United States Department of Energy
Office of Hearings and Appeals

In the Matter of Denise Hunter	)	
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Filing Date: August 15, 2012	)	Case No. WBH-12-0004
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Issued: August 5, 2013

Initial Agency Decision

William M. Schwartz, Hearing Officer:

This Decision concerns a Complaint that Denise Hunter filed against The Whitestone Group (Whitestone), her former employer, under the Department of Energy's (DOE) Contractor Employee Protection Program regulations found at 10 C.F.R. Part 708. At all times relevant to this proceeding, Whitestone was a DOE contractor providing protective services at the DOE's Argonne National Laboratory (ANL) facility in Argonne, Illinois. Whitestone hired Ms. Hunter as the Project Manager for its services at ANL. Ms. Hunter contends that during her employment with Whitestone, she made multiple disclosures protected by Part 708 and that Whitestone retaliated against her by placing her on probation and then terminating her. Among the remedies that the Complainant seeks are reinstatement, back pay, and reimbursement for her legal and medical expenses. As discussed below, I have concluded that Ms. Hunter is entitled to relief under Part 708.

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). 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 a DOE contractor from retaliating against its employee because the employee has engaged in certain protected activity, including:

> (a) Disclosing to a DOE official, a member of Congress, . . . [the employee's] employer, or any higher tier contractor, information that [the employee] reasonably believe[s] reveals—
>
> (1) A substantial violation of any law, rule, or regulation;
> (2) A substantial and specific danger to employees or to public health or safety; or
> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this regulation.

57 Fed. Reg. 7541, March 3, 1992, as amended at 65 FR 6319, February 9, 2000, codified at 10 C.F.R. § 708.5.

An employee who believes that he or she has suffered retaliation for making such disclosures or for participating in such a proceeding may file a complaint with the DOE. It is the burden of the complainant 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, 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 complainant 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.* A contractor's failure to meet that burden results in the approval of relief for the employee.

B. Factual Background

For about 11 years, Ms. Hunter was employed by several subcontractors at ANL as the Project Manager overseeing ANL's protective force, which provides physical security for ANL's facilities and site. Transcript of Hearing (Tr.) at 34. In the spring of 2011, Whitestone succeeded ARES Protective Services as the contractor providing protective force services. *Id.* at 286-87. On April 1, 2011, Whitestone hired Ms. Hunter as the Project Manager under the new contract. Exhibit 10 at 11, 18. Whitestone, however, paid Ms. Hunter a significantly lower salary than did its predecessor. Tr. at 34-35. This reduction in compensation, as well as a number of Whitestone management policies with which she disagreed, complicated Ms. Hunter's relationship with her employer, in particular its upper management.

According to the record developed in OHA Case No. WBI-12-0004, the investigation preceding the hearing in this proceeding, Ms. Hunter's relationship with Whitestone was tumultuous from the start. On March 29, 2011, before Ms. Hunter began working for Whitestone, Denny Dees, Whitestone's then Vice President of Operations, issued a memorandum to Ms. Hunter entitled "Job Description: Program Manager Argonne National Laboratory" (the Job Description). The Job Description set forth Whitestone's expectation for Ms. Hunter's future job performance. In addition to delineating Ms. Hunter's responsibilities and explaining which management

decisions she needed to consult with the corporate office about before implementing, it stated, "I expect a positive encouraging attitude and relationship with your subordinates. The strong negative reinforcement is in the past. . . . I expect your attitude towards Senior members of the Whitestone Staff to improve and become positive." Job Description at 1.

In April 2011, Whitestone hired Lyle Headley as the Operations Manager for ANL's protective force. That position was immediately subordinate to Ms. Hunter's position. During this hiring process, Ms. Hunter grew concerned that Whitestone was hiring Mr. Headley without conducting the pre-employment screening process required by Whitestone's contract with ANL, the provisions of which must comply with several DOE directives, including DOE M 470.4-3A, Contractor Protective Force, which requires screening of all protective force employees prior to employment. Ms. Hunter claims that, in April 2011, she reported this issue to Mr. Dees[1] and William Conway, Whitestone's Regional Manager and Ms. Hunter's direct supervisor. Tr. at 52-53, 171-72. She claims that she also reported her concern to Sylvia Rada, ANL's Contracting Officer/Technical Representative (COTR); David Metta, ANL's Associate Director of OSC Programs and Systems; Sandra Guendling, ANL Security Specialist; Jeanne Shaheen, ANL Procurement; and Tom Gradle, DOE Safeguards and Security at ANL. *Id.* at 54. At the hearing, Mr. Conway testified that Ms. Hunter had not informed him about this issue and, though he admitted that Ms. Rada had raised the issue with him, he had no knowledge that Ms. Hunter had disclosed her concern to anyone at ANL. Tr. at 387-88. Nevertheless, Mr. Metta, in his statement to the investigator in this case, confirmed that Ms. Hunter had brought this issue to his attention. He further stated that ANL then investigated Ms. Hunter's allegations and determined that Mr. Headley had in fact not been subjected to the required pre-employment screening as required by DOE regulations. Whitestone conducted that screening in November 2011 and terminated Mr. Headley in December 2011, when the screening results revealed information about Mr. Headley that disqualified him from holding his position. Statement of David Metta, Case No. WBI-12-0004, at 1.[2]

After Mr. Headley's employment was terminated, Whitestone's contract with ANL was modified effective January 1, 2012, to permit other Whitestone employees temporarily to share the Operations Manager's responsibilities and to be compensated for those additional duties until a replacement could be found. Tr. at 83-119; Exhibits 13-15. Ms. Hunter prepared a schedule of adjusted pay rates for those employees who assumed additional duties, including herself. Tr. at 95; Exhibit 15 at 7-8. On February 16, 2012, Mr. Conway and Glenn First, who had replaced Mr. Dees as Whitestone's Vice President of Operations in January 2012, met with the Whitestone employees at ANL to discuss the reassignment of and compensation for duties. Because the employees had not yet received payment for their extra duties, on February 22, 2012, Doris Manning, who had been temporarily promoted to Operations Manager, sent an e-mail to Mr. Conway and Mr. First, with a copy to Ms. Shaheen, on behalf of affected Whitestone employees, seeking an explanation. Exhibit 18 at 1-3.

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[1] Mr. Dees left Whitestone on May 9, 2011.

[2] As Mr. Metta could not attend the hearing, the parties stipulated that he would have testified in a manner consistent with his oral statements to the investigator, as memorialized by the investigator. Tr. at 32.

Ms. Hunter asserts that, beginning in September 2011, she received telephone calls from concerned Whitestone vendors and subcontractors who claimed that they had not received payment for goods and services they had provided to Whitestone at ANL. Ms. Hunter asserts that Whitestone had already submitted some of these unpaid bills to ANL for reimbursement. Tr. at 63. Ms. Hunter asserts that by billing ANL for payments that it had not actually made, Whitestone was committing fraud since, under Whitestone's contract with ANL, it was only allowed to be reimbursed for those costs it had already actually paid. At the hearing, Ms. Hunter claimed that she reported this issue to Mr. Conway and two others at Whitestone, and to Jeanne Shaheen of ANL. *Id.* at 64-65. During the investigation, she claimed that she had also reported this concern to Mr. Smith at Whitestone and Mr. Metta at ANL. Neither Mr. Conway nor Mr. Smith recalls discussing this issue with Ms. Hunter. Tr. at 419 (Conway); Statement of Bill Smith, Case No. WBI-12-0004. Mr. Metta, however, recalls that Ms. Hunter reported this issue to him and provided him with a list of vendors that showed how long it had taken each vendor to receive its payment from Whitestone. He further recalled discussing this information with Susan Underwood, ANL's Contracting Officer for the Whitestone Contract. Statement of David Metta, Case No. WBI-12-0004, at 1-2. In addition, Tom Gradle, DOE Safeguards and Security at ANL, stated to the investigator that Ms. Hunter had informed him about this irregularity in late 2011. Statement of Tom Gradle, Case No. WBI-13-0004.

On February 27, 2012, Ms. Hunter filed a Part 708 Complaint with the Employee Concerns Program Manager of the DOE's Office of Science—Chicago Office. In that Complaint, as supplemented by a second filing the next day, Ms. Hunter claimed that Whitestone had retaliated against her by belittling her and lying about her to her staff, by undermining her authority, and by reducing her salary. Exhibit 27 at 3-8.

On March 8, 2012, Whitestone placed Ms. Hunter on a 45-day probation. The stated reason for the probation was "not properly defusing major internal issue . . . [and] not communicating critical information to your direct supervisor." Exhibit 10 at 35-36. Mr. Conway testified that the issue that led to Ms. Hunter's probation was the February 22, 2012, e-mail that Ms. Manning sent to him on behalf of herself and her co-workers, a copy of which was also sent to Ms. Shaheen of ANL. Tr. at 460. A re-evaluation meeting was scheduled for April 15, 2012.

On April 1, 2012, Ms. Hunter received an e-mail from Mr. Headley's sister, who informed her that Mr. Headley was storing DOE uniforms and DOE-issued badges at their parents' home. Ms. Hunter spoke to Mr. Headley's sister. Ms. Hunter forwarded that e-mail to Mr. Conway on April 2, 2012, adding that she had spoken to Mr. Headley's sister, who stated to her that she had provided this information to Mr. Conway in November 2011, as well as to ANL at a later date. Exhibit 30. She also told Mr. Conway that she had determined, after doing her own investigation, that the numbers appearing on the badges taken by Mr. Headley did not match any badge numbers assigned to Whitestone's protective force. *Id.* [3] Ms. Hunter also forwarded the e-mail to Sandra Guendling at ANL. Exhibit 3; Tr. at 73. Ms. Hunter asserted in her complaint

[3] She ultimately learned that at least one of the badges had been issued by Fermilab, another DOE installation nearby. A number of Fermilab-issued badges and other equipment were maintained at Argonne in a locked area ("the cage") to which Mr. Headley, as Operations Manager, had keys. Moreover, when Mr. Headley was terminated, he turned in to Ms. Hunter the security badge he had been issued as a Whitestone employee at ANL. Tr. at 69-70.

that she also notified Mr. First at Whitestone and Tom Gradle of DOE of these thefts in April 2012. Statement of Denise Hunter, Case No. WBI-12-0004, at 2. Ms. Guendling and Mr. Gradle informed the investigator in this case that the police ultimately recovered the stolen property from Mr. Headley. Statements of Sandra Guendling and Tom Gradle, Case No. WBI-12-0004.

On April 9, 2012, before the 45-day probation period had ended, Whitestone terminated Ms. Hunter's employment. The stated reason for the termination was that an "audit and investigation uncovered fraudulent activity and falsification of documents by Denise Hunter," that her conduct was unprofessional and that "her alleged dishonesty for her own personal benefit violates Whitestone Policy." Exhibit 10 at 33-34 (citing Whitestone's employee handbook, which lists grounds for immediate termination, Exhibit 11 at 10-11). At the hearing, Mr. Conway testified that the basis for Ms. Hunter's termination was a document dated December 22, 2011, that she provided to Whitestone, identified in the record as Exhibit 22.[4] This document started as a form letter, containing blanks to be filled, for the purpose of informing Whitestone employees at ANL of their temporary duty pay modification in exchange for accepting additional responsibilities after Mr. Headley's termination. Ms. Hunter completed and signed many of these form letters for her employees. Tr. at 156. The blanks in Exhibit 22, however, are filled out for Denise Hunter, and notify her of her temporary increase in hourly rate. In the blank following the term "Accepted" appear the names "Bill Smith, William, Sylvia Rada," which Ms. Hunter acknowledges to be in her handwriting. Tr. at 152, 155. In addition to asserting that she never intended her listing of those names to represent their signatures, Ms. Hunter pointed out that she had not included Mr. Conway's last name and that the names were not situated in the appropriate blank on the form to constitute Whitestone's approval of the rate modification. *Id.* at 152, 155-56. Whitestone nevertheless determined that those words constituted falsification of a document and thus grounds for immediate termination.

That same day, Mr. First and Mr. Conway reported to the local county sheriff's office, asking that criminal charges be pursued against Ms. Hunter. Exhibit 23 at 1. After noting that little or no effort was made to disguise or mimic the alleged forged signatures and reviewing the Part 708 complaint to understand the context in which the document was created, the sheriff's department concluded that Ms. Hunter lacked the requisite intent to deceive and determined that probable cause did not exist to pursue criminal charges. *Id.* at 2-3.

In October 2012, Jeff LaRe, Executive Vice President of Whitestone, contacted the sheriff's office, providing another document that Whitestone believed contained the forged signature of Doris Manning, and explaining that Ms. Hunter was Ms. Manning's supervisor. Exhibit 29 at 2. Mr. Conway testified that he believed Ms. Hunter had forged Ms. Manning's signature on that document. Tr. at 523; Exhibit H. After comparing the signature on that document with that of Ms. Manning and Ms. Hunter, the sheriff's office found no similarities between the signature

[4] How Whitestone obtained this document is disputed. Ms. Hunter claims that, in a telephone call, Mr. Conway and Mr. First asked her who would be authorized to approve Whitestone's offer of temporary rate modification to Ms. Hunter, and she replied that Bill Smith, William Conway, or Sylvia Rada could do so. According to Ms. Hunter, they then asked that she write down those names and send them during the call, which she did. Tr. at 155. On the other hand, Mr. Conway does not recall that telephone call, and contends that no one at Whitestone saw this document until they reviewed Ms. Hunter's Part 708 complaint, to which it was an attachment. *Id.* at 574-75.

appearing on the document and that of either Ms. Manning or Ms. Hunter, and administratively closed the file. Exhibit 29 at 2.

C. Procedural Background

Whitestone received Ms. Hunter's Complaint on March 9, 2012. Tr. at 630. Whitestone responded to the Complaint on March 27, 2012. After informal efforts failed to resolve the issues raised in her Complaint, Ms. Hunter requested that her Complaint be forwarded to the Office of Hearings and Appeals (OHA) for an investigation and hearing. The Manager of the Argonne Site Office forwarded the Complaint to OHA on May 16, 2012, and the OHA Director appointed an investigator.

During the investigation and at the request of the investigator, Ms. Hunter amended her Complaint a second time, on June 12, 2012. In this Complaint, Ms. Hunter alleged that she had made six disclosures protected under Part 708, including the following disclosures: (1) that Whitestone hired Mr. Headley without conducting the required pre-employment screening process, (2) that Mr. Headley had taken protective force uniforms and a DOE security badge from ANL and stored them at his home, and (3) that Whitestone was billing ANL for reimbursement of costs before it had paid those expenses to vendors and sub-contractors. She further alleged that Whitestone had retaliated against her for making those disclosures by creating a work environment in which she could not effectively manage her staff, denied her vacation and sick leave, placing her on probation, and ultimately terminating her employment without cause. As relief for these alleged retaliations, Ms. Hunter requested reinstatement to her position as Project Manager, back pay, reimbursement of costs and expenses, including medical bills and legal expenses, and any other relief deemed necessary to make her whole.

The OHA investigator interviewed Ms. Hunter, Whitestone and ANL employees and a DOE employee, and reviewed a large number of documents before issuing a Report of Investigation (ROI) on August 15, 2012. In the ROI, the OHA investigator concluded that at least one of Ms. Hunter's disclosures, and her filing of her Complaint, were likely protected activities and were contributing factors to her being placed on probation and her later termination. Report of Investigation at 6, 8.[5] The investigator did not reach a determination whether Whitestone had demonstrated by clear and convincing evidence that it would have placed Ms. Hunter on probation and terminated her in the absence of her disclosures and filing a Part 708 Complaint. *Id.* at 12.

[5] The OHA investigator determined that three of Ms. Hunter's six alleged disclosures did not fall within the ambit of Part 708, because they were "essentially reports to the wrongdoers informing them that their conduct was unlawful." Report of Investigation, Case No. WBI-12-0004, at 5 (citing *Kahn v. Department of Justice*, 618 F.3d 1306, 1312 (Fed. Cir. 2010)). In enacting the Whistleblower Protection Enhancement Act (WPEA) of 2012, Pub. L. No. 112-199, Congress has now clarified the definition of protected disclosures under the Whistleblower Protection Act to include such disclosures. WPEA § 101. OHA has not yet ruled whether such disclosures are protected under Part 708, and I need not do so here. At the hearing stage of this proceeding, Ms. Hunter focused on the three remaining alleged disclosures described above. While she did mention in passing a fourth alleged disclosure—alleged improper billing for overtime—she did not provide a sufficient evidentiary basis to meet her burden of proof for this allegation or the other alleged disclosures that the ROI determined not to fall within the ambit of Part 708. Tr. at 81-83. In any event, even if the record contained sufficient evidence for concluding that Ms. Hunter had in fact made these protected disclosures, the outcome of this Decision would not be significantly affected.

On August 15, 2012, the OHA Director appointed me as the Hearing Officer in this case. I conducted a two-day hearing in this case in Argonne, Illinois, beginning on November 27, 2012. Over the course of the hearing, six witnesses testified. Ms. Hunter introduced 32 exhibits into the record, and Whitestone introduced 10 exhibits.

II. Analysis

As stated in Section I.A above, in order to prevail in a Part 708 proceeding, an employee must show, by a preponderance of the evidence, that he or she made a protected disclosure or engaged in protected behavior, and that this was a contributing factor to one or more alleged acts of retaliation by the contractor against the employee. For the reasons set forth below, I find that Ms. Hunter made protected disclosures and participated in a protected activity, and that they were a contributing factor in her termination. Moreover, because Whitestone has failed to show by clear and convincing evidence that it would have taken the same action in the absence of any disclosures, I conclude that Ms. Hunter is entitled to relief under Part 708.

A. The Protected Disclosures and Protected Activity

As previously discussed, an employee of a DOE contractor makes a protected disclosure when he or she reveals to that employer, a higher-tier contractor, a DOE official, a member of Congress, or any other government official with oversight authority at a DOE site, information that the employee reasonably believes reveals (i) a substantial violation of a law, rule or regulation; (ii) a substantial and specific danger to employees or to public health or safety; or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. 10 C.F.R. § 708.5(a). The test of "reasonableness" is an objective one, *i.e.*, whether a reasonable person in the complainant's position, with his or her level of experience, could believe that his or her disclosure met any of the three criteria set forth above. *Frank E. Isbill*, Case No. VWA-0034 (1999).

1. Mr. Headley's Pre-Employment Screening

The contract between Whitestone and ANL requires that Whitestone conduct a pre-employment check of all protective force employees before they are employed under the contract. Exhibit 6 at 124. As Operations Manager of Whitestone's protective force at ANL, Mr. Headley was subject to this requirement. Mr. Conway testified that, because he was not the regional manager for Whitestone at the beginning of the ANL contract in April 2011, he could not testify to the extent of the pre-employment check conducted on Mr. Headley before he began working at ANL. Tr. at 381-82. He did discuss a New Hire Checklist that was completed by April 8, 2011. *Id.* at 477; Exhibit E at 3-4. Nevertheless, on November 29, 2011, Ms. Rada, the ANL contracting official, was still requesting that Whitestone provide it with the background check for Mr. Headley. Exhibit D at 1 (e-mail from Ms. Rada to Joan Hart, Whitestone). A report by a commercial background screening company indicates that the screening process was still underway in December 2011. Exhibit 9 at 18-23. As discussed above, Ms. Hunter contends that she reported her concern regarding Whitestone's failure to several individuals, at both

Whitestone and ANL, and Mr. Metta confirmed in his statement to the investigator that she did in fact make a disclosure of this nature to him.

The issue to be decided is whether Ms. Hunter reasonably believed that the disclosures she made to Mr. Metta revealed (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. As the Project Manager, Ms. Hunter maintained the personnel files for her staff, and was aware that there was no pre-employment check in Mr. Headley's file. Tr. at 51-52. She testified that this failure was "a big deal," and that ANL representatives spoke with Mr. Conway about the problem. *Id.* at 55. In light of Ms. Hunter's position, as the highest-ranking manager of the ANL protective force for ten years, I conclude that a reasonable person with her level of experience could reasonably have believed that Whitestone's failure to perform its pre-employment check of a high-ranking protective force employee was a substantial violation of a rule, in this case, a contractual provision in compliance with a DOE directive in effect at the time of the contract. *See* DOE M 470.4-3A at Attachment 1, ¶ 3.b (contractors must conduct pre-employment screening of potential protective force members). Consequently, I need not decide whether Whitestone's action posed a substantial and specific danger to employees or to public health and safety or constituted fraud, gross mismanagement, gross waste of funds, or abuse of authority.

Whitestone has not raised or advanced any arguments that might support a contrary conclusion. The record does not substantiate Ms. Hunter's claim that she disclosed to several Whitestone employees her concern on this matter, and Mr. Conway affirmatively denies that he learned about this matter from Ms. Hunter herself, but rather from Ms. Rada. Tr. at 387-88. Mr. Metta's statement, however, which the parties have stipulated would mirror his testimony if he had appeared at the hearing, confirms that Ms. Hunter made a disclosure to ANL, a higher-tier contractor. That disclosure, coupled with Ms. Hunter's reasonable belief that Whitestone's failure to complete its pre-employment check on Mr. Headley until shortly before his termination was a substantial violation of a rule, constitutes a protected disclosure under Part 708. 10 C.F.R. § 708.5(a)(1).

2. Mr. Headley's Theft of Official Equipment

On April 1, 2012, Mr. Headley's sister sent an e-mail to Ms. Hunter, in which she described "Department of Energy" uniforms and badges that Mr. Headley had taken from ANL. She also stated in her e-mail that she had seen Mr. Headley wearing such uniforms and badges daily in public. Exhibit 30. Ms. Hunter forwarded that e-mail the following day to Mr. Conway at Whitestone and Ms. Guendling at ANL. *Id.*; Exhibit 3. Ms. Hunter therefore disclosed Mr. Headley's actions to her employer and to a higher-tier contractor.

Once again, I must decide whether Ms. Hunter reasonably believed that these disclosures revealed (i) a substantial violation of any law, rule, or regulation, (ii) a substantial and specific danger to employees or to public health or safety, or (iii) fraud, gross mismanagement, gross waste of funds, or abuse of authority. At the hearing, Ms. Hunter testified as to the importance of her disclosure. She stated that she knew that a report must be filed concerning stolen property. She further stated that the uniforms and badges, if worn, could allow an unauthorized

person, such as Mr. Headley, to impersonate a protective force member and thereby gain access to controlled areas. Finally, she believed that Mr. Headley might attempt to do so, particularly in light of his sister's statement that he wore uniforms and badges in public. Tr. at 72-73. Ms. Hunter's testimony convinces me that she reasonably believed that her disclosures of Mr. Headley's theft revealed a substantial violation of a law.

In her e-mail to Mr. Conway, she informed him that Mr. Headley's sister had already notified him in November 2011 about the theft. Exhibit 30. She wrote, "I do know we need to report to counterintelligence the stolen property . . ." *Id.* It could be argued that Ms. Hunter's April 1, 2012, e-mail did not constitute a disclosure: that, in disclosing Mr. Headley's theft, she knew she was not revealing new information to Whitestone, as Mr. Headley's sister had already communicated her concerns to Mr. Conway. *See John Robertson*, Case No. WBH-12-0002 (2013). Ms. Hunter's e-mail reveals new information as well, however, in the form of details she learned by speaking with Mr. Headley's sister and as a result of investigating further. Specifically, she determined, and reported to Mr. Conway, that the badges had not been assigned to the ANL protective force. Exhibit 30. A reasonable person may conclude from this disclosure that Mr. Headley had not merely retained his own badge, which would not have been an issue in November 2011 when Mr. Headley was still employed by Whitestone, but rather that he had improperly appropriated badges from the ANL site. Given her extensive background in property security, I find that Ms. Hunter reasonably believed that the company had a duty to report the theft. In any event, because Ms. Hunter reasonably believed that her disclosures of Mr. Headley's theft revealed a substantial violation of a law, her disclosures constitute protected disclosures under Part 708. 10 C.F.R. § 708.5(a)(1).

3. Whitestone's Billing for Reimbursement

In her position as Project Manager of ANL's protective force under several different contracts, Ms. Hunter was responsible for billing ANL for reimbursement of the protective force's expenses and services. Before she began billing ANL under the Whitestone contract, she verified with ANL and Whitestone that the new contract was, as the others had been, a reimbursable contract. Tr. at 57. Unlike her former employers, however, Whitestone did not provide Ms. Hunter with access to documents that would indicate whether Whitestone had already paid its suppliers. *Id.* at 58-59. She became uncomfortable with her role when she began to receive calls from vendors who had not been paid by Whitestone. *Id.* at 61. She knew that Whitestone had billed ANL for these expenses, as she had prepared those invoices, even though the vendors had not received any money. *Id.* at 63. She reported these calls to two Whitestone employees, writing that because the contract is reimbursable, "submitting the billings [to ANL] indicate[s] an assumption of payment" by Whitestone to vendors. Exhibit 2. She repeated these concerns to Ms. Shaheen of ANL in a letter dated February 22, 2012. Exhibit 1 at 2. Ms. Hunter therefore disclosed her billing concerns to her employer and to a higher-tier contractor.

Having determined that Ms. Hunter made a disclosure regarding Whitestone's billing process, I must now consider whether she reasonably believed her disclosure revealed a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to public health or safety; fraud, gross mismanagement, gross waste of funds, or abuse of authority. I find that Ms. Hunter has not met her burden in this regard. To establish her reasonable belief that

Whitestone's practice of billing for expenses before disbursing those amounts to vendors violated a law or rule, or was evidence of fraud, she would have to know that Whitestone's contract with ANL outlawed that practice. During the investigation stage of this proceeding, Ms. Hunter admitted that she had not had access to the entire contract, and the investigator found that Ms. Hunter had not yet met her burden in this regard. ROI at 7. After carefully considering all the testimony and documents, and notwithstanding Ms. Hunter's stated experience with reimbursable contracts, I find no additional support for concluding that Ms. Hunter reasonably believed that Whitestone's billing practices constituted fraud or a substantial violation of a rule.

4. February 27, 2012, Whistleblower Complaint

Ms. Hunter engaged in conduct protected under Part 708 when she filed a whistleblower complaint under that Part on February 27, 2012. *See* 10 C.F.R. § 708.5(b).

B. The Alleged Retaliations

In order to prevail, Ms. Hunter must next demonstrate, by a preponderance of the evidence, that her protected disclosures or her filing a Part 708 Complaint was a contributing factor to one or more alleged acts of retaliation taken against her by Whitestone. Under the Part 708 regulations, "retaliation" means "an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to the employee's compensation, terms, conditions or privileges of employment as a result of the employee's disclosure of information" or participation in protected conduct as described in 10 C.F.R. § 708.5. Ms. Hunter alleges that Whitestone retaliated against her by placing her on probation in March 2012 and terminating her employment in April 2012.[6]

In determining whether protected disclosures were a contributing factor to allegedly retaliatory acts, OHA Hearing Officers have noted that there is rarely a "smoking gun" that establishes such a nexus. *See, e.g.*, *Himadri K. Das*, Case No. TBH-0089 (2010); *Ronald Sorri*, Case No. LWA-0001 (1993). Consequently, we have consistently held that retaliatory intent can be established through circumstantial evidence. Specifically, a complainant can demonstrate that a protected disclosure was a contributing factor to an alleged retaliatory act if he or she can show that the acting official had actual or constructive knowledge of the protected 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. *Id.* Since there is no direct evidence of retaliation in the record, Ms. Hunter must demonstrate that the Whitestone employees responsible for the alleged retaliatory acts had actual or constructive knowledge of her protected disclosures, and must also show temporal proximity between the disclosures and the retaliation. Logically, this same analysis applies to actual or constructive knowledge, on the part of those responsible for alleged retaliatory acts, of a whistleblower's participation in a Part 708 proceeding.

[6] Ms. Hunter's second amended Complaint of June 12, 2012, lists ten acts of alleged retaliation by Whitestone. In a brief filed at my request, however, Ms. Hunter limited her allegations of retaliation to her probation and her termination, and these were the only alleged retaliatory acts developed at the hearing. Accordingly, I will address only those actions here.

For the reasons set forth below, I find that none of Ms. Hunter's protected activity was a contributing factor to Whitestone's decision to place her on probation. I do find, however, that one of Ms. Hunter's two protected disclosures and her filing of a Part 708 Complaint were contributing factors to Whitestone's decision to terminate her employment.

1. The Probation

Whitestone placed Ms. Hunter on a 45-day probation on March 8, 2012, retroactive to March 2, 2012. Mr. Conway, Ms. Hunter's direct supervisor, signed the Corrective Action Form memorializing that action. Exhibit 10 at 36. The stated reasons for the probation are Ms. Hunter's failure to "defus[e] a major internal issue that was directly communicated to you," and to "communicat[e] critical information to your direct supervisor." *Id.* As is common in Part 708 cases, nothing in the record here demonstrates that Whitestone placed Ms. Hunter on probation in retaliation for her making a protected disclosure to it or to ANL. I must therefore consider whether Mr. Conway had actual or constructive knowledge of any protected disclosure. At the hearing, Ms. Hunter testified that she had told Mr. Conway that Mr. Headley had not been subject to the required pre-employment check. Tr. at 53. Mr. Conway testified that he had heard about this matter only from Ms. Rada in November 2011, and never knew that Ms. Hunter had communicated this concern to her. *Id.* at 383, 387-88. No documentary evidence or testimony of other witnesses supports the testimony of Ms. Hunter or Mr. Conway. Consequently, I cannot find that Ms. Hunter has met her burden of demonstrating by a preponderance of evidence that Mr. Conway had actual or constructive knowledge of her protected disclosure when he placed her on probation. Under these circumstances, I need not consider whether the probation followed the disclosure within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. While Ms. Hunter has established that she made a protected disclosure when she communicated her concern to ANL about the lack of pre-employment check for Mr. Headley, I conclude that that disclosure was not a contributing factor in Mr. Conway's decision to place her on probation.

Nor do Ms. Hunter's other protected activity—filing her Part 708 Complaint and disclosing Mr. Headley's theft—constitute contributing factors to her probation. Mr. Conway testified that he was not aware that Ms. Hunter had filed her Complaint when he was preparing the probation documents. Tr. at 495. Moreover, though Ms. Hunter filed her Complaint with the DOE on February 27, 2012, Lori Colussi-Junk, Whitestone Director of Human Resources, testified that John Clark, the Chief Executive Officer of Whitestone, asked her on March 9, 2012, to forward the Complaint to certain Whitestone officers, not including Mr. Conway. Tr. at 629-30; *see* Exhibit C. Mr. Clark testified that he became aware of the Complaint on March 19, 2012. *Id.* at 291-92. Despite the inconsistency of these latter statements, I cannot find that Ms. Hunter has met her burden of demonstrating that Mr. Conway had actual or constructive knowledge of the Complaint when he signed her Corrective Action on March 8, 2012. As for Ms. Hunter's disclosure about the uniforms and badge, that did not occur until April 2, 2012, long after Mr. Conway's action.

2. The Termination

Whitestone's CEO, John Clark, terminated Ms. Hunter's employment with Whitestone on April 9, 2012. Exhibit 10 at 30; Tr. at 299. He testified that he did so relying on the knowledge and recommendation of Mr. Conway, Ms. Junk, and Glenn First, Whitestone's then Vice President of Operations. Tr. at 315-16. I will therefore consider not only Mr. Clark's actual knowledge of Ms. Hunter's protected activity but the constructive knowledge that may be attributed to him through his advisors' knowledge of that activity. *See Jonathan K. Strausbaugh and Richard L. Rickenberg*, Case Nos. TBH-0073, -0075 (2008) (complainant can demonstrate constructive knowledge by establishing that decision-maker was influenced by persons with knowledge of protected activity).

In contrast to the timing of events with relation to her probation, all of Ms. Hunter's protected activities preceded her termination. Consequently, each of them could possibly be a contributing factor to her termination, provided, as discussed above, the acting official had actual or constructive knowledge of the protected disclosure and acted within a period of reasonable temporal proximity.

With respect to Ms. Hunter's disclosure that Whitestone had failed to complete Mr. Headley's employment check before hiring him, the record is silent as to whether Mr. Clark, Ms. Colussi-Junk, or Mr. First had any knowledge. Mr. Conway was aware that the pre-employment check had not been completed in a timely manner, as Ms. Rada of ANL had discussed the matter with him. Nevertheless, he testified that he was not aware that Ms. Hunter had disclosed this failure to anyone. For the reasons set forth in the above section, I find that Mr. Conway did not have knowledge of Ms. Hunter's disclosure. Ms. Hunter has not shown by the preponderance of the evidence that Mr. Clark had actual knowledge of this disclosure, nor that any of his three advisors had actual knowledge of the disclosure that could be attributed to Mr. Clark as constructive knowledge of the disclosure. Accordingly, I conclude that the Ms. Hunter's pre-employment check disclosure was not a contributing factor to her termination.

With respect to Ms. Hunter's disclosure about Mr. Headley's theft of property and her filing of a Part 708 Complaint, I have determined that each was a contributing factor to her termination. Mr. Conway was clearly aware of this second disclosure, as Ms. Hunter sent him an e-mail on April 2, 2012, specifically addressing this topic, informing him of the steps she was taking and of her belief that Whitestone had an obligation to report the stolen property to DOE. Exhibit 30. Because Mr. Conway was one of the individuals who advised Mr. Clark on the matter of Ms. Hunter's termination, I attribute Mr. Conway's actual knowledge of this disclosure to Mr. Clark, the acting official, as constructive knowledge of the disclosure. The one-week period between Ms. Hunter's disclosure and her termination is clearly so short a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

Moreover, Whitestone officials were aware of Ms. Hunter's participation in a Part 708 proceeding when the company received a copy of Ms. Hunter's whistleblower complaint. According to Ms. Colussi-Junk, Mr. Clark directed her on March 9, 2012, to forward copies to a number of company officers, including Mr. First. Therefore, by March 9, 2012, or shortly thereafter, Mr. Clark, Ms. Colussi-Junk, and Mr. First had seen Ms. Hunter's Complaint. As

Mr. Clark had actual knowledge of Ms. Hunter's participation in a Part 708 proceeding, I need not attribute Ms. Colussi-Junk's and Mr. First's knowledge to him as constructive knowledge of the same disclosure. Because Mr. Clark terminated Ms. Hunter's employment within no more than a month after Whitestone received Ms. Hunter's Complaint, a reasonable person could conclude that the filing of the Complaint was a contributing factor in the decision to terminate her.[7]

C. Whether Whitestone Would Have Terminated Ms. Hunter's Employment in the Absence of Her Protected Activity

Section 708.29 states that once a complaining employee has met the burden of demonstrating that conduct protected under § 708.5 was a contributing factor in the contractor's retaliation, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal." 10 C.F.R. § 708.29. "Clear and convincing evidence" requires a degree of persuasion higher than preponderance of the evidence, but less than "beyond a reasonable doubt." *See Casey von Bargen*, Case No. TBH-0034 (2007). If the contractor meets this heavy burden, the allegation of retaliation for whistleblowing is defeated despite evidence that the retaliation may have been in response to the complainant's protected conduct.

It is well settled that several factors may be considered in determining whether an employer has shown, by clear and convincing evidence, that it would have taken the alleged act of retaliation against a whistleblower in the absence of the whistleblower's protected conduct. The Federal Circuit, in cases interpreting the federal Whistleblower Protection Act (WPA), upon which Part 708 is modeled, has identified factors that may be considered, including "(1) the strength of the [employer's] reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone." *Kalil v. Dep't of Agriculture*, 479 F.3d 821, 824 (Fed. Cir. 2007) (*citing Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006)).

1. The Strength of the Stated Reasons For Terminating Ms. Hunter's Employment

The Employee Corrective Action Statement issued to Ms. Hunter provides the official reasons for her termination: "An audit and investigation uncovered fraudulent activity and falsification of documents by Denise Hunter. Denise's conduct is unprofessional and her alleged dishonesty for her own personal benefit violated Whitestone Policy." Exhibit 10 at 34. Mr. Conway testified that the "fraudulent activity and falsification of documents" stated in the Corrective Action Statement referred to the Temporary Employment Adjustment document dated December 22, 2011, on which Ms. Hunter had written, in the blank following "Accepted," the names "Bill Smith, William, Sylvia Rada" in her own handwriting. Tr. at 466; Exhibit 22. If this document were properly authenticated, it would have authorized a significant hourly rate increase for Ms. Hunter. When questioned about the extent of the audit and investigation mentioned in the Corrective Action Statement, Mr. Conway stated, "[W]e knew that we didn't

[7] I reach the same result if I accept March 19, 2012, as the date Mr. Clark became aware of Ms. Hunter's Complaint, as he maintained in his testimony. Tr. at 292.

sign this, and she had sent it in to DOE makes it look like we [had] signed and agreed to this, and weren't holding our part of the Agreement." Tr. at 467. He further stated that Whitestone did not ask Ms. Hunter about the document as part of its audit and investigation. *Id.* at 468.

On the same day that Whitestone issued the termination statement, Mr. Conway and Mr. First asked the local sheriff's department to pursue criminal charges against Ms. Hunter for forgery. *Id.* At the hearing, however, Mr. Conway conceded that the names on Exhibit 22 were all in the same handwriting, that the words "Bill Smith" did not resemble Mr. Smith's actual signature, and that "William" appeared on the form without his last name, Conway. He nevertheless would not concede that those facts indicated no intention to deceive. *Id.* at 471-73. After it concluded its investigation, the local sheriff's department determined that Ms. Hunter's "actions in correlation with the document do not appear to have the intent to deceive," and determined that probable cause did not exist to pursue criminal charges. Exhibit 23 at 3.

I have considered the context in which Exhibit 22 appears in the record. As discussed above, Ms. Hunter contends that she provided this document to Whitestone at the request of Whitestone officials, and Mr. Conway contends that Whitestone officials first saw the document as an attachment to Ms. Hunter's Part 708 Complaint. Despite that inconsistency, it is clear that Ms. Hunter communicated in writing with Whitestone officials concerning the temporary pay increase she sought, and that Whitestone never approved it. Exhibit 16 at 1-2; Exhibit 19 at 1. Nothing in the record indicates that Ms. Hunter provided Exhibit 22 to the DOE other than as an attachment to her Complaint. I therefore find that no Whitestone or DOE official took any action on that document, and that Ms. Hunter never submitted the document to the DOE for the purpose of obtaining the pay increase she sought nor in an effort to circumvent Whitestone's decision on that matter or otherwise defraud the company.

Finally, I have reviewed Exhibit 22 and fail to see how a reasonable person could infer that the document was intended to deceive anyone, given the lack of effort to imitate anyone's signature, the fact that Mr. Conway's name is listed only as "William," and the fact that the three alleged signatures do not appear on the form in the correct place for approving the sought adjustment. I also note that Whitestone filed another report with the local sheriff's department in October 2012, alleging in effect a second forgery by Ms. Hunter, which the local sheriff's department reviewed and administratively closed. Exhibit 29 at 2.

After considering the facts presented in this case, including the allegedly forged documents and the various sheriff's reports, I conclude that the stated reasons for terminating Ms. Hunter, fraudulent activity and falsification of documents, are weak and pretextual.

2. The Strength of Any Motive to Retaliate For the Whistleblowing

On the other hand, there is at least some evidence that Whitestone had a motive to retaliate against Ms. Hunter for her whistleblowing activity. Mr. Conway was aware that Ms. Hunter was inquiring with ANL and DOE about how to report the missing property that Mr. Headley had taken from the facility. Exhibit 30. Whitestone leadership could reasonably have been concerned that such an inquiry would focus the ANL's and DOE's attention on the fact that a former Whitestone employee was not trustworthy, and furthermore that Whitestone may have

been negligent in not investigating the allegation of theft when it first learned about it in November 2011.

Whitestone was, at the very least, not comfortable that Ms. Hunter had filed a Part 708 Complaint with the DOE. Mr. Clark testified that his company does not engage in the practices Ms. Hunter accused it of, and that no other employee had ever filed a whistleblower complaint against Whitestone. Tr. at 293, 294. Moreover, when Whitestone leadership read Ms. Hunter's Complaint, they would have been concerned about many of the issues she raised in that document, even if those issues might ultimately prove to be unsubstantiated. For example, the Complaint contains an e-mail to a number of ANL procurement staff members with whom she had worked for many years, alleging that Whitestone has asked her to break rules and laws, Exhibit 27 at 40-41, and a letter to Ms. Shaheen of ANL in which she discloses, *inter alia*, that vendors have not been paid despite Whitestone billing ANL for reimbursement. *Id.* at 59-61. Mr. Conway testified that, hypothetically, if he had known that Ms. Hunter had communicated her concerns to ANL, he would have recommended suspending her. Tr. at 459-60. After reviewing the Complaint, Mr. Conway's concerns were no longer hypothetical.

After Ms. Hunter filed her Complaint, the DOE's Inspector General conducted an investigation of Whitestone, and ANL re-opened its protective force contract for bidding after Whitestone's first year. *Id.* at 295-96. Mr. Clark testified that the contract with Whitestone was for five years, and this was the first time in Whitestone's history that a government agency re-opened a contract before its term was complete. *Id.* at 296. When questioned whether Ms. Hunter's Complaint was the reason ANL took this unusual step, Mr. Clark stated that he was not "a hundred percent sure about that." *Id.* Whether either the IG investigation or the contract re-opening was the direct result of the allegations made in Ms. Hunter's Complaint is a matter of speculation. Nevertheless, these setbacks placed Whitestone in an unenviable position, and a reasonable person could conclude that they afforded Whitestone additional motive to retaliate against Ms. Hunter.

3. Treatment of Similarly Situated Employees

The record contains little evidence concerning Whitestone's treatment of similarly situated employees. According to Ms. Hunter's counsel, the parties had stipulated that Whitestone would not produce any evidence on the matter, and no discovery was taken. Tr. at 700. Unaware of this stipulation, the Hearing Officer questioned Mr. Conway on this topic, and he replied that another Whitestone employee who was determined to have falsified documents had been terminated. *Id.* at 581-82. After reviewing the testimony, I am not convinced, despite Mr. Conway's assertions, that this termination was handled in the same manner as that of Ms. Hunter. In describing the investigation conducted in the comparison case, Mr. Conway stated that the company spoke with the accused employee and the employee admitted that she had falsified documents. *Id.* Such an investigation, however cursory, was not conducted in Ms. Hunter's case. This limited evidence argues, if anything, that Ms. Hunter was treated differently than a similarly situated employee. In any event, it does not support a finding that Whitestone has met its burden of showing by clear and convincing evidence that it would have terminated Ms. Hunter even if she had not engaged in activity protected by Part 708.

Based on the foregoing, I conclude that Whitestone has not shown by clear and convincing evidence that it would have terminated Ms. Hunter's employment in the absence of her protected activity. As discussed above, Whitestone's stated reasons for her termination are weak and outweighed by a number of motives for retaliating against her, and the record is devoid of evidence of similarly situated employees who were treated in the same manner as Ms. Hunter.

III. Conclusion

In the foregoing Decision, I have found that Ms. Hunter has established by a preponderance of the evidence that she engaged in protected conduct when she made her disclosure regarding Mr. Headley's theft to Whitestone and ANL and when she filed her Part 708 Complaint, and that these activities were a contributing factor to an act of retaliation, her termination. I have further found that Whitestone has not presented clear and convincing evidence that it would have taken the same action absent the protected conduct. Therefore, I find that Ms. Hunter is entitled to relief under Part 708.[8] After I receive documentation from the parties, as set forth in the Order below, I will direct Whitestone to remove any negative information regarding Ms. Hunter's termination from her personnel file and notify her in writing that such removal has been performed, to reimburse her for back pay and benefits starting from the date of her termination, offset by any income earned from employment during that same period, and to reimburse her for other reasonable expenses, including attorneys' fees, associated with her termination and this proceeding. I will direct both parties to brief the issue whether reinstatement is appropriate in this case.

Ms. Hunter shall submit a calculation in support of her claims for back pay and benefits to Whitestone. As for her litigation expenses, attorney fees in Part 708 cases are generally calculated using the "lodestar" methodology described by the U.S. Supreme Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *See Jonathan K. Strausbaugh and Richard L. Rickenberg*, Case Nos. TBH-0073, -0075 (2008); 10 C.F.R. § 708.36(a)(4). I will direct Ms. Hunter to submit a calculation of attorney fees with evidence supporting the hours worked and the rates claimed. *See Strausbaugh and Rickenberg* (and cases cited therein).

It Is Therefore Ordered That:

(1) The relief sought by Denise Hunter in the Complaint she filed under 10 C.F.R. Part 708 is hereby granted as set forth below, and denied in all other respects.

(2) Within 15 days of receipt of this Initial Agency Decision, Ms. Hunter shall submit to the Whitestone Group and to the Hearing Officer a report containing a detailed calculation of her attorney fees reasonably incurred to prepare for and participate in proceedings leading to the Initial Agency Decision. The fees shall be calculated using the lodestar approach. The report, which shall be limited to ten pages in length, shall also contain a calculation of her claim for back pay and associated benefits from the date of her termination, offset by any income earned from employment during that same period, as well as any other claims for costs and expenses

[8] As stated above, Ms. Hunter seeks reinstatement to her position as Project Manager, back pay, reimbursement of costs and expenses, including medical bills and legal expenses, and any other relief deemed necessary.

associated with her termination and this proceeding.

(3) Within 15 days of its receipt of the report described in paragraph (2) above, Whitestone shall submit a responsive document to Ms. Hunter and to the Hearing Officer, which shall be limited to ten pages in length. Should the parties elect to seek mediation to resolve the remedial phase of these cases, they shall notify me immediately and I will hold this proceeding in abeyance for a period of 30 days.

(4) Each party shall brief the issue whether and to what extent reinstatement is appropriate in this case. Each party's respective brief shall be limited to ten pages in length and shall be submitted to the other party and the Hearing Officer at the same time as those submissions described in paragraphs (2) and (3) above.

(5) This is an Initial Agency Decision, which shall become the Final Decision of the Department of Energy unless, within 15 days of its receipt of a Supplemental Order with regard to remedy in this case, a party files a Notice of Appeal with the Director of the Office of Hearings and Appeals, requesting review of the Initial Agency Decision.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: August 5, 2013