was already fairly compensated for his work, and without an increase in responsibility that warranted a promotion, he would not promote Gardner merely to allow Gardner to get a raise. Tr. at 108, 231, 246.

There is no evidence in the record that any other Rust employee received a merit increase that would result in a salary over the maximum limit for his salary grade. I find that Rust has provided credible evidence that Gardner was denied a merit increase due to Rust's corporate policy of limiting merit increases to an established salary range as explained in Rust's personnel manual.

(2) Motive for Retaliation

Gardner contends that Van Leuven and Dabrowski wanted no controversy as they departed from GJPO to their next DOE-related contracts. He infers that both men wanted to stay in DOE's good graces, and so "offered him up" as a message to other Rust employees not to cause trouble for DOE. Tr. at 188. According to Van Leuven, it was a "well known fact" that DOE was unhappy with Gardner. Tr. at 105-106. Dabrowski also testified that certain DOE managers had expressed to him their disapproval of Gardner's activities. Tr. at 129.

Notwithstanding the above, I find little evidence that the Rust managers were motivated to retaliated against Gardner by denying his 1996 merit increase. Both men knew that Gardner was likely to lose his job anyway in the impending RIF. Both men knew that in 1995, DOE did not want to reimburse Rust for Gardner's job. Both men knew that Gardner was not popular with DOE management in Grand Junction or in Albuquerque. However, despite DOE's obvious displeasure with Gardner, it was Van Leuven who wrote a letter in July 1995 that resulted in Gardner's job being restored to reimbursement under the contract, with a merit increase, retroactive to February 1995. IG 30. I therefore find that although there was some evidence of motivation for Rust management to retaliate against Gardner, that evidence was weak.

(3) Rust's Actions Against Similarly Situated Employees

Finally, I find that Rust has presented evidence that it takes similar actions against employees who are not whistleblowers, but are otherwise similarly situated. In the instant case, a similarly situated employee

would be an employee who was compensated at the upper limit of his salary range. As stated above, the record contains ample evidence that Rust's policy was to deny merit increases that would result in an employee's salary exceeding the upper limit of the employee's salary grade. Attachment T of the Rust contract requires that an employee's salary "shall not exceed the maximum established for the employee's job classification unless prior written approval of the Contracting Officer is obtained." This is consistent with the Pay Practices and Policies section of the Rust Personnel Manual. Att. A, Ex. 3. The manual further states that "a merit increase . . . is a salary rate adjustment within the existing range." *Id*.

Gardner argues that other employees were given merit increases above their maximum allowable salary, and points to the IG's Report of Investigation as proof. ROI at 8. In the ROI, Archuleta is quoted in a telephone interview as stating that Rust requested merit increases for 21 Rust employees with salaries "over the cap," and Gardner was not on the list.(3) IG 41. The IG interpreted "cap" to mean the upper limit of a salary range. ROI at 9. Based on this interpretation, the IG then concluded that Rust had requested salary increases for 21 employees that would result in salaries in excess of the upper limit of the salary range associated with their salary grade. ROI at 8; IG 41. Because Gardner's name was not on that list, the IG concluded that Rust had not met its burden of proving that it would have denied Gardner's increase absent his protected disclosures. ROI at 9.

However, a review of the record shows that the IG investigator misunderstood Archuleta's use of the word "cap." Archuleta testified credibly and under oath at the hearing that he was referring to the Department of Energy Acquisition Regulation (DEAR) annual salary threshold, (4) and not the top of the salary range. Tr. at 35, 71. Rust submitted evidence that the merit increases for the 21 employees with salaries over $80,000 all resulted in new salaries that fell within the range for their respective salary grades. Ex. A, Attachment A. In other words, their new salaries, reflecting the merit increases, did not exceed the maximum salary rates for their positions. As Archuleta clarified at the hearing, the 21 employees were submitted for an increase "because they had room within their salary range to be granted those increases." Tr. at 111. Therefore, I find that Rust has presented evidence that it takes similar actions against employees who are not whistleblowers, but are otherwise similarly situated.

D. The Alleged Retaliatory Action of Interference with Complainant's Future Employment

Gardner alleged that Rust interfered with his future employment with successor contractors by demoting him, thus giving the appearance that DOE did not want Complainant employed by Rust or its successors. IG 1 at 5. According to Gardner, this destroyed his future employment prospects with any DOE contractor nationwide. *Id.*

Gardner alleges that his reassignment on June 17, 1996 was a demotion, and that Van Leuven's company-wide distribution of a memo about the reassignment was a deviation from standard company policy. Gardner maintains that Van Leuven announced the demotion publicly so as to alert successor contractors that Gardner was a problem employee. Tr. at 192-195. According to Gardner, this series of events destroyed his ability to obtain future employment at any DOE site. IG 1 at 5. It is not unreasonable to interpret Van Leuven's very public reassignment of Gardner as a demotion, given that only three months remained on the contract, and most of the GJPO employees already knew that he had been tasked with close-out activities. Gardner had reported to the president of the company for several years, but was abruptly reassigned to a manager, two levels below the president, who was not well-respected at Rust. Tr. at 154. Rust's former human resources manager testified that he viewed the reassignment as a demotion. *Id*. Nonetheless, I cannot interpret Van Leuven's actions as interference with Gardner's future employment opportunities.

Gardner points to the fact that he was not hired by the successor contractors as proof that Rust "seriously damaged his career." IG 1 at 5. The record does contain evidence that Gardner applied for jobs with the successor contractors and was not interviewed by either company. IG 11; IG 18. However, both companies stated that they did not have strategic planning jobs available. *Id*. One firm denied that anyone from DOE

or Rust passed along negative information about the complainant. IG 11. During the hearing, Van Leuven testified that Gardner did not request his assistance in a job search, and claims that he would have spoken to the new contractor on Gardner's behalf, if requested. Tr. at 101-102. Van Leuven testified that he would recommend Gardner today. Tr. at 114-115. Similarly, Tom Dabrowski (Dabrowski), president of Waste Management Nuclear Services, testified that in his opinion Gardner did a "good job" for Rust.(5) Tr. at 125-126. In fact, Dabrowski testified that he spoke to Gardner and offered to recommend Gardner to the successor contractor, but Gardner never requested his help. *Id*. Based on the foregoing, Gardner's lack of success in finding a job with the new contractor does not persuade me that Rust interfered with his future employment opportunities.

After a careful review of the record, I find no evidence that Rust interfered with Gardner's future employment. Gardner's managers both testified that although they were willing to recommend him for employment with the new contractors after the Rust contract ended, Gardner never requested their assistance. Neither Van Leuven nor Dabrowski ever received a written or oral request for a reference from any prospective employer. Tr at 114, 126. Gardner did not offer any explanation for not securing the assistance of his former managers, influential industry executives who may have been able to help him secure employment with the successor contractors. Therefore, I have no evidence that any Rust managers interfered with Gardner's future employment opportunities.

IV. Conclusion

As set forth above, I have determined that the complainant has failed to establish the existence of a violation on the part of Rust for which he may be accorded relief under DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. The record shows that Gardner made protected disclosures to contractor management, DOE officials and public officials, and that Gardner's disclosures were a "contributing factor" in the denial of his merit increase for 1996. Nonetheless, I find that Rust has carried its burden to show by clear and convincing evidence that it would have denied Gardner's raise even in the absence of his disclosures. The record is clear that other events leading to the denial of his increase, including the demise of the Rust-DOE contract and the resulting elimination of Gardner's strategic planning duties, were not connected with Complainant's protected disclosures. I rejected Gardner's claims that Rust interfered with his prospects for future employment with other DOE contractors. There was no evidence in the record that the successor contractors had a suitable opening for Gardner, that Gardner applied to any other DOE contractors for a job, or that Gardner took advantage of career assistance offered by the president of Rust's parent company.

Accordingly, I will deny Gardner's request for relief under 10 C.F.R. Part 708.

It Is Therefore Ordered That:

(1) The Request for Relief filed by Robert Gardner 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 15 days of its receipt, a Notice of Appeal is filed requesting review of the Initial Agency Decision by the Director of the Office of Hearings and Appeals with the Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0107, telephone number (202) 426-1566, fax number (202) 426-1415.

Valerie Vance Adeyeye

Hearing Officer

Office of Hearings and Appeals

Date: November 8, 1999

(1)Section 3161 provides funding to support the transitions of workers and communities affected by the reductions of Atomic Energy Defense Act (AEDA) activities at defense nuclear facilities. DOE contended that activities at GJPO were not funded by the AEDA account, and thus did not qualify for Section 3161 assistance. IG 45. Gardner argued that Rust employees at GJPO were eligible for Section 3161 assistance, and that DOE violated the law by refusing to provide funds for assistance to the affected employees. IG 1.

(2)I note that the page from the Rust personnel manual provided was dated October 5, 1995, even though Complainant's latest salary action was signed on August 22, 1995.

(3)Archuleta was not afforded the opportunity to review the Memorandum of Investigation that resulted from his telephone interview with the IG investigator. Tr. at 36.

(4)In this regulation, any salary action over the $80,000 level requires the approval of the DOE contracting officer. Tr. at 71; DEAR 970.3102.

(5)Rust Geotech was a wholly-owned subsidiary of Waste Management Nuclear Services, and Van Leuven reported to Dabrowski. Tr. at 119.