United States Department of Energy
Office of Hearings and Appeals

In the Matter of Alison Marschman	)	
	)	
Filing Date: May 29, 2014	)	Case No.: WBA-13-0011
	)	
	)	

Issued: August 1, 2014

Decision and Order

This Decision considers an Appeal of an Initial Agency Decision (IAD) issued by the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) on May 8, 2014, of a Complaint filed by Alison Marschman (hereinafter referred to as "the Employee") against her former employer, Battelle Energy Alliance (hereinafter referred to as "the Contractor"), under the DOE's Contractor Employee Protection Program, 10 C.F.R. Part 708. As set forth in this Decision, we have determined that the Appeal be denied.

I. Background

A. Regulatory Background

The DOE established its Contractor Employee Protection Program 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. *See* Criteria and Procedures for DOE Contractor Employee Protection Program, 57 Fed. Reg. 7533 (1992), *as amended*, 64 Fed. Reg. 12862 (1999) and 65 Fed. Reg. 6314 (2000). The Program's primary purpose is to encourage contractor employees to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers. The Part 708 regulations prohibit retaliation by a DOE contractor against its employee because the employee has engaged in certain protected activity, including disclosing to his or her employer information that he or she reasonably believes reveals a substantial and specific danger to employees or to the public, and for participating "in a Congressional proceeding or an administrative proceeding conducted under this regulation." 10 C.F.R. § 708.5(b).

An employee who believes that he or she has suffered retaliation for engaging in protected activity may file a complaint with the DOE. It is the burden of the employee under Part 708 to establish "by

a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate in an activity, 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." 10 C.F.R. § 708.29. If the Employee meets this burden of proof, "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." *Id.*

B. Factual Background

The Employee was hired by the Contractor in September 2007 and went to work on a full time basis as a Senior Radiological Control Technician (RCT) in the INL's Central Facilities Area (CFA). In September 2009, she filed a complaint under 10 C.F.R. Part 708, in which she alleged that the Contractor retaliated against her for raising safety concerns. After the Employee filed her 2009 Complaint a series of discussions with senior level managers (Victor Alverez, David Hill, and Steve Marschman (the Employee's spouse)) of the Contractor, ensued. As a result of these discussions, the Contractor transferred the Employee from CFA to a part-time position as a Health Physics Technician (HPT) at the Materials and Fuels Complex (MFC), and agreed to take several steps to address the Employee's safety concerns.[1] The Contractor created this part-time HPT position especially for the Employee, who was the only part-time HPT at MFC during the period in question. In February 2010, the OHA dismissed the 2009 Complaint because the Employee was offered the remedy that she had requested in her complaint (the transfer to MFC and the removal from her personnel file of the documentation of a verbal warning that she received while at CFA). 2010 Dismissal letter at 2; *see* 10 C.F.R. § 708.17(c)(6).[2]

After this transfer, the Employee initially worked at the Fuel Conditioning Facility (FCF) and reported to Steve Aitken, the Radiological Control (RADCON) Manager, and Maxine Rubick, who was the Employee's direct supervisor until November 2011. In January 2011, Paul Nelson transferred from the Advanced Test Reactor Complex and replaced Mr. Aitken as MFC's RADCON Manager. In August 2012, the Employee transferred from the FCF to a new instrument group in MFC supervised by Trenna LePage. From then until the Employee's termination in January 2013, her first, second, third and fourth line managers were, respectively, Ms. LePage, Mr. Nelson, Chere Morgan, and Sharon Dossett.

On November 27, 2012, Mr. Nelson issued a verbal warning (the Contractor's mildest formal disciplinary measure) to the Employee after a verbal altercation between her and a co-worker, during which the Employee stated that the co-worker "had better stop belittling [her] or [the co-worker] would be sorry." Employee's Exhibit (Emp. Ex.) 19; Contractor's Exhibit (Cont. Ex.) 21. The Contractor considered this statement to be potentially threatening, even though the Employee's intent was merely to report her co-worker's behavior to management. *Id.*

[1] HPTs and RCTs monitor radiation levels to protect workers and the public and to ensure compliance with company procedures and regulations.

[2] 10 C.F.R. § 708.17(c)(6) provides that the DOE may dismiss a complaint if "[The] employer has made a formal offer to provide . . . a remedy that DOE considers to be equivalent to what could be provided as a remedy under this regulation."

On December 18, 2012, the Employee met with Mr. Nelson and Ms. LePage. During this meeting, the Employee was presented with a memorandum entitled: "Status Change of Part-Time 20+ to Full Time or Casual." Emp. Ex. 20. The December 18th memorandum stated in pertinent part:

> The MFC Radcon Operations Group is committed to adjusting our current workforce in order to address current business needs. Based on MFC mission work being performed, we have determined that we need to change your current part-time (20+) status to regular full-time. As an alternative, you may elect to change your status to casual part-time. Please refer to the attached Benefit Summary Sheet to compare the benefit differences between part-time 30+, 20+, and casual.
>
> This reassignment does not create an employment contract. Employment with BEA is "at will" and may be terminated with or without cause by either yourself or BEA at any time.
>
> Should you decline this reassignment, you will be deemed to have voluntarily resigned from employment with BEA, and HR will submit a termination notice on your behalf with a termination date of Thursday, December 20th, 2012.
>
> Please indicate below your selection. If you have any questions concerning the directed reassignment, please contact Deborah Chaffee at (208) 526-8782.

Cont. Ex. 26.

At the December 18, 2012, meeting, the Employee asserted that requiring her to abandon her part-time status would violate the "settlement agreement" that resolved her 2009 Part 708 complaint. Mr. Nelson replied that he would need to see a copy of the agreement. The Employee also noted that the full-time position that she would be accepting if she chose that option was not specified in the memorandum, and Mr. Nelson responded that it was the same position that she currently held, with the only change being from part-time to full-time. Mr. Nelson, tabled the discussion in order to investigate the Employee's assertion that changing her status would violate a written settlement agreement. Apparently, there was no written settlement agreement between the parties.

On December 19, 2012, Mr. Nelson contacted the Employee to determine if she had a copy of the settlement agreement and if she had decided which option to accept. The Employee informed Mr. Nelson that Mr. Marschman had arranged for a meeting with Mr. Alvarez, to discuss the situation. Later that day, Mr. Alvarez sent Mr. Marschman an e-mail, in which he said that the Contractor would defer further discussion and a decision on the December 18th memorandum until after the New Year. Resp. Ex. 29. Mr. Alvarez also "encourage[d] an open mind as the lab needs full time help in this area and can use [the Employee's] talents accordingly." *Id.*

On January 9, 2013, Ms. Morgan and Ms. LePage met with the Employee and presented her with a slightly revised copy of the memorandum. The only revision that was made, however, was that the date of termination, should she choose not to accept reassignment to full-time or casual part-time

status, was changed from December 20, 2012, to January 14, 2013. Cont. Ex. 32. The Employee refused to choose any of the three options, refused to sign the memorandum, and said that she and her husband would be meeting with Mr. Alvarez. Ms. Morgan replied that she would get the right people together to resolve the matter and would contact the Employee.

On January 21, 2013, Mr. Nelson, Ms. Morgan and Ms. LePage met with the Employee again, who again refused to choose one of the three options or to sign the memorandum. Instead, the Employee presented Mr. Nelson, Ms. Morgan and Ms. LePage with a copy of an e-mail that she had sent earlier to Jan Oglivie of the DOE's Idaho Operations Office. That e-mail said, in pertinent part, that "[d]ue to the workforce restructuring happening within the Idaho National Laboratory, the loss of work scope and a possibility of up to four hundred and fifty layoffs, I choose to remain a regular part time employee as agreed upon between DOE, BEA and myself as part of my 708 agreement." Emp. Ex. 22. Mr. Nelson informed the Employee that because she had failed to choose one of the three options set forth in the memorandum, she would be considered to have voluntarily resigned from her position with [The Contractor]. She was then escorted off of the premises.

C. Procedural Background

On April 19, 2013, the Employee filed the Part 708 "Whistleblower" Complaint that is the subject of this proceeding. That Complaint states, in pertinent part, that "[i]n 2/17/2010 TBI-0093 [The Employee's 2009 Part 708 Complaint] was dismissed because [the Contractor] provided a remedy to the situation. Now the remedy has been removed. [The Contractor] says that they don't recognize my whistle blower remedy or if there was one." She went on to request relief in the form of monetary damages. Emp. Ex. 23.

The Complaint was forwarded to OHA, and Ms. Shiwali Patel was appointed the Attorney-Investigator. On June 19, 2013, Ms. Patel dismissed the Complaint. Cont. Ex. 26. She concluded that, by refusing to sign or to choose one of the three options on the memoranda that were presented to her on December 18, 2012, January 9, 2013, or January 21, 2013, the Employee voluntarily resigned from her position as an HPT. Ms. Patel concluded that voluntary resignation does not qualify as "retaliation" as that term is defined by 10 C.F.R. § 708.2. Additionally, Ms. Patel found that the Employee had not been the victim of a constructive discharge because the Employee had not alleged sufficiently intolerable workplace conditions such that a reasonable person in the Employee's position would have felt compelled to resign. Finally, Ms. Patel concluded that the Employee had not alleged facts that, if proven, would support a claim that her 2009 Complaint was a contributing factor in her termination. *Id.*

The Employee appealed the dismissal of her Complaint. On August 8, 2013, OHA granted her Appeal and remanded the matter to Ms. Patel for a full investigation. *Alison Marschman,* Case No. WBA-13-0007 (2013). In granting the Appeal, OHA found that the Employee's loss of position was not voluntary because she was not allowed to remain in her regular part-time employment, a status that she clearly preferred. OHA further concluded that because the loss of position was involuntary, it could be considered retaliation under 10 C.F.R. § 708.2. OHA further stated that, because of the difficulty in producing direct evidence of an employer's retaliatory intent, the OHA has held that an employee can meet his or her burden of proof through circumstantial evidence, and that a protected disclosure or activity can be found to be a contributing factor if there is sufficient temporal proximity between the disclosure or activity and

the alleged retaliation. Assuming, without deciding, that the approximately three-year period between the 2009 Complaint and her 2013 termination was too long a period to establish temporal proximity, OHA concluded that there were other ways by which the Employee could prove that her protected activity was a contributing factor to her loss of position. Specifically, OHA stated that such a nexus could be established if the Employee was able to demonstrate a pattern of retaliation after her 2009 Complaint. Because OHA was unable to conclude, as a matter of law, that the Employee could not demonstrate that her protected activity was a contributing factor to her loss of position, OHA granted her Appeal. *Id.*

On remand, Ms. Patel conducted an investigation, during which she interviewed the Employee and 20 other witnesses and reviewed a large number of documents. On October 18, 2013, Ms. Patel issued her Report of Investigation (ROI). In the ROI, Ms. Patel discussed ways in which it could be demonstrated that a protected disclosure or activity was a contributing factor to a negative personnel action. Ms. Patel found that the Employee engaged in a protected activity when she filed her 2009 Part 708 Complaint, and that the Contractor terminated the Employee on January 21, 2013. Ms. Patel further concluded that it was Mr. Nelson who decided to change the Employee's employment status. Ms. Patel went on to state that there was conflicting evidence in the record as to whether Mr. Nelson had actual or constructive knowledge of the Complaint prior to their December 18, 2012, meeting, and she then discussed whether the three-year period between the 2009 Complaint and the Employee's termination was too long to establish temporal proximity. If the Employee is able to demonstrate that her 2009 Complaint was a contributing factor to her loss of position, Ms. Patel continued, it would then be incumbent upon the Contractor to demonstrate, by clear and convincing evidence, that it would have taken the same action against the Employee in the absence of her protected activity. Ms. Patel concluded that, although there was some evidence that the Contractor would have taken the same action based on business needs, it was unclear that this evidence was "clear and convincing." Comp. Ex. 53.

On October 18, 2013, OHA appointed Robert B. Palmer as the Administrative Judge in this matter. After discovery and the submission of pre-hearing briefs, Judge Palmer convened a hearing on January 8-10, 2014. The Employee submitted 57 exhibits and presented the testimony of six witnesses, in addition to testifying herself. The Contractor submitted 62 exhibits and presented the testimony of seven witnesses.

On May 8, 2014, Judge Palmer issued the IAD, finding that because the Employee had not met her burden of proving that her protected disclosure[3] and protected activity was a contributing factor to the Contractor's decision to require that she change her employment status from part-time to full-time (or a casual call-in basis).

The Employee filed her Notice of Appeal on May 29, 2014, requesting review of the IAD. On June 12, 2014, the Employee filed her Statement of Appeal Issues and Standards for Review. On June 18, 2014, OHA established a briefing schedule under which the Employee's Appeal Brief was due on June 30, 2014, and the Contractor's Appeal Brief was due on July 14, 2014. OHA

[3] In addition to the Employee's protected activity in filing her 2009 Part 708 Complaint, Judge Palmer found that the employee made a protected disclosure in December 2010, when she raised a safety concern about equipment being used to measure radiation. *See* IAD at 6.

received the Employee's Appeal Brief on June 30, 2014, and the Contractor's Appeal Brief on July 14, 2014.

II. Analysis

The standard of review in our Part 708 appeal cases is well-established. Conclusions of law are reviewed de novo. *See Curtis Hall*, Case No. TBA-0002 at 5 (2008). Findings of fact are overturned only if they are clearly erroneous, giving due deference to the trier of fact to judge the credibility of the witness. *Id.; Salvatore Gianfriddo*, Case No. VBA-0007 (1999).

In her Appeal, the Employee asserts nine principal arguments. First, the Employee contends that Judge Palmer erred by ruling that several disclosures which the Employee had omitted from the Complaint, and raised at the hearing for the first time, would not be considered because considering them would have been unfair to the Contractor "given the lack of notice." Employee's Appeal Brief at 16. Second, the Employee contends that Judge Palmer erred in concluding "that 'any disclosures' [the Employee] 'revealed' were *not safety disclosures - not* 'a substantial and specific danger to employees or to the public.'" *Id.* at 15 (emphasis in the original). Third, the Employee asserts that "*every single [Contractor] witness* disagreed with Paul Nelson's unprofessional *gamesmanship* in refusing to state *in writing* [the Employee's] simple request that the 'Status Change' Memorandum she was being asked to sign simply state the *specific full-time position* - the 'job specified' - she was being asked to take." *Id.* at 4 (emphasis in the original). Fourth, the Employee asserts that Judge Palmer erred in finding that the Employee "*alleged* that she was retaliated against by [the Contractor] for raising safety concerns while working at CFA" – suggesting that such had not been proven or conceded." *Id.* at 5. Fifth, she asserts that Judge Palmer erred in concluding that the Employee's "prior Rule 708 Complaint was 'dismissed' when in fact, the Employee alleges, it was essentially found meritorious 'because she was offered the remedy that she requested.'" *Id.* at 5. Sixth, the Employee asserts that Judge Palmer erred in concluding that she bore the burden of proving that her protected activity was a contributing factor to the Contractor's decision to require her to become a full time or casual employee. *Id.* at 3-4. Seventh, the Employee argues that Judge Palmer erred by finding that the Employee had not established a pattern of retaliation against her by the Contractor. *Id.* at 15. Eighth, the Employee contends that Judge Palmer's finding that the Contractor had shown, by clear and convincing evidence, that it would have terminated her regardless of whether she had engaged in protected activity, was in error. *Id.* at 7. Ninth, the Employee argues that Judge Palmer failed to consider "the record as a whole." *Id.* at 2. Below, we address the Employee's arguments *seriatim*.

A. Whether Judge Palmer erred by ruling that considering several disclosures that were not included in the Complaint, and raised at the hearing for the first time, would have been unfair to the Contractor "given the lack of notice."

In Footnote 5 of the IAD, Judge Palmer noted that during the Employee's hearing testimony, she referred to several instances during which she raised safety concerns, disagreed with the Contractor's management as to the proper procedures to be used to ensure worker safety, or was allegedly asked to "cut corners." He then concluded that these allegations do not amount to activity that is protected by the Part 708 regulations, because these alleged disclosures were

raised by the Employee for the first time at the hearing, stating "it would be manifestly unfair to BEA to accept these alleged disclosures as protected activity, given the lack of any notice to the Contractor." IAD at 6, footnote 5. The Employee's Appeal Brief, ignoring the very *reason de etre* for legal pleadings, contends that Judge Palmer's finding was "just plain silly," further stating: "How can it be 'manifestly unfair to [the Contractor]' or a 'lack of notice' when it is [the Contractor] that is doing the wrongful activity?" We find that Judge Palmer did not err in holding that alleged protected activity, that is omitted from a Complaint under Part 708 and raised for the first time in hearing testimony, should not be considered by the Administrative Judge when determining whether the Employee has met the regulatory burden set forth at 10 C.F.R. § 708.29. *See Edward G. Gallrein, III*, Case No. WBH-13-0017 (2014) citing *Speer v. Rand McNally*, 123 F.3d 658, 665 (7th Cir. 1997) (complaints under Part 708 cannot be amended in prehearing briefs in opposition to motions for summary judgment);

B. Whether Judge Palmer erred in concluding that the Employee had not shown that certain disclosures by the Employee were safety disclosures.

In Footnote 5 of his decision, Judge Palmer noted that during the Employee's hearing testimony, she referred to several instances during which she raised safety concerns, disagreed with the Contractor's management as to the proper procedures to be used to ensure worker safety, or was allegedly asked to "cut corners." He then concluded that these allegations do not amount to activity that is protected by the Part 708 regulations, because: "In some cases, it is not clear that she reported any concerns to [the Contractor's] management or to individuals other than her co-workers. In others, it is not clear that she reasonably believed that any disclosures revealed a substantial and specific danger to employees or to the public." IAD at footnote 5. On Appeal, the Employee contends that "Judge Palmer . . . took a giant leap to the erroneous *non sequitur* conclusion that 'any disclosures' Alison 'revealed' were *not safety disclosures - not* 'a substantial and specific danger to employees or to the public.'" Employee's Appeal Brief at 15. The Employee greatly overstates the breath of Judge Palmer's holding, however. Contrary to the Employee's assertion, even though Judge Palmer found that in some instances the Employee had failed to carry her burden to show that she made a protected safety disclosure, he specifically found that the Complaint had met her burden of showing that she made a protected disclosure in one instance (and had engaged in protected activity as well). IAD at 6.

C. Whether Judge Palmer erred by finding that the Employee's testimony that she was given insufficient information in writing to make an informed decision concerning the Status Change memorandum was not credible, and committed further error by concluding that the Contractor's alleged refusal to negotiate the terms of the Status Change Memorandum did not constitute retaliation.

The Appeal asserts that "*every single [Contractor] witness* disagreed with Paul Nelson's unprofessional *gamesmanship* in refusing to state *in writing* [the Employee's] simple request that the "Status Change" Memorandum she was being asked to sign simply state the *specific full-time position* - the 'job specified" - she was being asked to take." Employee's Appeal Brief at 4 (emphasis in the original). This assertion is without merit. As an initial matter, I note that the Employee's factual assertion is not supported by the record. Two of the four people present at the meeting in which the Employee was terminated specifically testified that the Employee did

not request that she be given a written verification that she would remain in the same position. Tr. at 516, 607. Only the Employee testified to the contrary. Second, this assertion mis-states the record, as the Contractor's Appeal Brief notes: "Not a single witness agreed that Mr. Nelson was unreasonable or that he engaged in 'gamesmanship' in allegedly refusing to specify the position in the Memorandum." Contractor's Appeal Brief at 45. Third, even if the Employee's assertion were true and Mr. Nelson had refused to modify the Status Change Memorandum, it would not have changed the ultimate outcome of this case, since, as discussed at length below, the Employee had not met her initial burden of showing, by a preponderance of evidence, that her protected activity was a contributing factor to the Contractor's issuance of the Status Change Memorandum. Fourth, even if Mr. Nelson had refused to alter Status Change Memorandum in the manner suggested by the Employee, that fact would not have conclusively shown that the issuance of the Status Change Memorandum was intended as retaliation rather than motivated by legitimate business concerns.

D. Whether Judge Palmer erred by failing to specifically find that the alleged safety concerns raised by the Employee were valid.

The Employee asserts that Judge Palmer erred in finding that the Employee "*alleged* that she was retaliated against by BEA for raising safety concerns while working at CFA – suggesting that such had not been proven or conceded." Employee's Appeal Brief at 5. This contention is without merit. Under the controlling regulatory standard, an Employee does not need to show that their disclosure was valid, but rather needs only to show that their concerns were based upon a reasonable belief. 10 C.F.R. § 708.5(a). Moreover, since Judge Palmer found that the Employee had in fact made a protectable disclosure and had engaged in protected activity under 10 C.F.R §708.5, this contention by the Employee is irrelevant and immaterial.

E. Whether Judge Palmer erred in concluding that the Employee's "prior Rule 708 Complaint was 'dismissed' rather than 'found meritorious.'"

The Employee asserts that Judge Palmer erred in concluding that her "prior Rule 708 Complaint was 'dismissed' when in fact, the Employee alleges, it was essentially found meritorious 'because she was offered the remedy that she requested.'" Employee's Appeal Brief at 5. This assertion is meritless. Judge Palmer's conclusion was factually and legally accurate. As the February 19, 2010, Dismissal Letter states, OHA, citing 10 C.F.R. § 708.17(c)(6), dismissed the Employee's 2009 Complaint over her objections, specifically because the Contractor had "provided the remedy" requested by the Employee. Emp. Ex. 15 at 3. Moreover, even if the Employee's assertion was factually correct, it would have no bearing on the outcome of this case, therefore it is also irrelevant and immaterial.

F. Whether Judge Palmer erred in concluding that the Employee bore the burden of proving that her protected activity was a contributing factor to the Contractor's decision to require her to become a full time or casual employee.

The Employee asserts that Judge Palmer erred in concluding that she bore the burden of proving that her protected activity was a contributing factor to the Contractor's decision to require her to become a full time or casual employee. Employee's Appeal Brief at 3-4. This assertion is

clearly without merit. The 708 Regulations specifically provide that: "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*." 10 C.F.R. § 708.29 (emphasis supplied).

G. Whether Judge Palmer erred by finding that the Employee had not met her burden of proving that her protected activity constituted a contributing factor to her termination, because she had not produced a preponderance of evidence establishing a pattern of retaliation against her by the Contractor.

In order to obtain relief in a proceeding under Part 708, an Employee must prove, by a preponderance of evidence, that their protected activity "was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor." 10 C.F.R. § 708. 29. In the IAD, Judge Palmer found that the Employee had not produced any direct evidence that the Contractor retaliated against her because she filed her 2009 Complaint, or because of her December 2010 protected disclosure. Citing a long line of OHA precedent, Judge Palmer further found that "the period of over three years between the filing of [the Employee's] September 2009 Part 708 Complaint and her January 2013 termination, and the period of over two years between her December 2010 disclosure and that termination are simply too long to establish any kind of presumption that this protected activity was a contributing factor to that termination." IAD at 7. However, Judge Palmer recognized that an Employee in Part 708 proceedings may also demonstrate a nexus between protected activity and alleged acts of retaliation by proving, by a preponderance of evidence, the existence of a pattern of retaliatory acts by a Contractor between the protected activity and the alleged acts of retaliation[4] for which the Employee seeks relief. IAD at 7. After carefully considering the evidence in the record, Judge Palmer found that "there is little or no evidence of a pattern of retaliatory actions or of other circumstances that would demonstrate a nexus between her protected activity and her termination." IAD at 12. Accordingly, he found that the Employee failed to demonstrate, by a preponderance of the evidence, that her protected activity was a contributing factor to her termination. Judge Palmer's holding that the Employee had not met her burden of proving that her protected activity was a contributing factor to the Contractor's decision to terminate her employment is fatal to her case and relieved the Contractor of its obligation to produce clear and convincing evidence that it would have terminated the Employee regardless of her protected activity.

The Employee further argues that Judge Palmer erred by finding that the Employee had not met her burden of establishing a pattern of retaliation against her by the Contractor. Employee's Appeal Brief at 15. To this end, the Employee contends: (1) the Employee's co-worker, Mr. Braase testified the Employee was insufficiently trained; (2) the Contractor unfairly issued a verbal warning to the Employee on November 27, 2012; (3) the Employee testified that she was assigned an excessive work-load; and (4) and the Employee testified she was repeatedly taken to

[4] The Part 708 regulations specifically define "retaliation" as "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (e.g., discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) as a result of the employee's" protected activity. 10 C.F.R. § 708.2.

Mr. Nelson's office and "chewed out" for things she did not do. Employee's Appeal Brief at 3, 17, 19.

1. Allegations of Insufficient Training

Both the Employee and Mr. Braase testified that the Contractor failed to adequately train the Employee. Judge Palmer considered this testimony and, citing both the hearing testimony of Mr. Nelson and an August 2012, internal Idaho National Laboratories Assessment Report entitled "INL Extremity Exposure Control and Radiological Training," concluded that the Employee had not met her burden of proving that "any lack of training on [the Employee's] part was due to retaliation for her previous Part 708 Complaint . . . because the record indicates that a lack of sufficient training was a problem for all HPTs at MFC, and that [the Employee] did not receive less training than most of her co-workers." IAD at 8. Giving due deference to Judge Palmer's credibility judgments on this issue, we find no reason to conclude that they were clearly erroneous.

2. The November 27, 2012, Verbal Warning

On November 27, 2012, Mr. Nelson issued a Verbal Warning to the Employee, for a verbal altercation with a co-worker that occurred on October 10, 2012. The Employee contends that this discipline was unfairly issued by Mr. Nelson in retaliation against the Employee for her protected activity. The Employee further contends that the Contractor's failure to discipline the other worker involved in this altercation and to conduct a broader scope investigation into this altercation constituted retaliation against the Employee.

Judge Palmer considered the testimony of the Employee, Mr. Nelson, and Ms. Vandel (the Contractor's former Employee Relations and Diversity Manager), as well as an email authored by the other worker involved in the verbal altercation, and then determined that (1) Mr. Nelson's testimony concerning the discussion between him and the Employee about the altercation was more credible than the Employee's testimony concerning that altercation, (2) that the Employee admitted that she had warned the other employee that "she will be sorry," (3) Mr. Nelson's finding that the Employee's "you will be sorry" statement to her co-worker violated the Contractor's rule against threatening statements was reasonable and warranted the issuance of a verbal warning, and (4) that there was no evidence of a retaliatory intent in Mr. Nelson's decision not to interview others who the Employee claimed would validate her version of the incident, since she admitted making the "you will be sorry" statement. Giving due deference to Judge Palmer's credibility judgments on these findings, we find no reason to conclude they were clearly erroneous.

3. Whether the Employee was assigned an excessive work-load in retaliation for her protected activity.

The Employee testified that she was assigned an excessive work load. In her testimony she claimed that, even though she was a part-time employee, she was expected to do as much work as a full-time employee. The Employee further testified that when she was present and after she was terminated, her assignments were divided amongst two other HPTs, therefore showing that

she was actually doing the work of two employees.[5] After carefully considering the Employee's testimony on this issue, two internal INL reports concluding that staffing at MFC "is inadequate to support work planning and support" and "concerns with adequate HP staffing and training" at MFC, the testimony of Mr. Nelson that MFC was "understaffed and struggling to support the demands of the ongoing work activities," and the testimony of Ms. LePage, Judge Palmer found that the preponderance of the evidence indicates that the Employee's heavy workload was due to a shortage of HPTs at MFC, rather than to retaliation. Giving due deference to Judge Palmer's credibility judgments on these findings, we find no reason to conclude they were clearly erroneous.

4. Whether the Employee was "repeatedly" taken to Mr. Nelson's office and "chewed out" for things she did not do.

The Employee testified that that she was repeatedly taken down to Mr. Nelson's office and "chewed-out" for things that she did not do. After considering this testimony, Judge Palmer found that the Employee "did not present any evidence as to details of these alleged instances or the nature of any accusations that were made against her" and that he was "therefore unable to make any findings as to the veracity of this allegation." IAD at 6. In other words, Judge Palmer was not sufficiently convinced of the credibility of this testimony to grant it any weight and he accordingly concluded that it did not constitute evidence of a pattern of retaliation. Giving due deference to Judge Palmer's credibility judgments on these findings, we find no reason to conclude they were clearly erroneous.

H. Whether Judge Palmer's conclusion that the Contractor had shown, by clear and convincing evidence, that it would have terminated the Employee regardless of whether she had engaged in protected activity, is supported by the record.

The Employee contends that Judge Palmer's finding that the Contractor had shown, by clear and convincing evidence, that it would have terminated her regardless of whether she had engaged in protected activity, was in error. Employee's Appeal Brief at 7. In support of this assertion, the Employee's Appeal Brief cites: (1) Mr. Nelson's alleged "gamesmanship" in allegedly refusing to state in writing the specific full-time position the Compliant was being asked to take; (2) the Contractor's alleged failure to produce the "attached beneficiary summary sheet" cited in the Status Change of Part-Time to Full Time or Casual Memo; and (3) the Individual's value to the Contractor because she was a "qualified and trained individual" with a Q-Level Security Clearance.

As an initial matter, we note that because we have affirmed Judge Palmer's determination that the Employee had not met her initial burden of proving that her protected activity was contributing factor to her termination, the burden has not shifted to the Contractor to show (by clear and convincing evidence) that it would have terminated her regardless of whether she had engaged in protected activity. However, our review of the record shows that Judge Palmer's conclusion was fully supported by the record. Judge Palmer concluded that the Contractor would have carried its burden to show by clear and convincing evidence that it would have

[5] The Employee did not indicate whether these two other employers continued to manage their previous workloads, while assuming part of her work load as well. Nor could the Employee's testimony concerning the Contractor's post-termination assignment of her workload have been based upon her personal knowledge.

verbally reprimanded the Employee in November 2012, and terminated her in January 2013, even in the absence of her protected activity. Having conducted a full review of the record, we concur with that conclusion.

H. Whether Judge Palmer failed to consider the record as a whole.

After considering the record as a whole, as well as the IAD, we find that there is no reason to believe that Judge Palmer failed to consider the record as a whole.

III. CONCLUSION

Because we affirm all of Administrative Judge Palmer's findings in this case, we must deny the Employee's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Alison Marschman on May 29, 2014, Case No. WBA-14-0011, of the Initial Agency Decision issued on May 8, 2014, is hereby denied.

(2) This Appeal Decision shall become a Final Agency Decision unless a party files a petition for Secretarial review with the Office of Hearings and Appeals within 30 days after receiving this decision.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 1, 2014