Case No. VWA-0040

December 13, 1999

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Initial Agency Decision

Name of Case: Rosie L. Beckham

Date of Filing: April 27, 1999

Case Number: VWA-0040

Rosie L. Beckham (hereinafter the complainant) filed a complaint against her former employer, KENROB and Associates, Inc. (hereinafter the contractor) under the Department of Energy (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. The program prohibits a DOE contractor from retaliating against an employee for disclosing certain information (a protected disclosure). A DOE office investigated the complaint and issued a report, which concluded that the complainant was not entitled to relief. The complainant requested a hearing, and I was appointed to conduct the hearing and issue an initial agency decision. As explained below, this initial agency decision concludes that the complainant has not met her burden of demonstrating that she made a protected disclosure. Accordingly, the decision denies the complainant's request for relief.

I. Background

A. The DOE's Contractor Employee Protection Program

The DOE Contractor Employee Protection Program is set forth at 10 C.F.R. Part 708. The DOE recently revised the program. 64 Fed. Reg. 12,862 (March 15, 1999).

Part 708 prohibits contractors from retaliating against contractor employees who engage in protected conduct. Protected conduct includes disclosing information that the employee believes reveals a violation of a law, rule, or regulation. If a contractor retaliates against an employee for making a protected disclosure,

the employee can file a complaint. The employee must establish, by a preponderance of the evidence, that the employee made a protected disclosure and the disclosure was a contributing factor to an alleged retaliatory act. If the employee makes the required showings, the burden shifts to the contractor to establish by clear and convincing evidence that it would have taken the same action in the absence of the employee's disclosure. If the employee prevails, the OHA may order employment-related relief such as reinstatement and backpay.

B. Factual Background

The contractor provided technical support services to the DOE. Those services included (i) the procurement of computer hardware and software, as well as related servicing and training and (ii) the preparation of financial reports.

In May 1995, the contractor hired the complainant as a contract specialist. The complainant had interviewed for a financial analyst position, but was offered, and accepted, a contract specialist position.

As a contract specialist, the complainant processed computer- related requisitions. Because the contractor did not have a DOE- approved purchasing system, the DOE required that the contractor submit all proposed procurements over $50 to DOE for its review and consent. Accordingly, the complainant prepared, for submission to DOE, a "consent" package, documenting a proposed award. The complainant forwarded the package to her second level supervisor, who approved the package and sent it to the DOE for its consent. The DOE granted its consent in a letter to the complainant's third level supervisor, who then signed a purchase order.

In addition to processing requisitions, the complainant maintained a looseleaf service of the federal acquisition regulations. When the complainant received replacement pages, she inserted the replacement pages in the binder and discarded the replaced pages. Many (if not all) of the replacement pages contained new regulations that were promulgated pursuant to the Federal Acquisition Streamlining Act of 1994 (FASA). At some point, the complainant received a circular concerning FASA. The circular, Federal Acquisition Circular 90-32 (September 18, 1995), is an exhibit to the investigatory report. IR, Ex. 28. The circular noted some FASA changes (and the corresponding new regulations). The circular also contained a statement that FASA was applicable to solicitations issued on or after December 1, 1995, as well as a statement that the changes noted in the circular did not apply to micro-procurements, i.e., procurements under $2,500. Id. (circular at coversheet & 4).

As the result of DOE budget cuts, the contractor's procurements declined markedly beginning in October 1995. The contractor's log of maintenance items shows approximately 30 procurements totaling over $100,000 for the period July through September 1995 - the last fiscal quarter of 1995 - and approximately five procurements totaling $6,000 for the period October 1995 through December 1995 - the first quarter of fiscal 1996. Hrg. Ex. 2. As the result of anticipated and actual budget cuts, the contractor's staff fell from 93 to 78 people. IR, Ex. 15 at 1.

Also as a result of DOE budget cuts, the contractor's preparation of financial reports increased. IR, Ex. 15 at 1,2. The DOE requested that the contractor prepare reports projecting the impact of various funding reductions. Id.

As a result of the decline in procurements, the increase in financial reports, and the departure of the employee responsible for financial reports, the contractor tasked the complainant with preparing some of the financial reports. IR, Ex. 15 at 2. The complainant had difficulty preparing the reports but attributed those difficulties to the reports' complexity and computer problems, rather than any lack of skill or effort on her part. IR, Ex. 5 at 13-16.

During December 1995, the complainant, with the contractor's permission, registered for a February 1996, one-day FASA seminar. During the same month, the complainant's first level supervisor counseled the complainant on several occasions, citing unprofessional conduct toward other employees, including the first level supervisor, and inaccurate reporting of time. See, e.g., IR, Exs. 5, 8. On January 2, 1996, the complainant sent an e- mail to her second and third level supervisors, discussing her first level supervisor's "expressed hostility" toward her and requesting that they assign her a different supervisor. IR, Ex. 23 at 11-12.

On January 3, 1996, the contractor terminated the complainant. The January 3, 1996 termination letter cited "blatant insubordination and disregard for your supervisor." IR, Ex. 22 at 7. The letter cited three incidents. The letter stated that, on December 21, 1995, the first level supervisor told the complainant that co- workers had complained that the complainant was screaming at them and using profanity. The letter stated that the complainant became very loud and asked to speak with those co-workers. The letter further stated that, on December 22, 1995, the first level supervisor convened a second meeting with the

complainant and one of her co-workers. The letter stated that the complainant refused to discuss the problems that the co-worker raised. Finally, the letter stated that, on December 29, 1995, the first level supervisor questioned whether the complainant had accurately reported her time. The letter stated that the complainant began screaming at the supervisor.

The complainant appealed the termination to the president of the company. In a January 3, 1996 letter, IR Ex. 23 at 2-4, the complainant denied that she had behaved in an unprofessional manner; the complainant attributed her problems with her first level supervisor to a remark the complainant made in mid-December about the supervisor's weight loss. The complainant stated that she intended the remark as a compliment, but the supervisor took offense. The complainant stated that the supervisor "never forgave" her and began "doing things to cause [her] harm." Id. at 2-3. On January 4, 1996, three contractor officials (the president, vice-president, and human resources director) met with the complainant. The complainant provided them with a copy of her January 3, 1996 letter, as well as a copy of a December 28, 1995 letter that she wrote to her first level supervisor.(1)

On January 10, 1996, the contractor rehired the complainant on a probationary basis. IR, Ex. 24. The president and the complainant's third level supervisor signed the letter. They rehired the complainant over the objections of the complainant's first and second level supervisors. IR, Ex. 13 at 3.

The January 10, 1996 letter, rehiring the complainant, stated that the complainant must correct the matters set forth in the January 3, 1996 termination letter, as well as negative work performance issues that surfaced during the contractor's consideration of the complainant's request for reinstatement. The letter set forth a list of ten performance criteria, including one that noted the decline in procurements and the complainant's obligation to perform other duties. IR, Ex. 24 at 3 (performance criteria). The letter provided for a review of the complainant's progress in meeting the criteria in two months, or sooner if necessary. Id. at 1.

During the two-month period December 1995 to January 1996, the complainant processed three procurements. They were: 1) a $1,020 maintenance agreement for a workstation, 2) a $2,475 computer training course, and 3) a $148.05 copier service call. Contractor's July 19, 1999 letter (attachments).

During the same period, the complainant had difficulty performing her spreadsheet duties. IR, Ex. 5 at 13-16, Ex. 25. On January 26, 1996, and January 30, 1996, the complainant told her first level supervisor that she did not have sufficient time to perform the financial reporting tasks assigned her, because of an "overload on doing the FASA research and the maintenance inventory list." IR, Ex. 5 at 9, Exs. 26, 27. On January 31, 1996, the complainant's first level supervisor requested documentation concerning the new FASA regulations, and the complainant provided a copy of the circular. IR, Ex. 5 at 9.

On February 2, 1996, the complainant's first and second level supervisors met with her and expressed dissatisfaction with the complainant's preparation of financial reports, specifically the complainant's spreadsheet skills. IR, Ex. 5 at 9, Ex. 9 at 2-3, Ex. 17 at 6. The supervisors suggested that the complainant take additional spreadsheet training, but the complainant objected, stating that her skills were adequate and that she needed to concentrate her efforts on learning the new FASA regulations. The second level supervisor told the complainant to cancel the FASA seminar, citing the complainant's financial reporting responsibilities, the decline in procurement work, and the lack of training funds.

In the same meeting, and in response to the instruction to cancel the course, the complainant told her first and second level supervisors that she believed that FASA applied to the contractor's procurements, beginning December 1, 1995. The complainant provided the circular as the basis for her belief. The complainant expressed misgivings that, since December 1, 1995, she had proposed three purchase orders without knowing whether they complied with the FASA regulations and stated that she would not go to jail for her first level supervisor. The complainant stated that she needed to learn the FASA regulations for six upcoming maintenance renewals. The second level supervisor asked the complainant for a copy of the material upon which she based her statements about FASA.

As of February 9, 1996, the complainant had not canceled the FASA seminar. The complainant reiterated, to her first level supervisor, that she needed to take the course and learn the new FASA regulations. The complainant's first level supervisor reiterated that she should cancel the course but could buy the book, and the complainant took that course of action. IR, Ex. 31.

The same day, the complainant's first level supervisor raised the issue of FASA with the complainant's third level supervisor, who in turn sought guidance from the cognizant DOE procurement official. On February 13, 1996, the DOE procurement official advised the third level supervisor that the contractor did not need to be concerned about FASA and could continue processing requisitions as it had in the past. IR, Exs. 8, 29. The DOE advice was relayed to the complainant, IR, Ex. 29, and nothing further was said on the matter, IR, Ex. 5 at 12.

On February 23, 1996, the contractor terminated the complainant, citing poor performance of her financial reporting duties. IR, Ex. 22 at 5-6. The contractor did not hire a replacement for the complainant. IR, Ex. 13 at 3.

C. Procedural History

After her termination, the complainant filed her Part 708 complaint. In her complaint, she alleged that the contractor retaliated against her for disclosing that she believed that FASA applied to the three procurements and that she did not know enough about the FASA to know if the three purchase orders complied or if future purchase orders would comply.

The investigatory report found that the complainant had not met her burden under Part 708. The report reflects interviews with three DOE officials, all of whom indicated that the new FASA regulations did not affect the contractor's procurements. IR, Exs. 6-8. (2) Nonetheless, the report accepted the complainant's assertion that she made a protected disclosure, but then concluded that the disclosure was not a contributing factor to her termination. The investigatory report found that, once one of the DOE officials advised the contractor that FASA did not affect its procurements, the contractor gave no further thought to the issue. IR at 11-12.

The complainant requested a hearing, and the OHA Director appointed me as the hearing officer. In a July 2, 1999 letter, I notified the parties of my preliminary assessment that the complainant had not made a protected disclosure:

I question whether the content of Ms. Beckham's January 26 and February 9 statements rises to the level of a protected disclosure. DOE officials indicated in their interviews that the statute did not apply. Accordingly, Ms. Beckham must demonstrate that she had a good faith belief that the purchase orders violated the statute and implementing regulations. General concerns that the statute might apply and might require changes do not rise to the level of a protected disclosure. Finally, if Ms. Beckham establishes that she had a good faith belief that the purchase orders violated the statute and implementing regulations, there is an issue whether the violation is the type contemplated by Part 708.

July 2, 1999 letter at 2. Based on this preliminary assessment and other events,(3)I advised the parties that I would bifurcate the hearing and limit the first session to the issue whether the complainant made a protected disclosure. I stated that if I ruled that the complainant made a protected disclosure, I would schedule a follow-on hearing on the remaining issues. Neither party objected to this approach. On July 16, 1999, I held a pre-hearing conference.

During the pre-hearing conference, the complainant's attorney stated that the complainant would not try to establish that a violation of law occurred, but merely that she had a reasonable belief to that effect. The complainant's attorney stated that he had contacted one or more DOE officials, but that he did not wish to call them. In a July 19 follow-up letter, I stated my understanding of the complainant's position:

It is undisputed that Ms. Beckham's stated concern -- that the purchases orders violated the FASA -- was unfounded. It is undisputed that FASA did not apply to KENROB's purchase orders and that if DOE procurement officials were called to the hearing, they would testify to that effect.

July 19, 1999 hearing officer letter at 1.(4)Accordingly, I suggested that the complainant testify specifically concerning her beliefs about the legality of the three procurements. Prior to the hearing, the complainant's attorney did not dispute my understanding of the complainant's position.

I convened the hearing on July 22, 1999. The complainant was the only witness. During the hearing, the complainant's attorney disputed my understanding of the complainant's position. He stated that the complainant conceded that DOE officials waived compliance with FASA but not that DOE officials viewed the FASA as inapplicable. Tr. at 50-51. Following the hearing, the complainant's attorney requested the opportunity to file a post- hearing brief. On October 25, 1999, after the completion of post-hearing briefs, I closed the record.

II. The Hearing

A. The Exhibits

The complainant testified concerning a number of exhibits. Aside from the circular, most of the testimony related to the exhibits reflecting FASA-related changes to the regulations, Hrg. Exs. 5-14, 16-18, 21-22, as well as documentation for one of the procurements - the $1,020 maintenance agreement for a workstation, Hrg. Ex. 3. The maintenance agreement documentation consisted of (i) the contractor's December 8, 1995 request for consent package and (ii) the DOE's January 17, 1996 consent. The contractor's request for consent package consisted of a cover letter and enclosures. The cover letter, from the complainant's second level supervisor to the DOE, requested DOE consent. The cover letter referred to three enclosures: (i) Purchase Requisition, (ii) Source Selection Documentation, and (iii) Solicitation Abstract. The complainant was the sole signatory to the latter two documents, i.e., the Source Selection Documentation and the Solicitation Abstract.

B. The Complainant's Beliefs Concerning the Three Procurements

1. The complainant's beliefs about the applicability of the FASA

The complainant testified that she believed that FASA applied to the contractor's procurements based on the circular. Hrg. Tr. at 136. The complainant challenged the opinions of DOE procurement officials that FASA did not apply. Id. at 140.

Although the complainant testified that she believed that FASA applied based on the circular, the complainant was unable to explain why the procurements would not fall within the circular's exclusion for micro-procurements, i.e., procurements of $2,500 or less. First, the complainant testified that the micro-procurement exclusion did not apply to the contractor's procurements, but she did not cite any portion of the circular or FASA. Instead, the complainant cited the DOE requirement that the contractor obtain DOE consent for any procurement over $50. Hrg. Tr. at 64. I noted that that argument, if accepted, would mean that the contractor had to comply with a procurement regulation, even if the regulation was specifically limited to larger procurements. The complainant then conceded that the circular's exclusion for micro-procurements applied to the procurements, but she argued that her procurements had to comply with the regulations listed in the standardized language in the consent package. Hrg. Tr. at 128-31, 151, 160-61. The complainant did not, however, explain why a reference in standardized language in the consent package to a particular regulation made the regulation applicable to all procurements, regardless of the regulation's express inapplicability to procurements under a particular dollar threshold.

2. The Complainant's Beliefs Concerning the Legality of the Three Procurements

The complainant did not testify that any of the three procurements were illegal. Instead, the complainant testified that compliance with FASA would have changed the "process" for the three procurements. Hrg. Tr. at 52-54, 100-01, 179. The complainant also testified that she may have violated the law by signing the documentation for DOE consent. Id. She reasoned that her signature was a representation that she believed that the procurements were lawful, when she did not know whether that was true. Id. As explained below, her testimony on these points was not convincing.

The complainant testified that under the FASA regulations, she would have conducted "market research." The complainant cited a new provision requiring the agency to conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements. Hrg. Ex. 6. In fact, all three procurements involved commercially available services - workstation maintenance, software training, and a service call - and, therefore, the goal of that provision was already met.

The complainant testified that under the FASA regulations, she might research the availability of commercial items with energy efficient features. Hr. Ex. 7. As just indicated, the three procurements involved services - not items. In any event, the provision cited by the complainant states that the extent of the agency's research would depend on a number of factors and, therefore, does not mandate particular research.

The complainant testified that the FASA regulations eliminated the preference for labor surplus area concerns. Hrg. Ex. 10. Again, it is not relevant because the complainant did not testify that she applied that preference in the three procurements.

The complainant testified that the FASA regulations provided an additional possible method of price analysis - one based on market research. Hrg. Ex. 12. The provision, however, retained other forms of price analysis, including the comparison of solicited offers - the form used by the complainant for the workstation maintenance agreement. Id. at 1 (¶ 15.805-2). Accordingly, the complainant did not demonstrate how that provision rendered any of the procurements illegal.

The complainant testified that the FASA regulations specified that lack of performance history, alone, should not exclude a firm from consideration. Hrg. Ex. 14. Although this provision would have allowed her to award the procurements to a contractor with no performance history, the complainant did not testify that she applied the provision - i.e., that she eliminated an offeror based on lack of performance history. The complainant only speculated that she could have solicited offers from unidentified firms with no performance history.

The complainant testified that if she had been familiar with the FASA regulations, which contemplated that five percent of awards would be made to women-owned businesses, she might have solicited a woman-owned business for one of the procurements. Hrg. Tr. at 100. The complainant did not, however, testify that her failure to do so would have violated the regulations and any such argument would be difficult to make since the set-aside refers to total procurements, not any individual procurement.

Finally, the complainant testified that, regardless of whether the procurements violated any laws, or whether the FASA would have changed the "process", she violated the contractor's ethics rules when she signed the Source Selection Documentation for the three procurements. The complainant testified that her signature was a certification that the procurements complied with the law, when in fact she did not know if that was correct.

In response to my questions, the complainant conceded that she accurately completed the Source Selection Documentation for the workstation maintenance agreement. See Hrg. Tr. at 175-83; Hrg. Ex. 3 at 4-7. The complainant completed the form by checking the following information: Type of purchase: fixed price;

Source of Supply: commercial sources; Business size: small disadvantaged business; Basis of Selection: checked debarment list; Competition, number of sources: more than one; Price Analysis: Comparison of proposed prices received.

Despite the foregoing, the complainant argued that the assertedly outdated consent documentation compromised her ability to evaluate the legality of the procurement. She was not at all clear on this point. The complainant's testimony did not indicate that her degree of familiarity with the new, FASA regulations was any less than her degree of familiarity with the prior regulations. The complainant told the contractor and the investigator that (i) she had spent a significant amount of time studying the new regulations and (ii) she did not know if the proposed procurements complied with the prior regulations because she had discarded her copy of those regulations. See, e.g., Hrg. Tr. at 114-23. The complainant's testimony about compliance with the prior and new, FASA regulations was so weak that I concluded that (i) she did not have the ability to judge the legality of a procurement under either set of regulations or (ii) she did not testify candidly.

D. The Complainant's Beliefs About the Legality of Future Procurements

In addition to her concerns about the three procurements, the complainant testified that she was concerned about future procurements. Again, the complainant testified that she not know enough about FASA to process future procurements. In addition, she claimed that if she signed outdated documentation she would be misrepresenting her knowledge about the legality of the procurements.

With respect to future procurements, the complainant mentioned six upcoming maintenance renewals. Although the complainant did not identify those procurements, the contractor's log of procurements indicates that four maintenance items were expiring in March 1996, one in June 1996, and a number later in 1996. Hrg. Ex. 2.

III. Analysis

The complainant argues that she made a protected disclosure. As explained below, I disagree.

It is undisputed that the complainant disclosed - (i) a circular discussing FASA changes and (ii) the complainant's belief that FASA applied to the contractor's procurements and that she lacked sufficient knowledge to know if past and future procurements complied. The complainant disclosed this information to her first and second level supervisors. Even if the complainant's beliefs were correct, she did not make a protected disclosure.

Part 708 does not protect disclosures of insignificant or de minimis violations. The current version of Part 708 specifies that the disclosure must reveal a "substantial" violation of law. 10 C.F.R. § 708.5(a)(1). That requirement tracks a FASA whistleblower protection provision, which protects contractor employees who disclose evidence of "substantial" violations. 64 Fed. Reg. at 12863 (preamble to Part 708, citing FASA § 6006, implemented in 48 C.F.R. Part 3, Subpart 3.9 (1999)). Although the prior version of Part 708 did not specify that the disclosure involve a "substantial" violation of law, that version contained an implicit requirement that the disclosures be significant. All of our grants of relief under Part 708 have involved significant disclosures. See, e.g., Barbara Nabb, 27 DOE ¶ 87,519 (1999) (mislabeling of hazardous waste); Daniel L. Holsinger, 27 DOE ¶ 87,503 (1998) (theft of government property); Am-Pro Protective Services, Inc., 26 DOE ¶ 87,511 (1997) (unsecured top secret safe); Lawrence C. Cornett, 26 DOE ¶ 87,507 (1996) (health risks concerning waste management); Howard W. Spaletta, 24 DOE ¶ 87,511 (1995) (safety of nuclear power plant); David Ramirez, 23 DOE ¶ 87,505 (1994) (asbestos exposure); Ronald Sorri, 23 DOE ¶ 87,503 (1993) (excessive pressure in toxic gas cylinders). The implicit requirement that a disclosure be significant is consistent with the WPA protection for federal employees. Frederick v. Dep't of Justice, 73 F.3d 349, 353 (Fed. Cir. 1996) ("violation of law" does not include a "minor transgression" or a "trivial lapse"). Accordingly, disclosures of insignificant or de minimis violations are simply not

protected under Part 708.

The complainant's disclosures involve, at most, insignificant or de minimis violations. It is undisputed that FASA streamlined procurement procedures and gave agencies more latitude to adopt commercial practices. The three procurements in this case all involved de minimis amounts. The complainant's disclosure that she did not know whether these de minimis procurements, or their documentation, complied with FASA is not the disclosure of a significant violation. Similarly, with respect to future procurements, given the uncertainty about whether the DOE would even request those procurements, or the manner in which such requests would be processed, the complainant's expressed concerns about future FASA violations are not disclosures of significant violations. Finally, the complainant's purported violation of the contractor's ethics policy, Hrg. Ex. 26, is not the violation of a law, rule, or regulation and, therefore, is outside the scope of Part 708. In any event, I fail to see how the complainant's asserted lack of knowledge in this context violated the ethics policy. Indeed, it is more likely that the complainant's allegedly inaccurate reporting of her time was a "falsification of timesheets" specifically prohibited by the ethics policy.

As just indicated, even if the new FASA regulations applied to the procurements, the complainant has not disclosed information evidencing a significant violation of law. Accordingly, she is not entitled to Part 708 relief. I do, however, wish to comment on the issue whether the complainant had a good faith, reasonable belief that FASA applied to the procurements.

As an initial matter, I note that cognizant DOE officials viewed FASA as inapplicable to the contractor's procurements. During the investigation, DOE officials opined that FASA did not apply because 1) FASA post-dated the DOE/KENROB contract, IR, Ex. 6, and 2) the DOE/KENROB contract did not contain federal acquisition regulation "flow down clauses," IR, Ex. 8. The complainant has argued that although DOE officials opined that FASA was inapplicable to the DOE/KENROB contract, they did not directly opine that FASA was inapplicable to the contractor's procurements. It is clear, however, from the context of their opinions, that they viewed FASA's inapplicability to the DOE/KENROB contract and the absence of "flow down clauses" as the reason why FASA did not apply to the contractor's procurements.

With respect to the three procurements, the complainant's reliance on the circular's reference to a December 1, 1995 effective date is clearly unreasonable. The circular, like the pre-existing regulations, contained an express exclusion for micro-procurements, i.e., procurements under $2,500. The complainant's asserted belief that the micro-procurement exclusion did not apply because DOE required its consent for procurements over $50 does not make sense; that would mean virtually all of the contractor's micro- procurements would have to comply with federal procurement regulations, regardless of their limitation to large dollar procurements. In any event, even if the complainant's reliance on the DOE requirement was reasonable, there is insufficient information about the requirement to conclude that it was a law, rule, or regulation. Indeed, it appears, at most, to have been a contractual matter, although even that it unclear.

Similarly, the complainant has not demonstrated that she reasonably believed that she violated, or might have violated, the law when she signed the purchasing documentation. At the hearing, the complainant conceded that the information that she provided accurately described the proposed procurement. At most, the complainant maintained that she did not understand the form because it had not been updated to refer to the new regulations.

Finally, I question whether the complainant had a good faith belief that the disclosures evidenced violations. The contractor's procurement work was declining, and the complainant was tasked with financial reporting responsibilities. The complainant made her February 2 disclosures in response to negative comments from her first and second level supervisors about her performance of her financial reporting duties. Although the complainant's attorney attributes her emotional demeanor during the hearing to her purported good faith, I viewed that testimony as evidencing an insubordinate attitude, i.e., an unwillingness to accept her supervisor's decision on a matter.(5) Supervisors and employees disagree

on matters; if the complainant held a good faith belief that the supervisor was requiring her to violate the law, she could have documented her belief in a memorandum or raised the matter with higher level contractor officials or the DOE. Given the facts and my analysis of them above, I believe that the complainant's failure to take such actions casts serious doubt on her alleged good faith.

IV. Conclusion

As indicated above, under Part 708, the employee has the burden of demonstrating that she made a protected disclosure that was a contributing factor to her termination. As also indicated above, the employee did not demonstrate that she made a protected disclosure. For that reason, the employee is not entitled to relief, and no further inquiry into her claim of retaliation, or the contractor's affirmative defense, is necessary.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by Rosie L. Beckham, OHA Case No. VWA-0040, is hereby denied.

(2) This is an initial agency decision that becomes the final decision of the Department of Energy unless, by the 15th day after receiving the initial agency decision, a party files a notice of appeal with the Director of the Office of Hearings and Appeals.

Janet N. Freimuth

Hearing Officer

Office of Hearings and Appeals

Date: December 13, 1999

(1) IR, Ex. 23 at 1, 7-8. In the December 28 letter, the complainant stated that, as a friend, she hoped that the first level supervisor would take hold of the "evil spirit" within her before it destroyed her.

(2) The DOE officials opined that FASA did not apply because 1) FASA post-dated the DOE/KENROB contract, IR, Ex. 6, and 2) the DOE/KENROB contract did not contain federal acquisition regulation "flow down clauses," IR, Ex. 8.

(3) The complainant's counsel was either unresponsive or tardy in various pre-hearing matters, and this conduct precluded adequate preparation for a hearing on all of the issues in the case. See July 9, 1999, July 14, 1999, and October 6, 1999 hearing officer letters to the parties.

(4) The contractor's attorney had a similar understanding of the complainant's position:

From our telephone conference of July 16, 1999, it is my understanding that it is the position of Ms. Beckham that she will admit that KENROB was not in violation of FASA 1994, or any other law, during the time frame covered by her Complaint. If, for some reason, this is inaccurate, please contact me immediately.

July 19, 1999 contractor letter. Prior to the hearing, the complainant's attorney did not challenge the contractor's understanding of the complainant's position. In apparent reliance on this lack of challenge, the contractor's attorney abandoned his previously stated intention of calling the DOE officials as witnesses.

(5) Indeed, the complainant continues to reject the opinion of DOE officials that FASA did not affect the contractor's procurements. Hrg. Tr. at 127-28, 153-57.